

GUIDELINES AND BEST PRACTICES
IMPLEMENTING 2018 AMENDMENTS TO
RULE 23 CLASS ACTION SETTLEMENT PROVISIONS
BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

EXECUTIVE SUMMARY

DUKE LAW SCHOOL
AUGUST 2018

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MEANS, FORMAT, AND CONTENTS OF SETTLEMENT NOTICE

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BEST PRACTICE 3B: The parties should consider using a professional claims administrator to send notice and claim forms and distribute benefits.

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GUIDELINE 12: In determining whether the “best practicable notice” can be sent in a reasonable manner, the court should focus on the means or combination of means most likely to be effective in the case.

BEST PRACTICE 12A: In assessing whether the particular means of sending notice is most effective, a court should take into account the following general considerations: (1) will the notice effectively reach the class; (2) will the notice actually come to the attention of the class; (3) are the notices informative and easy to understand; and (4) are all class members’ rights and options easy to act upon?

BEST PRACTICE 12B: When selecting a means of giving notice, the parties and court should begin by assessing the reliability of the method of communication typically used by the defendant in its regular business to notify its customers or clients.

GUIDELINE 13: Best notice practicable includes individual notice to all members who can be identified through reasonable efforts. First-class U.S. mail may often be the preferred primary method of notice.

BEST PRACTICE 13A: Individual notice to class members often is practicable when the defendant communicates directly with class members as part of its regular business, either relying on U.S. mail postal addresses or email addresses.

BEST PRACTICE 13B: The deliverability rate of communications with customers can offer a useful indicator of the effectiveness of the means of communication.

BEST PRACTICE 13C: The parties and court should be skeptical about contact information that is compiled from free offerings, promotional sign-ups, or promotions.

GUIDELINE 14: Notice by email communication may be the best individual notice practicable under the circumstances if shown to be reliable. It may also be a low-cost supplemental means of notice.

BEST PRACTICE 14A: The effectiveness of a notice sent by email can be assessed using available metrics. Among the metrics, the *read rate* is the most reliable.

BEST PRACTICE 14B: The parties and court should consider the capacity and limits of email technology when evaluating its effectiveness for notice purposes.

BEST PRACTICE 14C: If individual notice is not practicable or effective, the parties and court should consider notice by digital media to provide the most effective notice under the circumstances, either to supplement other means of notice or as a standalone means.

BEST PRACTICE 14D: The parties and court should consider whether the notice program is using an appropriate media mix that will reach the target population.

GUIDELINE 15: Notice using social media, a subset of digital media, may be effective.

GUIDELINE 16: A court must evaluate the effectiveness of a notice program that relies on digital media, including social media, as a means to send notice.

BEST PRACTICE 16A: If notice is sent by digital media, the parties should evaluate and quantify the percentage of class members that the notice will reach.

BEST PRACTICE 16B: A low *lifetime frequency cap* (three or fewer) is ordinarily an insufficient level at which to expose a target audience sufficiently to the message.

BEST PRACTICE 16C: The parties should provide the court with an analysis of the metrics that the parties rely on to determine the effectiveness of the means of class notice. If a notice program is reporting reach, it must be supported and validated in a transparent manner.

BEST PRACTICE 16D: Social media metrics, such as *clicks*, should not be used as a substitute for a validated reach statistic.

BEST PRACTICE 16E: The parties and court should monitor the effectiveness of class notice sent by digital media throughout the notice period.

GUIDELINE 17: A class-notice expert or professional claims administrator can assist the parties and court in ascertaining the effectiveness of using digital media to send notice.

BEST PRACTICE 17A: The parties and court should ensure that the class notice expert or claims administrator is competent to assist them in evaluating the effectiveness of notice by digital media.

BEST PRACTICE 17B: The parties and court should carefully review the class-notice expert's or administrator's methodology in concluding that notice sent by an electronic means is most effective.

GUIDELINE 18: Language text and formatting may appear differently, depending on the medium it is viewed on. The differences can be sufficiently substantial to degrade the effectiveness of the communication.

BEST PRACTICE 18A: Notices sent by digital media should be formatted appropriately for maximum effectiveness that is consistent with the FJC guidance.