

## FEDERAL JUDICIAL CENTER ISSUES “CLASS ACTION NOTICE CHECKLIST” WITH PROBLEMATIC POSITIONS

January 13, 2011

To Our Clients and Friends:

Recently, the Federal Judicial Center issued a “Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide,” available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf). Although most of the Checklist’s guidance should be non-controversial, including that class action notices should be “written in clear, concise, easily understood language,” and that “[t]here should be no unnecessary hurdles that make it difficult for class members to exercise their rights,” the Checklist’s recommendations about the *scope and expense* of notice appear to go beyond the textual requirements of Fed. R. Civ. P. 23(c)(2)(B) and 23(e)(2). Adopting the Checklist across-the-board could require notice costs that are out of proportion to an otherwise fair settlement, making smaller-value class actions more expensive to settle, perhaps prohibitively so. Parties to settlements should be aware of the Checklist and prepared, in appropriate cases, to argue that its provisions should not be rigidly applied.

Rule 23(c)(2)(B), upon which the Checklist builds, explicitly requires judges to consider the particular circumstances of a case in determining the appropriate scope of notice to putative class members. The Rule says that “[f]or 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 to all members who can be identified *through reasonable effort*.” Rule 23(e)(2), which deals specifically with noticing proposed class action settlements, says that “[t]he court must direct notice *in a reasonable manner* to all class members who would be bound by the proposal” (emphasis added in both). Appropriately, neither Rule provision states any absolutes with respect to the scope or expense of notice.

The Federal Judicial Center’s Checklist, by contrast, omits mention of this language and begins by suggesting that a notice program should reach at least 70-95% of class members. The Checklist states no basis for this threshold other than that many previous settlements attained it. The Checklist acknowledges that this threshold would be impossible to reach in some lower-value settlements, unless the defendant is willing to incur notice costs that are out of proportion to the settlement as a whole. It responds by saying that “if the cost to reach and inform a high percentage of the class is not justified by a proposed settlement, an opt-out class may not be appropriate” and “may also be evidence that the settlement is weak.” Implied in these statements is that courts should consider rejecting inexpensive settlements, even if otherwise fair and even where proposed notice costs represent a

reasonable proportion of the settlement's overall value, if the 70-95% threshold would not be attained.

With respect to Rule 23(c)(2)(B)'s requirement for "individual notice to all members who can be identified through reasonable effort," the Checklist discourages efforts to substitute less expensive email or other online notice for postal mail. Citing the opinion of one advocate for mailed notices, the Checklist calls postal mail "more effective than email in reaching class members." Notice experts do not agree on this proposition, however, and — particularly in cases involving e-commerce, where class members already interact with the defendant via email or other online means — there is good reason to believe the opposite.

The Checklist also touts the value of notice experts, even going so far as to suggest that judges may find it advisable to engage their own experts (presumably at the parties' expense) when the parties have not done so, or to check the views of party-engaged experts. Hiring one or more experts, however, could pile more unsustainable expenses on a small settlement.

If followed by courts, these Checklist provisions — desiring direct or published notices to reach at least 70% of class members, requiring that direct notices be sent by postal mail rather than the Internet, and encouraging the use of notice experts — would make it substantially more expensive for parties to settle lower-value cases. Settling parties should be aware of the Checklist and prepared to explain both its tension with the text of Rule 23 and why, under the particular circumstances of their cases, rigid application of the Checklist would not be appropriate.

Please feel free to contact us with any questions.

Jeffrey S. Jacobson  
+1 212 909 6479  
jsjacobson@debevoise.com

Lorna G. Schofield  
+1 212 909 6094  
lgschofield@debevoise.com