

Plain Language is not enough.

Notice must first reach class members, and then come to their attention.

Todd B. Hilsee, President, Hilsoft Notifications, Philadelphia, PA

The new “plain language” amendment to Federal Rule of Civil Procedure 23(c)(2) addresses only one of the key areas relating to notice, yet sets up a common misperception that this is the only area of concern. The author collaborated on writing and designing the Federal Judicial Center’s new “illustrative” plain language notices now posted at www.fjc.gov.¹ Many federal and state courts have approved such notices that the author has written in actual practice. However, from an effective communication perspective, notice must also: 1) Get to the class; 2) Be noticed; and only then can it 3) be read and understood, if written in clear simple language. Then, through the notice and mechanisms for administering responses, it must be convenient to act upon.

It is essential that class members be given an adequate opportunity to know about and understand their rights in class action cases brought and settled on their behalf, and be able to act on or get the benefits that a settlement intends to provide, thereby giving defendants the lasting res judicata effect they need. Effective notices must be readable, but notices cannot be understood if they do not come to the attention of class members affected by them, and class members cannot “notice” the notices if they are not “reached” by the notice campaign in the first place. If the notice method reaches only a small percentage of a class², how can notice bind all members of the class? More courts should be educated about basic notice planning methodologies, even in agreed upon settlement notice situations, before a notice program is approved for dissemination.

For effective communication, notices must:

1. **Get to the class.** The notice must effectively reach a substantial percentage of the class.
2. **Be noticed.** The notice must come to the attention of class members.
3. **Be read and understood.** The notice must be simple, clear, and easy to understand.

The new “plain language” amendment to Federal Rule of Civil Procedure 23(c)(2) addresses only the third point, and serves no purpose if points one and two are not achieved.

¹ Mr. Hilsee and Dr. Terri LeClercq of the University of Texas School of Law collaborated with the Federal Judicial Center to write and design illustrative plain language class action notices, following on the heels of an enormous amount of research and early draft notices prepared and studied by the FJC’s Research Division under the direction of James Eaglin, by Robert J. Niemic, Thomas E. Willging, and Shannon R. Wheatman Ph.D. (now Hilsoft Notifications Notice Director).

² Based on calculable statistics that are uniformly relied upon. *See below.*

After overcoming all these hurdles, **the notice must be easy to act upon**. While this relates more to the process and handling of responses pursuant to notice, the notice wording and design itself together with the mechanisms for administering the notice and its responses, must not limit potential response. Instead, the benefits that a settlement intends to provide should be as readily available to as many class members as practicable.

Reach the class.

The importance of first “reaching” class members should not be underestimated. Reach is especially important in the many consumer cases where mailing lists are incomplete or inaccurate. When mailing notices is considered, the concerns are many. Is the address list up to date? How many names are on the list? How many names are not on the list? U.S. Census data shows that 16% of our population changes their address every year.³ The post office will only forward mail for up to one year. After 4 years, the U.S. Post Office National Change of Address database cannot match names and addresses to new addresses. Only about 40% of people who move report their moves to the Post Office. Will the recipient think it is junk mail and not open it? U.S. Postal Service data shows us that 86.8% of people do not open all of the mail they receive which they perceive to be “advertising” mail.⁴ Examples of the junk mail that we all receive show us why recipients are suspicious of mailings. “Official Notices” turn out to be car dealers announcing a sale. “Rate Notifications” turn out to be long distance telephone offers.

Courts need to link the determination of the adequacy of notice with conservative and credible evidence on how many class members will be notified, as a percentage of the total class. They need to know that this is routine for the qualified professional. “Net reach”⁵ and “frequency of exposure”⁶ methodologies are tools that communication professionals have long used to mathematically determine how many persons are exposed to “vehicles” with communications messages in them. These methods have become well established in class action litigation since *In Re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (N.D. Ga. 1992). These methods have allowed courts to study notice adequacy from an objective basis: how many class members will be notified, and what percentage of the total class does that

³ U.S. Census Bureau, Geographical Mobility Study, 2001.

⁴ United States Postal Service Household Diary Study, 2000

⁵ “Reach” is the net or unduplicated number of class members who will have an opportunity for exposure to a notice. Exposure is opening or viewing a publication, or receiving a mailing, containing a notice.

⁶ “Frequency” is the average number of times that each different person reached will be exposed to a vehicle containing a notice placement.

represent?⁷ However, notice programs proceed today without the court having the benefit of simple calculations revealing that only a tiny fraction of the class had a chance to read the notice.⁸

Reach tools are widely used.

Advertising and media planning firms around the world have long relied on similar audience data and techniques: Audit Bureau of Circulations (“ABC”) data has been relied on since 1914⁹; 90-100% of media directors use reach and frequency planning¹⁰; all of the leading advertising and communications textbooks all cite the need to use reach and frequency planning¹¹, and a leading treatise says it must be used; 90 of the top 100 media firms use Mediamark Research data (which has a 95% confidence interval)¹²; and at least 3,000 media

⁷ Numerous courts have since relied upon the notice dissemination methodology described in the decision in *Domestic Air* at 141 F.R.D. 534 (1992) in ruling on notice issues including, *Macarz v. Transworld Systems, Inc.*, 201 F.R.D. 54 (D.Conn. 2001); *In re Motorsports Merchandise Antitrust Litigation*, 112 F.Supp.2d 1329 (N.D.Ga. Sep 14, 2000); *Burke v. Ruttenberg*, 102 F.Supp.2d 1280 (N.D.Ala. 2000); *In re Toys R Us Antitrust Litigation*, 191 F.R.D. 347 (E.D.N.Y. 2000); *In re Lease Oil Antitrust Litigation* (No. II), 186 F.R.D. 403 (S.D.Tex. 1999); *In re Prudential Ins. Co. of America Sales Practices Litigation*, 177 F.R.D. 216 (D.N.J. 1997); *Ravens v. Iftikar*, 174 F.R.D. 651 (N.D.Cal. 1997); *In re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493 (S.D.N.Y. 1996); *Ex parte Masonite Corp.*, 681 So.2d 1068 (Ala. 1996); *Cox v. Shell Oil Co.*, 1995 WL 775363 (Tenn.Ch. 1995); *In re Potash Antitrust Litigation*, 161 F.R.D. 411 (D.Minn. 1995); *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314 (E.D.Pa. 1993).

⁸ For example, relying on “window-dressing” techniques like publication in the USA Today alone, purporting to provide “national” notice, realistically exposes at best about 3% of a given targeted audience, based on Audit Bureau of Circulations and Mediamark Research data.

⁹ Audit Bureau of Circulation is the industry’s leading, neutral source for documentation on the actual distribution of newspapers printed and bought by readers. Established in 1914, ABC is the leading third-party auditing organization in the U.S. ABC is a non-profit cooperative formed by media, advertisers, and advertising agencies to audit the paid circulation statements of magazines and newspapers. Widely accepted throughout the industry, it certifies over 3,000 publications, categorized by metro areas, region, and other geographical divisions.

¹⁰ Turk, Effective Frequency Report: It’s Use And Evaluation By Major Agency Media Department Executives, Journal of Advertising Research, p. 56, April/May 1988; Lancaster, Kreshel, Harris, How Leading Advertising Agencies Perceive Effective Reach and Frequency, Journal of Advertising, Vol. 14, No. 3, p. 32, 1985.

¹¹ E.g., American Advertising Agency Association, Reach & Frequency, Guide to Media Research, p. 25, 1987, revised 1993 notes: “In order to obtain this essential information, we must use the statistics known as reach and frequency. Other textbook sources that have identified the need for reach and frequency for years include: Sissors, Jack S., Surmanek, Jim, Reach & Frequency, Advertising Media Planning, p. 57-72., Crain Books; 2nd Addition, Chicago, IL. 1982; Lancaster, Kent M., Katz, Helen E., Print Media Evaluation, Strategic Media Planning, p.120-156, NTC Business Books, Chicago, IL. 1989. Jugenheimer, Donald W., Turk, Peter B., Advertising Media, Grid Publishing, Columbus, OH. 1980; Sissors, Jack Z., Bumba, Lincoln, Advertising Media Planning, McGraw-Hill; 4th edition, 1993; Surmanek, Jim, Introduction to Advertising Media: Research, Planning, and Buying, NTC Business Books, Chicago, IL. 1992.

¹² Mediamark Research, Inc. is a leading source of publication readership and product usage data for the communications industry. As the leading U.S. supplier of multimedia audience research, MRI provides information to magazines, televisions, radio, Internet, and other media, leading national advertisers, and over 450 advertising agencies. MRI’s national syndicated data is widely used by companies as the basis for the majority of the media and marketing plans that are written for advertised brands in the U.S.

firms in 25 different countries use media planning software for reach and frequency planning.¹³ Around the world, audience data has been used for years.¹⁴

Based on this prevalence, more courts should be regularly presented with data and calculations—at the outset, and as performed by qualified experts and professionals—which would verify the adequacy of a proposed outreach program for a notice campaign. Notice programs would improve dramatically.

Due process means aspire to reach the class.

Back in 1950, the United States Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), guided those of us charged with designing and giving notice to act as if we truly want to inform people.¹⁵ Unfortunately, since 1950, the procedural rules that govern class action notice practice, whether federal or state rules, have not mandated understandable and plain language notices until the current F.R.C.P. 23 revision, and courts have been largely silent on this issue.¹⁶ Almost more troubling however, is the fact that federal and state notice statutes and rules are completely silent on the issue of requiring notice to reach the class members to begin with, and none require that notices be designed to come to the attention of class members. Only California class action notice practice is especially tuned in to effectuating the principles of effective communication under the notice provisions of its Consumer Legal Remedies Act (CLRA). California has strong case law on the need to actually reach the people affected by class action lawsuits with notice: “The notice given should have a

¹³ For example, Telmar is the world's leading supplier of media planning software and support services. Over 3,000 users in 25 countries, including 95% of the world's top agencies, use Telmar systems for media and marketing planning tools including reach and frequency planning functions. Established in 1968, Telmar was the first company to provide media planning systems on a syndicated basis.

¹⁴ Like MRI for publications and Nielsen Media Research ratings for television and Arbitron ratings data for radio in the U.S., there are many other audience data tools specific to many countries including: Roy Morgan; MA; MMP CIM; Estudos Marplan; PMB; NADbank; Media Project; Index Danmark/Gallup; Kansallinen Mediatutkimus; IPSOS – Press Quotidienne; AEPM; AWA; MA; Bari/NSR; Media Analysis, Szonda IPSOS; AUDIPRESS; SUMMOSCANNER; AC Nielsen Media Readership Survey; ForBruker & Media; Norsk Medieindeks; Media Study Polonia; MediaUse; AMPS; Orvesto Consumer; MACH; Ukraine Print Survey; NRS; Simmons (SMRB), Scarborough.

¹⁵ “But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.” *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306, 315, 70 S. Ct. 652, 657 (U.S. 1950)

¹⁶ Very little appears in published decisions about the need for plain language notices, but courts have recently recognized the merits of simple wording, e.g., “The substance of the pre-settlement notice was adequate, as was the Settlement Notice. The Settlement Notice contained a detailed explanation of the terms in plain language...” *In re Ikon Office Solutions, Inc. Securities Litigation* 209 F.R.D. 94, 101 (E.D.Pa.,2002)

reasonable chance of reaching a substantial percentage of the class members . . .” *Cartt v. Superior Court* 50 Cal.App.3d 960, 974 (1975).¹⁷ This has helped consumer notice programs designed by notice experts for California state courts to be relatively strong, but more courts in California and elsewhere need to be shown the evidence that advertising and communications professionals understand and work with daily, so that notice programs will more consistently become as effective at reaching class members as they need to be.

Common problems with notice dissemination methodology.

Leading notice experts have adopted the reach model for ensuring that notice programs reach substantial percentages of their class members, using documented audience statistics, but many notice programs proceed without such data and often result in critical and tell-tale signs of dramatic flaws:

Problem	Explanation
Doesn't reach class effectively	A notice program can fall short of reaching a large percentage of class members, when more people could easily and reasonably be reached.
Effect not quantified	Courts deserve to know the easily quantifiable coverage—how many class members will get notice, as a percentage of the total—that a notice program they are being asked to approve will achieve.
Isn't targeted to class members	Each class is different. For example, using the <u>Wall Street Journal</u> to reach a class of lower income adults would be suspect.
Demographically inappropriate	Notice plans are sometimes devoid of any study as to the particular demographic profile of the majority of class members. For example, we wouldn't count on mailings to a class of homeless persons.
Geographically insufficient	Plans often make the mistake of focusing notices on large cities alone. Class members live in small towns too, and we can't deliberately omit them from notice coverage just because of that choice.
"Scattershot" notices placed	Relying on notice in a newspaper here and there, or simply posting to a website and arguing that notice was "available to class members" is not effective notice according to the Supreme Court or simple communication and advertising principles. ¹⁸

¹⁷ See generally, *California Class Actions Practice and Procedure*, Cabraser, LexisNexis Matthew Bender Division, 2003, ISBN: 0820553573. *California Class Actions Practice and Procedure* is a 1-volume publication covering all requirements, tactics and forms for use in class action litigation in California state courts. The author contributed the notice chapter, Chapter 8.

¹⁸ Reacting to a notice published in a law journal in New York City purporting to be sufficient due process for affected non-lawyers in many other parts of New York State and elsewhere, the Court wrote: "Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual

Doesn't account for how class gets information	It can be determined how to best reach different classes of people. This study should be evident in a Notice plan submitted for court approval.
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Against this backdrop of reach and method of dissemination problems, few truly consider the practical impact of the Supreme Court's guidance in another significant notice and due process opinion, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which cited *Mullane's* further prescription that notice must be: "...reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* at 314. If it is a mathematical certainty that your notice program reached only a small percentage of a class—using reasonable calculations that almost all communications professionals regularly employ—how can the entire class be bound? When you don't know which lucky few people were reached, as in a program reliant on minimal publication, how can anyone be bound?

Design the notice to be "noticed."

Once a notice program is planned to reach a high percentage of class members—and every case is unique as to what specific percentage is reasonable, practicable and achievable—then the notice must come to the attention of class members. We know that readers are not certain to read each and every piece of mail they may perceive to be junk mail. We know that readers may not read and scrutinize all of the fine print contained in newspapers and magazines, even those they open and read. So, why do we see so many notices mailed and published in small type, with nothing to call the notice to the attention of the class members it affects? We need to get away from the small-type, back-page newspaper notices criticized long ago in *Mullane*.¹⁹ While many attorneys—and settlement administrators at their behest—are often accustomed to formatting, mailing and publishing notices with no prominent callout (a "headline"), instead, being more comfortable with old legal-pleading style documents in uniformly small font sizes.

beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests." *Mullane*, supra note 10, at 320.

¹⁹ "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." *Mullane supra* note 10, at 315.

Carefully crafted headlines are critical.

Communications professionals have long known that design features to call a communications message to the attention of an intended reader are critical. Note this sampling of advertising industry guru's long-standing, and never-refuted writings on what should be obvious: Put a simple and prominent headline on the notice, calling attention to who should read the notice and why it is important to them.

- "The advertisement is read only by interested people who, by their own volition, study what we have to say. The purpose of the headline is to pick out people you can interest."²⁰
- "The headline is the most important element in most advertisements. It is the telegram which decides whether the reader will read the copy."... "The wickedest of all sins is to run an advertisement without a headline."... "It is a mistake to use highfalutin language when you advertise to uneducated people."²¹
- "Get your message in the headline. Research shows 4/5 readers never get further than the headline."... "(there are) three guiding principles for headlines. Present a benefit to the reader. Make benefit quickly apparent. Make the benefit easy to get."²²
- "The headlines that work best are those that promise the reader a benefit."... "Headlines more than anything else decide the success or failure of an advertisement."²³
- "What makes certain headlines successful...there are four important qualities that a good headline possesses: self-interest, news, curiosity, and quick, easy way."²⁴

Being "noticed" is the point of a class action notice. The notice is delivered in an environment together with many other messages received by class members during his or her day. We can't pretend that class members get our notices in a "clean room" without distractions. Despite the fact that we still see many notices mailed and published today that would effectively serve as a nice "busy" print for kitchen shelf paper, more and more notices are being designed with attention-getting headlines and other graphic elements generally consistent with effective communication principles. Modern notices utilize writing and design professionals to effectuate good notice, and use proper headlines and even proper wording content and style. The Federal Judicial Center's models make this apparent. Even the sample outside of mailing envelopes we designed at www.fjc.gov show prominent headlines on the mailing so that when a notice arrives in a class member's mailbox it has the best chance of being opened and read.

²⁰ Claude C. Hopkins, *Scientific Advertising*, Ch. 5., Lord & Thomas, Chicago, 1923.

²¹ Ogilvy, David. *Confessions of an Advertising Man*. p.104, Canada: McClelland & Stewart Ltd., 1963.

²² Roman, Kenneth & Maas, Jane. *How to Advertise*, p. 32, New York, NY: St. Martin's Press, 1976.

²³ Ogilvy, David. *Ogilvy on Advertising*. p.71, New York: Crown Publishers Inc. 1983.

²⁴ Caples, John & Hahn, Fred E. *Tested Advertising Methods*. P. 26, New Jersey; Prentice Hall. 1997.

Common problems with notice design and content.

Traditional notices are often hard to read and uninviting. To make matters worse, business considerations often drive how notices are disseminated. Some parties attempt to use notice as a “tool” to serve their purposes in the litigation. Defendants may wish to use a lack of effective notice to minimize what they perceive will be “negative” publicity. Plaintiffs, for their part, may seek to avoid a costly campaign when it’s on their dime. Parties may also see limited notice as an elastic mechanism to reduce objections or class participation—and therefore cost—in a claims-made settlement. The reality is that adequate notice need not create any short or long-term business effect for defendants, nor threaten the continuation of a case for Plaintiffs. Against this backdrop, problems with design and content are rampant:

Problem	Explanation
Isn't noticeable	Notices without an appropriate headline or graphic devices to ensure that it stands out when it comes in the mail, or appears in a publication, must be avoided.
Is written in legalese	Very few class members are lawyers. Wording in seemingly precise legal terms won't give greater protection to the parties, because hardly anybody will understand it—or read it!
Attempts to scare people from participating	A defendant may propose wording that makes it seem like a risky, time consuming and potentially invasive procedure for the class member who simply wants to proceed in a class certified for trial. Notice should not be designed as a litigation tool to generate (or stop) exclusions.
“Sells” the settlement	The parties may decide to “frame” the settlement in a notice so that the class is more inclined to accept it without question. Neutrality is required (and really doesn't affect whether objections will or will not be lodged).
Hurdles to exercise rights	Don't make it hard for people to do the things they are entitled to do—if they choose to. Making exclusion forms hard to obtain, and making a claim form so long and onerous that few will fill it out, hinders due process.
Scant notice content	Don't publish a “notice about a notice” (that doesn't even indicate or refer to the basic rights people have) and claim to have reached people with “notice”. Simply putting people on notice that there is a notice, is not notice. With those scant summaries, only those who respond (a known quantity and often not that many) will know what their rights are.
Vilifies defendant	Plaintiffs may propose wording that indicates its scorn for defendants. The notice (regardless of who is responsible for paying for it or issuing it) should be in neutral words from the court. A good notice is not harmful to a defendant's business or reputation.

Solicits clients for lawyers	The court's official notice is not the long awaited opportunity to sign up class members for litigation purposes.
Omits pertinent information	Be careful not to miss the easy things. The rules and the authorities give a terrific starting point for the basic content that should be present. You can't avoid discussing objections just because the parties don't want objections.
Language, cultural and other barriers	If the class is largely made up of foreign language speakers, then a notice can and should be available in foreign languages.
Class can't self-identify	If the class member can't quickly and easily determine whom the notice is directed to, and whether he/she is affected, there is a problem.
Hard to respond and get information	The days when notices advised: "you are free to stop by the Clerk's office to read the pleadings," and didn't offer basic information at a simple website or toll free phone number, are over.

If you roll the dice on a bad notice program, some of the questions you must be prepared to answer are: If you really wanted the class to know about their rights, why didn't you make it noticeable? If it was reasonable to reach a greater percentage of the class, why didn't you? If you are offering benefits in a settlement, why are you making it difficult for the people who are entitled to them to get them? If class members have the right to opt-out and object, why make them jump through hoops to do so?

Does this mean that good notice programs are out of reach financially? Does it mean that effective notices must look and sound like ads for a tractor-pull? Does it mean that a defendant needs to be vilified? The answer to all these questions is no. Successful notice programs, if designed correctly, are affordable, noticeable—albeit as neutral and appropriately written as words from the court's mouth—and in plain language.

Courts realize that good notice is more than the words.

Newly revised Federal Rule of Civil Procedure 23 is effective and, with it, a prescription for clear, concise, plain language notices. However, the notes accompanying the rule change make clear that the intentions of the Advisory Committee on Civil Rules underlying the plain language provision is that the purpose is to effectuate good communication with class members, not simply to use plain wording as a protection against challenges: "The direction that class-

certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members.”²⁵

Communication experts agree that good communication results not only from wording, but from dissemination methodologies to ensure that people are effectively reached by notices, by exposure frequency planning to ensure that people get reminders to act on messages that will result in benefits coming to them, and from design and style aspects that cause communications devices to come to the attention of those affected.

The judiciary understands that the key concepts in this article are essential for good notice.²⁶ Courts simply need to be informed that long-standing methodologies exist to help them accurately assess the adequacy of notice programs, so that the focus is not solely on the words of a notice, but also on inadequate notice dissemination and design tactics that may be stopping the important information from reaching and being noticed by class members.

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²⁵ Advisory Committee notes accompanying Federal Rule of Civil Procedure 23.

²⁶ The author testified that notices should be “designed to be noticed,” and about the other keys of good notice identified in this article during a hearing on proposed changes to Rule 23 before the Advisory Committee on Civil Rules of the Judicial Conference of the United States on January 22, 2002, and was told:

“I want to tell you how much we collectively appreciate your working with the Federal Judicial Center to improve the quality of the model notices that they’re developing. That’s a tremendous contribution and we appreciate that very much. You raised three points that are criteria for good noticing, and I was interested in your thoughts on how the rule itself that we’ve proposed could better support the creation of those or the insistence on those kinds of notices.”

Hon. Lee H. Rosenthal, Advisory Committee on Civil Rules of the Judicial Conference of the United States.