CAFA Notice Requirements for Class Action Settlements

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Speaker Biography

Andrew B. Downs is a shareholder in the firm of Bullivant Houser Bailey PC, primarily resident in its San Francisco office and is also the Shareholder in Charge of Bullivant’s Las Vegas office. Admitted in both California and Nevada, he practices throughout both states with an emphasis upon the defense of complex coverage and bad faith litigation, including class actions and multi-district litigation. Mr. Downs has handled the defense of multiple class actions with hard damages in excess of $100,000,000. Currently a Vice Chair of the Federation’s Extra-Contractual Liability Section, Mr. Downs is a former Chair of the Federation’s Property Insurance Section and is also a former Chair of the Property Insurance Law Committee of the Tort, Trial & Insurance Practice Section of the ABA. A frequent author and speaker, Mr. Downs is one of the Editors of the Property Insurance Litigator’s Handbook published by the American Bar Association in 2007 and is a member of the Conference Committee for the 2009 and 2010 Claims Conferences sponsored by the Property Loss Research Bureau and the Liability Insurance Research Bureau. He is a 1983 graduate of the University of California Los Angeles School of Law and a 1980 graduate of The Johns Hopkins University.
INTRODUCTION

In an effort to curb abuses of the class action process by the plaintiffs' bar, Congress passed the Class Action Fairness Act in 2005. Along with expanding federal subject matter jurisdiction over class actions, CAFA sought to limit abuses in settlements of class actions, particularly those in which attorneys fees and payments to representative class plaintiffs consumed a disproportionate amount of the economic value of the settlement.

This paper addresses the settlement aspects of CAFA, with particular attention to the actions which counsel for the settling defendant needs to take, in particular the notice requirements.

THE STATUTORY SCHEME

The provisions of CAFA, Pub. L 109-2, 119 Stat 4, are scattered throughout Title 28 of the United States Code. The provisions relating to settlements are contained in Chapter 114, 28 U.S.C. §§ 1711 through 1715. CAFA applies only to class actions filed in, or removed to, federal court.¹

The notice requirements appear in section 1715. Special requirements apply when the settling defendant is a depository institution or an affiliate of a depository institution.

WHY NOTICE MATTERS

The giving of notice under CAFA is a prerequisite to the approval of a class action settlement by a federal court. A court cannot enter an order giving final approval to the settlement until 90 days after the CAFA notice is given.²

In addition, a class member who failed to opt out of the settlement may choose not to be bound by a settlement if the necessary CAFA notice to regulators was not given, even though the class member did receive notice of the settlement.³
NOTICE PROCEDURES FOR NON-DEPOSITORY INSTITUTION DEFENDANTS

1. **Who is Entitled to Notice?**

   In all instances, notice should be given to the Attorney General of the United States. In addition, notice needs to be given to an appropriate state official. If there is a state regulator with primary regulatory or supervisory authority over the settling defendant, such as a Commissioner of Insurance, Commissioner of Corporations, etc., notice should go to that individual. If there is no primary state regulator, then notice should be given to the state Attorney General.

   The more difficult question is “Which states?” The text of CAFA provides little guidance, simply stating “... who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person.” As of November 15, 2009, there had yet to be any published opinions interpreting this provision of CAFA. The legislative history suggests that the applicable states are any states in which a class member resides. This means that the settling defendant needs to know where the class members reside. Also, as discussed below, where feasible, the settling defendant needs to give each regulator a list of the class members in his or her jurisdiction. If the class definition is not state-specific and the locations of class members cannot be determined by other means (such as only those states in which the defendant’s conduct had an effect), the best course of action is to give notice to the regulator or Attorney General in all 50 states. The legislative history contemplates that where there are class members resident in a state, but the defendant does not do business there and thus is not subject to regulation there, that notice for that state would go to the state attorney general.

2. **Content of the Notice**

   The notice (which can be either in pleading form or letter form, personal and client preferences vary) must contain the following:

   - A copy of the complaint and all exhibits (this material may be posted on the internet at the discretion of the settling party).
   - Notice of any scheduled hearings (be they the Preliminary Approval Hearing, the Final Approval Hearing or any other hearings) in the class action.
• A copy of the proposed or final (depending on the procedural posture of the case) notice to the class members. Ordinarily this notice is given by the representative plaintiffs; the settling defendant needs to include a copy.

• The proposed or final settlement agreement.

• Any contemporaneous agreement between plaintiffs’ counsel and the settling defendants.

• The proposed final judgment or dismissal.

• If feasible, the names of the class members who reside in each state and the proportionate share of the claims of such members to the entire settlement. If not, estimates of the number of class members and their share of the settlement need to be provided for each state.

• Any written judicial opinion relating to the settlement.

If technically feasible, the best practice is to take advantage of the option to post the complaint and exhibits on the internet. You can use a secure password protected site, so long as the URL, and the log in and password are included in the body of the notice. One advantage to doing it this way is that the applicable regulators have to work harder to obtain a copy of the complaint. If the included Settlement Agreement is sufficiently straightforward, the regulator’s staff may not bother to go to the internet to obtain the complaint. Regardless of how above board the settlement may be, the less attention there is from “interested” third-parties, the more likely the settlement is to be approved.

3. **Special Rules for Depository Institutions**

If your client is a “depository institution,” there are different rules. A Federal depository institution is a federally chartered bank, a holding company for a federally chartered bank, a foreign bank or a non-depository institution subsidiary of any of them. A state depository institution is any state regulated institution so defined in the Federal Deposit Insurance Act.⁶

Where the settling defendant is a federal depository institution, notice need only be given to the person who has primary federal regulatory or supervisory responsibility, provided that some or all of the
matters alleged in the class action are the subject of regulation or supervision by that person.

When a state depository institution is involved, the notice is to be given to the State Bank Supervisor as defined in the Federal Deposit Insurance Act of the state in which the defendant is incorporated or chartered, again provided that the matters alleged are subject to regulation or supervision, and also to the appropriate federal official. No notice is required to other states, even if class members live there.  

4. Timing of the Notice

CAFA requires that the notice be sent “no later than 10 days after a proposed settlement of a class action is filed in court.” What neither the statute, nor an judicial decision to date has explained is when the proposed settlement is deemed filed in court. Is it when the plaintiffs file their motion for preliminary approval, or is it only after the court has granted preliminary approval.

Depending on the calendars in the particular district and the court’s willingness to shorten time, there may be several weeks between the date a preliminary approval motion is filed and the hearing date. The prudent approach, honored in the breach in the author’s experience, is to serve the notice within ten days of the date on which the plaintiffs file their motion for preliminary approval.

This requirement can be problematic in several respects. First, the defendants may not possess the complete list of likely class members needed for the CAFA notice to regulators. As soon as a settlement has been agreed to, defense counsel should commence requesting that list from putative class counsel and also using its own resources should begin to compile one. Do not rely solely upon the plaintiffs. Counsel who waits until after the preliminary approval motion has been filed to begin to draft the CAFA notice and to obtain the list of class members will have considerable difficulty meeting the ten day requirement. The silver lining is that there is no statutory sanction for a failure to satisfy that deadline so long as the Final Approval Hearing is at least 90 days after the CAFA notice is given.

Second, depending on the level of organization of plaintiffs’ counsel, the various notices that need to be attached to the CAFA notice may not be ready. Prudent plaintiffs’ counsel will have those notices ready and incorporated in their preliminary approval moving papers. But there are times when artificial deadlines are imposed for the filing of
preliminary approval motions, which result in incomplete initial submissions.

Third, each settling defendant (or group commonly represented) has to give the CAFA notice. The prudent defense attorney will work with the attorneys for the other settling defendants to create a common form of notice, class membership database and plan for service of the notices.

5. **Supplemental Notices**

Although not mandated by CAFA, it is prudent for the settling party to give supplemental notice if there is a change in the terms of the settlement or the procedural posture of the case after the initial notice is given. It is also prudent to give notice of the final approval hearing date once that date is set.

**CONCLUSION**

The CAFA settlement notice is a necessary part of the settlement of any class action subject to CAFA. It is also the one part of the settlement process that the settling defendants cannot delegate to the plaintiffs.

The statute leaves some procedural questions unanswered. Thus far, the courts have not answered them.
§ 1715. Notifications to appropriate Federal and State officials

(a) Definitions.--

(1) **Appropriate Federal official.**--In this section, the term "appropriate Federal official" means--

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) **Appropriate State official.**--In this section, the term "appropriate State official" means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) **In general.**--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made
electronically available through the Internet and such service includes notice of how to electronically access such material); 

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of--

(A)(i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

(c) Depository institutions notification.--

(1) Federal and other depository institutions.--In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal
regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) State depository institutions.--In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

(d) Final approval.--An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

(e) Noncompliance if notice not provided.--

(1) In general.--A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

(2) Limitation.--A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

(3) Application of rights.--The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) Rule of construction.--Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.
Endnotes

7 U.S. Senate Report 109-14, February 28, 2005, p. 34.