



Internet Noticing Primer

for Class Action Notice

By Chris Guerriero & Green Class Notice, LLC

Preface...

This Internet Noticing Primer was designed to provide judges and attorneys a way to examine the benefits of integrating the latest industry-standard online advertising and consumer outreach technologies into a comprehensive, targeted and cost-effective class-noticing strategy.

The primer will also discuss i-Noticing, a proprietary concept designed to maximize the reach of any notice program, and the frequency which the notice is displayed to unnamed class members in class action litigation.

Green Class Notice, LLC (“GCN”) is a nationally recognized internet advertising and legal notification consulting firm led by internet advertising expert Chris Guerriero, specializing in the design and implementation of class action notification programs to reach both identified and unidentified putative Class Members.

Guerriero developed the i-Noticing program, the first comprehensive effort to bridge the growing divide between industry-standard online advertising and the specific needs of Class Action Administrators in registering class members.

i-Noticing uniquely blends the same strategies which large corporations use to locate and interact with their customers, with 22 separate internet noticing solutions to create campaigns which are fast to implement, measurable every step of the way, highly targeted and cost-effective.

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Internet Noticing Standards: New Capabilities, New Requirements

How Precision Online Class Member Targeting and Green Publishing Trends Are Shaping the Definition of “Best Notice Practicable” in the Twenty-First Century

In class action litigation, the law regarding identifying and providing notice to unnamed class members (for purposes of settlement or after the Court certifies a class) requires that counsel provide the “best notice practicable under the circumstances.”

For example, consumer fraud litigation involving products primarily sold in retail, notice has traditionally been provided via print publications. While that may have been sufficient 10 years ago, the internet and its reach have significantly changed companies’ advertising behavior and, as a result, consumers response behavior. Accordingly, notice programs that provide for primarily print-based notice are, in a phrase, “behind the times.” Notice programs which do not contain a significant internet component no longer meet the “best notice practicable” requirement of the law. Twenty-one attorneys general agree. See *Rivera v. Bio-Engineered* case no. SACV07-1306 JVS (RNBx).

This primer will review emerging trends in online advertising and consumer targeting, and examine the benefits of integrating the latest industry-standard online advertising and consumer outreach technologies into a comprehensive class-noticing strategy. The primer will also discuss i-Noticing, a proprietary concept designed to maximize the reach of any notice program, and the frequency which the notice is displayed to unnamed class members in class action litigation.

Increased Use of the Internet and Its Implications

Online access and usage in the United States has continued to grow at a rapid pace in recent years, with an estimated 79% of English-speaking adults using the Internet in 2009, including 60% using broadband connections at home and 55% with wireless access.¹ This upward trend is expected to continue, with the National

¹ Pew Internet & American Life Project: “Internet, broadband, and cell phone use statistics.” January, 2010. The proportion of younger Americans online is far higher than the overall average, as might be expected: 93% of those ages 18-29 use the Internet.

Broadband Plan forecasting “affordable access to robust broadband service” for every American by 2020.²

Time spent online has also continued to grow. Harris Interactive reports the average American spent 14 hours per week online in 2008 (up from seven hours in 2000³) and a majority of adults report they now go to the Internet first for many types of information.⁴ In certain categories, the numbers are even higher, with recent data suggesting up to 97% of consumers now turn to the Internet to find information about products and services⁵ and 61% using the Internet for news on a daily basis.⁶

Meanwhile, use of social-networking and community sites, such as Facebook, MySpace and Twitter, increased 41% in 2009, with 61% of U.S. Internet users having a profile on at least one social networking site and the top eight social networks receiving 248 million unique visitors in December, 2009.⁷

The Print Media Decline, and Its Effects

The upward trend in Internet usage has been matched by a downward spiral in print media circulation and readership over the same period. For example, in a 2008 report, the Pew Research Center for the People & the Press found that print newspaper readership among adults was down to a historical low of 34% (while, at the same time, on-line/electronic readership of newspapers was up nearly 28%). The same data suggests that the trend is likely to continue, as the vast majority of print-newspaper readers are over the age of 50 (suggesting that people under that age opt to read the newspapers on-line). Indeed, Wall Street analysts forecast that 10 of the nation’s 50 largest remaining newspapers may be forced to close down in 2010.⁸

From a “notice perspective,” many of the larger “newspapers of record” commonly relied upon for notice purposes experienced even higher declines than average, with the Los Angeles Times experiencing an 11% decrease in circulation, and USA Today 17.1%.⁹

² FCC National Broadband Plan, Implementation & Benchmarks.

³ Harris Interactive Poll: Internet Penetration 2008

⁴ Experian Simmons Spring 2009 New Media Study.

⁵ BIA/Kelsey Group: “User View Wave VII” report, 2010.

⁶ Pew Project for Excellence in Journalism: “State of the News Media 2010”

⁷ Mintel International Group: “Social Networking in the United States 2010”

⁸ Time Magazine: “The 10 Most Endangered Newspapers in America” – <http://www.time.com/time/business/article/0,8599,1883785,00.html>

⁹ The New York Times “U.S. Newspaper Circulation Falls...” - http://www.nytimes.com/2009/10/27/business/media/27audit.html?_r=1

Print magazines have experienced a similar decline, with newsstand sales down 9.1% according to the Audit Bureau of Circulations.¹⁰ Some consumer magazines, like U.S. News & World Report¹¹ have followed the growing newspaper online-only or online-hybrid trend of “going green” in search of a more sustainable, paperless business model¹², while others, including Newsweek, have voluntarily slashed circulation numbers in an attempt to save on printing costs.¹³

The Problem of Defining “Best Notice Practicable”

In the changing media landscape, with an ongoing exodus of readers from print to digital, the once black-and-white question of what constitutes the “best notice practicable under the circumstances” has become far less clear.

While print publications were the only practical option for notification of unidentified absent class members prior to the Internet age, the shift in corporate marketing strategies to online concepts should result in a similar shift to electronic class notice (similar to the substitution of email notice as an acceptable - and even, occasionally, preferable alternative to first-class mail for direct noticing of individually identifiable class members).¹⁴

Indeed, the growing need for required inclusion of online outreach as part of a comprehensive noticing plan was strongly hinted at, if not outright stated, by the 21 attorneys general who objected to the Rivera v. Bio-Engineered settlement.¹⁵ As the Attorneys General said in that objection, in the 21st century, when “[companies] want to get the word out, [they] use the Internet.” So, why should notice of class action litigation be any different? The simple answer is that it shouldn’t.

The “Plain and Simple” Problem

Beyond the untargeted, declining reach of print publications, print-heavy notice programs suffer from a second significant problem in the context of the “best notice practicable” standard -- print notices are often presented in dense type, condensed into a small space in order to save money. And, while the print notices contain all of

¹⁰ Business Week: “TV Guide Leads U.S. Magazine Circulation Declines” –

<http://www.businessweek.com/news/2010-02-08/u-s-magazine-circulation-decline-accelerates-in-second-half.html>

¹¹ Bloomberg: “U.S. News Cut to Monthly Publication” –

<http://www.bloomberg.com/apps/news?pid=20601103&sid=aOrKILoiA8Bk&refer=us>

¹² Seeking Alpha: “Detroit Newspapers Are Going Green” –

<http://seekingalpha.com/article/111096-detroit-newspapers-are-going-green>

¹³ Folio: “Newsweek Confirms Million-Copy Rate Base Slash” –

<http://www.foliomag.com/2009/newsweek-confirms-million-copy-rate-base-slash>

¹⁴ C. Hanson & K. Beyah. “A Look At Creative Notice Procedures in Rule 23(b)(3) Class Actions” ABA Class Actions & Derivative Suits Newsletter, Winter/Spring 2008

¹⁵ Case No. SACV07-1306 JVS (RNBx)

the “necessary” disclosures and “legalese,” they, truly, are not “plain and simple.” As noted by the objectors in *Azizian v. Federated Department Stores*: “the black and white notices were buried in newspapers and the back pages of certain magazines and were not attention getting.... [t]hey were unlikely to be noticed, let alone read, by most class members.”¹⁶

As set forth below, the Internet, with a *properly designed* electronic notice program, does not present the same problems. Electronic ads can, and should be, short and to the point, targeted properly, and allow class members to click directly-over to web pages that provide sufficient information, in plain and simply terms, to class members.

How Enhanced Online Targeting Capabilities and Changing Consumer Behavior Are Reshaping The Noticing Landscape

As noted above, the dramatic increase in consumers’ use of the Internet has brought about significant changes in corporate advertising and communications strategies, and in the metrics businesses use to determine the success of their advertising and publicity campaigns.

Since the “best notice practicable standard” and the demands of due process have generally required the use of the most effective means possible within “reasonable effort” to reach potential class members,¹⁷ these changes are likely to have an increasingly direct impact on court determinations on the adequacy of class notice plans.

The measurement of print advertising has generally been restricted to predictive data based on “vehicle exposure” and circulation, and on estimates of the public’s “opportunity to see” a given advertisement. These estimated “reach” measurements alone have governed the pricing of ads in major publications and the number of people publishers and advertising agencies predict will be “exposed” to them.¹⁸

However, new online advertising technologies have made ad targeting far more effective and results data far more measurable,¹⁹ with the result that many companies are now demanding greater levels of accountability and “return on

¹⁶ No. 4:03-CV-03359 SBA

¹⁷ *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974)

¹⁸ MediaMark Research: “Print Advertising Measurement: Getting Into the Nitty Gritty.”

¹⁹ *Op cit.*

objective” from their advertising campaigns, according to a study by the Association of National Advertisers.²⁰

Advances in capabilities for behavioral and demographic targeting (within privacy best practices) have allowed previously impractical levels of precision in engaging with consumers, and allowed advertisers to identify and communicate with customers in a more targeted manner.²¹ As a result, corporate spending on online ads reached an all time high in 2009, and is expected to jump to \$29.7 billion in 2010.²²

At the same time, business spending on print advertising has continued to plummet, with the Publishers Information Bureau reporting magazine ad revenues down 20% in the first quarter of 2009 from the same period a year earlier²³ and the Newspaper Association of America reporting newspaper ad revenue down 16.6% in 2008 and a further 28% in 2009.²⁴

Does The Typical Class Member Even See Traditional Display Ads Any Longer?

According to a recent Forrester Research study, consumers are also beginning to expect “interactive customer relationships” that “go way beyond a 30-second television spot or two-dimensional print ad,²⁵ and 42% of adults and 55% of online youth now express a preference for interactive social media outreach over traditional display advertising.²⁶

Companies are embracing these interactive, “contextual” technologies, along with online press releases and other *accountable* advertising technologies, for their ability to deliver targeted impressions and measurable results, in fact 86% of advertisers are now making use of social media applications.²⁷

More and more, companies that once relied almost entirely on print advertising campaigns are taking a *high* percentage of their ad spending online, as H&R Block

²⁰ ANA Accountability Study: “Marketing, Finance Not on Same Metrics Page”

²¹ Evans, David S. “The Online Advertising Industry: Economics, Evolution, and Privacy” Journal of Economic Perspectives, April 2009.

²² IDC: “U.S. Online Ads Grew First Time in a Year in 4Q09”

²³ Magazine Publishers of America: “Magazine Advertising Shows Effects of Soft Economy in Q1” –

http://www.magazine.org/advertising/revenue/by_ad_category/pib-1q-2009.aspx

²⁴ The New York Times: “U.S. Newspaper Circulation Falls 10%” –

<http://www.nytimes.com/2009/10/27/business/media/27audit.html>

²⁵ Forrester Research: “U.S. Interactive Marketing Forecast, 2009 to 2014”

²⁶ Forrester Research: “The Social Tools Consumers Expect from their Favorite Brands”

²⁷ Forrester Research: “Interactive Marketing Channels to Watch in 2009”

did recently with a tax-preparation campaign focused on Facebook, MySpace, Twitter and YouTube.²⁸

Some have even begun running campaigns that bypass both print and television altogether, as illustrated by Kimberly-Clark Worldwide's launch of its Pure & Natural Huggies diaper product line using only online advertising, "in order to invest in the digital media the company's *new mom target* uses most."²⁹

Why the Evolving Definition of "Best Notice Practicable" Must Include Internet Noticing

As recent declines in print advertising spending and sharp increases in online advertising have demonstrated, businesses are increasingly revising their definitions of the *best advertising practicable* in favor of digital channels where the most customers can be easily identified and reached.

Until recently, it has generally been safe to assume that the courts will approve print-only noticing plans on the strength of a declaration showing that a substantial percentage of potential class members had an "opportunity to see" the notice based on circulation figures. However, given the availability of trackable online technologies, it is not unreasonable to assume that class members and judges alike will begin to advocate for evidence of cost-effective, measurable results beyond those that print advertising can deliver.

Already, there have been challenges to print-reliant noticing plans based on the argument that class action noticing, which "can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class members,"³⁰ should be held to the same accountability standards companies now demand from their own advertising.

In the *Rivera v. Bio-Engineered* settlement,³¹ for example, the objecting state attorneys general note that, "When [Bio-Engineered Supplements] wants to get a message out, it uses its web site, it advertises on the Internet, and there is no reason it should not do so for this lawsuit." The use of online advertising, they argue, "directed at magazines, organizations and web sites...would be more effective at alerting the community of people who have purchased BSN's products than two small-print notices published in the Legal Notices section of USA Today."

²⁸ Forrester Research: "U.S. Interactive Marketing Forecast, 2009 to 2014"

²⁹ Neff, Jack. "New Huggies, Old Spice Launches to Go TV-Free" Advertising Age, May 4, 2009

³⁰ *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831 (3rd Cir. 1973)

³¹ *Op cit.* 17

Increasingly, it may be expected that, particularly if the company involved in a class action settlement makes significant use of targeted online advertising in its everyday ad campaigns, **the noticing plan should include a significant online component if it is to hold up to court scrutiny.**

Plans that do not make use of the latest advances in results tracking and accountability risk being perceived as falling short of a good-faith effort at best notice, as in the BSN settlement.

Further, it should be noted that the mere existence of a settlement website cannot be expected to meet the accountability criteria expected from today's online communication capabilities.

As noted in the BSN settlement objection, the Class Action Administrators appointed for the case had established a website where class members could register, but due to an absence of any meaningful efforts to advertise its presence online, the site could not be found even through highly specific keyword searches related to the case and company in question. As the attorneys general stated in making their complaint of grossly inadequate notice, "Obviously the web site will provide no actual notice unless a person is already looking at it."³²

How i-Noticing™ Keeps Class Action Administrators Up to Date with the Latest Online Advertising Best Practices

Effective use of online noticing must go well beyond simply establishing a claims registration website if it is to be perceived as keeping pace with the best practices for targeting and accountability in current use in the private sector.

i-Noticing, a proprietary method developed by online marketing expert Chris Guerriero, founder of Green Class Notice, LLC,³³ is the first comprehensive effort to bridge the growing divide between industry-standard online advertising and the specific needs of Class Action Administrators in registering class members.

By driving targeted, measurable ad impressions to class registration websites, and tailoring industry-specific strategies to interactively engage class members online in all verticals, including but not limited to Consumer Packaged Goods, automotive and weight loss; i-Noticing has been able to meet the standard of "best notice

³² Op cit. 17

³³ <http://www.greenclassnotice.com>

practicable” and document the thoroughness and cost-effectiveness of class noticing plans with a level of detail that meets the most cutting-edge accountability standards and the latest “plain and simple language” communication requirements.³⁴

Although the specific methods employed to find, target and measure potential class members adapts regularly to keep pace with technological advances, some of the strategies currently employed in i-Noticing include:

- Total Demographic Analysis (a process which provides an analysis of the class member, and their online trends, in order to determine the best means to reach and engage them online in maximum, quantifiable numbers)
- Micro-Media Commercials (audio and video created to effectively capture and hold the attention of class members, these videos can be syndicated to dozens of audience-specific and general-audience multimedia sites)
- Social Media Management (just as many large companies are currently leveraging the popularity and high traffic of social media sites, i-Noticing locates forums, chat rooms and other communities where conversations about the product(s) are currently taking place and interactively places the notice in front of the target audience to provide clear, timely information)
- Online Print Coverage (using the same highly effective online press release and article distribution platforms used by companies to generate fast publicity, expert online publicists create content that is quickly syndicated across the Internet within 24 hours or less, making information about the settlement easily discoverable by class members through the most popular websites and search engines)
- Web Seminars (using technology increasingly used by companies to interactively engage prospective customers, i-Noticing “webinars” are pre-recorded and available online 24/7 with information about the settlement so class members receive clear, step-by-step information on how to decide if a settlement pertains to them, and whether or not they wish to register)
- Web Media Placements (by targeting websites actively visited by typical class members based on Total Demographic Analysis data, i-Noticing can put highly

³⁴ See In re Final Approval Order And Judgment Class Action, E.T. Browne Drug Co, Inc (Case No. BC411117)

targeted, cost-effective banner ads, and/or carefully designed video and audio ads, in front of potential class members without resorting to un-targeted “shotgun” campaigns.

Through careful market research and the latest online advertising and publicity technologies, i-Noticing is consistently able to provide class registration results that both meet or exceed court expectations and provide solid documentation of a comprehensive noticing effort that preempts any objections of inadequate notice.

Conclusion

Recent declines in print newspaper and magazine readership and circulation, paralleled by rapid growth in Internet usage and availability, has changed the class action noticing landscape in ways that are only beginning to be fully appreciated by many companies and Class Action Administrators.

As companies increasingly turn to online advertising for its cost effectiveness, targeting and accountability, and forgo expensive and often difficult-to-measure print advertising, the standards for meeting FRCP Rule 23(c)(2) standards of “best notice practicable under the circumstances” and the rigors of due process must adapt in order to remain relevant and compliant.

The ability of print advertising to meet the standard of “best notice practicable,” along with recently adopted “plain and simple language” noticing requirements is now falling short as consumer attention shifts toward the Internet. Noticing plans must keep pace with this growing trend by identifying and reaching out to class members online in order to avoid allegations of inadequate noticing efforts and shortfalls in class member registration.

In order to avoid objections of inadequate notice in settlement agreements, Class Action Administrators must ensure that noticing plans make use of results-based online technologies just as effective as those being leveraged by companies to sell their products.

About Green Class Notice

In today's world of connected customers – it's important to have a sharper view of what the typical class member looks like, where they congregate online, how they make decisions, and what would motivate them to file a claim.

Green Class Notice uses the same targeted technology that major corporations use to understand their customers and to position themselves quickly, effectively, cost-effectively in front of those customers.

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