THE IMPORTANCE OF "SCHEDULE F": HOW REAL ACCESS TO JUSTICE IS DRIVEN BY NOTICE AND CLAIM FORMS

Charles M. Wright and Luciana P. Brasil[1]
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OVERVIEW

Access to justice is one of the three widely acknowledged purposes of class proceedings legislation[2]. While this term has been frequently used in the class action context, what exactly is access to justice, and when does it occur?

From the perspective of the claimants, access to justice does not occur when the action is filed, certified or when it survives motions to strike; rather, it normally occurs when they make a claim, either under a settlement or judgment. It is then, and only then, when the claimant becomes aware he or she may personally derive a benefit from the class action - that the claimant will actually be accessing justice rather that spectating from the sidelines.

How then does one evaluate whether the access to justice goal of class proceedings legislation is met? The examination of take-up rates (the proportion of class members who make a claim) and compensation rate (the proportion of class members who receive a benefit) can provide some valuable insight into whether or not this goal was met. However, there is no compulsory mechanism for production of this information post-settlement, and the reluctance amongst class action practitioners to provide these details means that it is not always possible to conduct this important analysis.

As will be discussed in this paper take-up rates[3] are a function of good notice, good forms, good relief, and ease of making a claim. Once claimants are aware of their potential entitlement to a benefit, good forms, good relief and ease of making a claim create a positive cost-benefit scenario that encourages these claimants to personally access justice by individually participating in the claims process.

NOTICE

It is a very simple concept: you can't access something you know nothing about.

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[1] The authors would like to acknowledge the assistance provided by Paul J. Miller in the preparation of this paper, and the interference of Ward K. Branch.

[2] *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, at para. 15.

[3] It should be noted that an over-inflated estimate of potential class members will generate an artificially lower take-up rate. Conversely, underestimating the number of potential class members will increase the take-up rate.

In ordinary litigation, the parties are aware of the action from its inception. They hired the lawyers. In class action litigation, that is not the case. With some exceptions (such as when the case has received a significant amount of publicity or where an organized group of class members retain counsel), claimants will typically not be aware of the class action until they receive notice of the proceedings.

Additionally, in ordinary litigation the Courts know they can rely upon lawyers to explain to their respective clients the meaning of any judgments rendered. While some judges have made a concerted effort to write judgments in plain language, at the end of the day there is always this safety translation mechanism that ultimately ensures that those who are affected by the judgment are aware of it, and understand it. In class action litigation, there is not always such a learned intermediary. As noted above, notice is typically the first and only means by which a claimant learns that he or she may be entitled to a benefit.

In order to promote real and effective access to justice, notice must:

(a) be provided so that it will reach all or substantially all potential claimants; and
(b) convey to the claimant sufficient information for him or her to understand:
    (i) whether he or she can make a claim for benefits; and
    (ii) how to do so.

The importance of these notice criteria was highlighted in last year's North Carolina decision in *Moody v. Sears, Roebuck and Co.*[4], where Judge Tenille refused to give full faith and credit to a nationwide class action settlement approved in Illinois[5] as a result of a poor notice effort[6]. As both parties moved to dismiss the North Carolina action, Judge Tenille compelled an accounting of the settlement benefits actually provided under the settlement, and the results were dismal: of a 1.5 million persons class, only 317 valid claims were filed, resulting in a total of $2,402 in cash and coupons for the national class (of which $66 were paid to North Carolina residents), and $1,100,000 in fees, and an overall 0.0211% compensation rate. In pointing at the deficiencies of the notice program, Judge Tenille concluded:

1. The method of dissemination was inadequate because it was poorly distributed; and

2. The content was deficient because it was uninformative.

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[4] *Moody v. Sears, Roebuck and Co.*, N.C. Superior Court, Case No. 02 CVS 4892

[5] *Wrobel v. Sears, Roebuck and Co.*, Illinois Superior Court, Case No. 02-CH-23058

[6] Todd B. Hilsee, *Nationwide Class Actions: Shine a Light on (Another) Bad Notice*, delivered at The American Bar Association's 11th Annual National Institute on Class Actions

The decision in *Moody* underscores the fundamental importance of an effective notice program to access to justice, and raises some serious questions as to whether or not notice should be discretionary, as it is in Canada.

Means of Notice and Reach

It is clear that in cases where there is sufficient information to provide direct notice to all potential claimants, and there is no other barrier to providing such notice, this should be done. Publishing notice in newspapers or websites or posting it at the defendant's place of business is useful, but it is no substitute for direct notice as it does not ensure that all claimants are aware of their potential entitlement to a benefit. Indeed, in *Moody*, *supra*, one of the identified deficiencies of the notice program was that the defendant Sears did not tap into its credit card holder database to provide direct notice to the claimants. Rule 23(c)(2)(B) of the *Federal Rules of Civil Procedure* ("FRCP") provides that the court should direct *"the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"*.

As a result, in cases where the defendant maintains a reasonably accurate list of persons who may be entitled to make a claim, such list should be sought / produced. The earlier this occurs, the better, as it also provides a good estimate of class members and fosters a settlement based on a realistic assessment of the potential exposure. Given the costs associated with publication in newspapers, especially if publication must occur nationally on a couple of occasions, it makes good economic sense to attempt to reach all claimants directly rather than relying solely or exclusively on newspaper advertising. Judges should ensure that all means of direct notice have been exhausted before allowing secondary notice.

If direct mailing is possible, an effective mailing is also important. Professional mailing companies have the equipment necessary to "cleanse" outdated mailing lists in order to ensure that the maximum number of notices will reach their intended target. Mandated follow-up for returned mail is also of benefit to class members and should be included in any direct notification effort. For example, in *Kranjcec v. HMQ*, where a settlement of $20 million was distributed to over 40,000 class members through direct deposit to bank accounts where possible, and direct mail for others, the settlement included the following provisions:

(a) Class counsel shall send each Settlement Class Member their respective share of the settlement by direct mail no later than forty-five (45) days after the Effective Date;

(b) Class counsel shall:
   i. Take reasonable steps to ensure that any settlement payment returned to it as undeliverable mail reaches the Settlement Class Member for whom it was intended; and

ii. Take reasonable steps to replace stale dated or lost settlement payment cheques up to a maximum of two replacement cheques for each Settlement Class members.

The effectiveness of direct notice is illustrated in *Hoy v. Medtronic Inc.*[7], a product liability case involving allegedly defective pacemaker leads. In that case, notice was provided in part by way of a direct mailing program to the known recipients of the allegedly defective pacemakers. The direct notice effort was not perfect because (a) the defendants did not have contact information for all potential claimants and (b) the contact information for some of the claimants was out-of-date, resulting in "undeliverables" of approximately 35%. Out of a class size of approximately 800 claimants, the defendants had contact information for 674 persons. Claims forms were sent directly to all of these persons, resulting in 426 claims (63% of the persons to whom direct notice was provided, and an overall 53% take up rate).

Another example of direct notice took place in *Fakhri et al v. Alfalfa's Canada Inc. c.b.a. Capers*[8]. In that case, it was alleged that food products sold at a specific location of the defendant's groceries stores were tainted with the Hepatitis A virus. The Vancouver Coastal Health Authority set up inoculation clinics and kept track of those who had received the inoculation. Direct notice of the settlement was provided to all persons who had received the inoculation. The compensation rate in that case was approximately 50%.

In *Nutech Brands v. Air Canada Cargo et al.*, a price-fixing conspiracy case involving fuel surcharges on air cargo rates, the plaintiffs have entered into a settlement agreement with a single defendant. In order to facilitate a broad, worldwide direct notice campaign, plaintiffs brought a motion to compel production from non-settling defendants of their customer lists. A similar order had been granted in the United States in parallel litigation. As of the writing of this paper, the parties were trying to reach agreement on the issue but no court order has as yet been granted. To the knowledge of the authors, the ability to obtain customer lists from non-settling defendants had not previously been accomplished.

Aside from cost, a frequent objection to a direct mailing program is the currency of the contact information, which in cases such as *Medtronic* can result in a percentage of returned mail. In situations such as this, it is appropriate to provide the returned envelopes to the plaintiff so that they can attempt to locate and notify these persons by other means. Providing for a second and concurrent means of notice is always an alternative.

The selection of alternate or supplemental means of notice should take into account the recipients' demographics. Age, physical or mental disabilities, geographical setting or cultural issues can all play a part in the effectiveness of notice. To the extent that it is possible to conduct some research into the demographics of the claimants so as to devise the means of notice, that should be done.

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[7] *Hoy v. Medtronic*, unreported, April 1, 2005, Vancouver Registry M000047 B.C.S.C.

[8] *Fakhri et al v. Alfalfa's Canada Inc. c.b.a. Capers*, 2005 BCSC 1123

Counsel should not hesitate to be creative in devising an effective means of notice. An examination of the relationship between the plaintiff and the defendant may provide new and effective means of notice. For example, in *Scott v. Blockbuster Inc.*[9], a late fee class action, notice was provided together with receipts for subsequent rental transactions during an extended period time. The repetitive nature of the customer relationship in that case allowed for notice to be provided to 25 million class members for a very nominal cost.

Advances in technology provide some innovative and potentially very effective means of notice, such as email, blogs and text messaging to class members' cell phones. This latter approach is obviously more suitable to cases where the claimants are from a younger demographic, but it shows the benefits of ingenuity when it comes to devising means of notice.

Contents of Notice

While it is important that the notice reach the claimant, it is equally important that it be understandable by the claimant, and that it provide sufficient information to allow the claimant to determine whether he or she is entitled to make a claim, and what is required in order to do so. The concern about potential costs is frequently a reason why people opt out of class actions, and so the notice should carefully address this. Once again, it is important to be sensitive to the demographics of the claimants to ensure that the contents of the notice will be understood by them.

The negative impact of unclear notices on access to justice was expressly acknowledged in the *Class Action Fairness Act*[10] ("CAFA"), which was enacted in the United States in 2005 in response to complaints about class action procedures and fairness. Under Section 2 of CAFA, Congress concluded that *"confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights."*

According to ABC Canada, four out of ten Canadians aged 16 to 65 struggle with low literacy. Across Canada, the percentage of Canadians age 16 and over with low literacy skills ranges from 14% to 24%[11]. Counsel should be mindful of those facts when devising the content of notice as a confusing notice is problematic in many ways:

(a) it does not promote access to justice as persons who have a valid claim may not understand that they are entitled to claim a benefit, or may be discouraged from making a claim;

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[9] *Scott v. Blockbuster Inc.* (January 22, 2002) No. D 162-535 (Jud. Dist. Ct. TX), cited in Todd B. Hilsee, *Nationwide Class Actions: Shine a Light on (Another) Bad Notice*, delivered at The American Bar Association's 11th Annual National Institute on Class Actions.

[10] *Class Action Fairness Act*, 28 U.S.C. Sections 1332(d), 1453, and 1711-1715.

[11] Adult Literacy Facts, posted on ABC Canada Literacy Foundation website (http://www.abc-canada.org/en/adult_literacy/facts).

(b) it increases administration costs as (i) it will generate a larger number of inquiries and (ii) a greater number of persons who are not eligible to participate in the settlement may make a claim, which will have to be processed and declined, with the corresponding appeal process in some cases; and

(c) to the extent that the defendants want to use the settlement process as an opportunity to regain their customers' confidence, such opportunity may be lost as a result of the overall frustration arising from a confusing notice.

As one claims administrator points out, words that are common in the everyday legal vernacular such as "counsel", "damages" or "compensation", may not be understood by the claimants, at least not in the sense in which they are intended[12]. In this respect, some opt out forms provide clear indication of the potential for confusion in even the best notice forms. In *Howard v. HMQ*, the probate fee class action in which Branch MacMaster was involved, the notice from indicated that the action was brought against the British Columbia government, but the style of cause contained the traditional words "Her Majesty The Queen". One of the claimants sought to opt out of the proceedings on the basis that the Queen was "a really nice lady" and no one should be suing her!

There has been a clear movement in the United States towards plain English in notice, at least at the federal level, where "plain" and "easily understood language" is a requirement of FRCP 23 (c)(2)[emphasis added]:

> (2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.
>
> (B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state <u>in plain, easily understood language</u>:
>
> • the nature of the action,
> • the definition of the class certified,
> • the class claims, issues, or defenses,
> • that a class member may enter an appearance through counsel if the member so desires,
> • that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
> • the binding effect of a class judgment on class members

[12] Telephone interview of Laura Bruneau of Bruneau Group on March 7, 2008. Ms. Bruneau was the settlement administrator in the Loblaws Hepatitis A and Air Transat Flight 236 settlements. Her website is www.bruneaugroup.com

under Rule 23(c)(3).

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

Additionally, the Federal Judicial Center in the United States has made the following suggestions concerning form of notices in its *Manual for Complex Litigation*[13]:

> Published notice should be designed to catch the attention of the class members to whom it applies. In many cases, a one-page summary of the salient points is useful, leaving fuller explanation for a separate document. Headlines and formatting should draw the reader's attention to key features of the notice. A short, informative blurb ("If you were exposed to ___, you may have a claim in a proposed class action settlement") on the outside of a mailing envelope serves a similar purpose.
>
> Question-and-answer formats help to make information accessible and can guide the reader through each step of a complicated certification or settlement explanation. Counsel should logically order the information that will assist the class member in making important decisions, such as whether to opt out of the class, object to a settlement, or file a claim. Counsel should discuss with the court whether class members are likely to require notice in a language other than English or delivery by a means other than mail. Lists of class members usually provide the best source of information for deciding how to deliver notice. In some cases, the cohesiveness of a class (for example, employees of a single plant) or the existence of a common gathering place (for example, shelters or food kitchens for a case involving the homeless) may suggest reliable and efficient ways to communicate notice.

While there is no such plain language requirement in Canadian common law class action legislation, Article 1046 of the Quebec *Code of Civil Procedure* provides the following directions with respect to the form of notice:

> Every notice that must be given to the members must be written in plain language that will be easily understood by the persons to whom it is addressed...

Sample illustrative forms prepared by the Federal Judicial Center at the Federal Rules Advisory Committee's direction are attached as **Appendix A** to this paper.

The decision in *Moody* raises the question of enforceability of a settlement reached in another jurisdiction when there are deficiencies in the notice program. Canadian courts should not hesitate to scrutinize the notice program before deciding to respect a foreign settlement. In doing so, our courts should take into account the demographics of the claimants. At a minimum, notices which are not circulated in both official languages

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[13] Federal Judicial Center, *Manual for Complex Litigation* (4th ed., 2004, § 21.31 at pp. 286-87).

should not be considered effective as they do not effectively reach the 24%[14] of Canadians whose mother tongue is French.

In the United States, the larger claims administration companies employ individuals who have developed expertise designing notice programs. Those persons will consult with counsel and will often give evidence to a court concerning the design of the notice program and its relative effectiveness. Although this type of professional opinion and assistance is undoubtedly useful to a court and helpful in terms of ensuring other courts will respect the court's settlement approval conclusions, such opinions can be very expensive. Whether courts ought to expect such opinions should probably be considered on a case-by-case basis depending on the nature of the class, and also the size of the settlement fund. If one considers that as a rule some particular percentage of a fund ought to be spent on notice, then the steps taken in respect of designing and implementing the notice will necessarily reflect the size of the settlement achieved.

GOOD CLAIMS FORMS

From Wikipedia:

> Cost-benefit analysis is a term that refers both to:
>
> - a formal discipline used to help appraise, or assess, the case for a project or a proposal, which itself is a process known as a project appraisal; and
> - an informal approach to making decisions of any kind.
>
> Under both definitions, the process involves, whether explicitly or implicitly, weighing the total expected costs against the total expected benefits of one or more actions in order to choose the best or more profitable action.

Transposed into the class action context, claimants will not want to "access justice" if that translates into a net cost for them, whether monetary or personal. Excessively complex forms, insignificant personal benefit or a cumbersome claims process could all push the cost-benefit analysis into the negative realm and deter claimants from making valid claims.

The same principles discussed above with respect to the need for the notice form to be drafted so that it is understood by the claimant apply equally, if not more forcibly, with respect to claims forms. If notice is the door to access to justice, claims forms are the maps that guide the claimant through the sometimes complex maze leading to his or her personal benefit.

It is important to keep in mind that, at this stage of the case, the defendant has already made a decision to compromise on the claims and extend a certain benefit to the potential claimants. While it is tempting to see this only as a potential liability for the defendant, it

[14] 1996 Census, as reported on the website of The Atlas of Canada (http://atlas.nrcan.gc.ca/sites/english/maps/peopleandsociety/lang/officiallanguages/mothertonguefrench/1).

is also a valuable opportunity for it to regain its customers' confidence. If the claims process is complicated and cumbersome, the claimants will associate these difficulties with the defendant, and will not give the defendant any "credit" for the settlement effort. We have seen examples of that in *Reid v. Ford*, a case where Branch MacMaster was involved. In that case, the settlement was administered by the defendants through a designated group within their customer service department, a process that was inheritated from the previous US settlement. The administrator's responses to the claims form were provided through a standard, "tick in the box" form that set out all possible grounds for denial of the claims. This generated a fair amount of confusion as some of the claimants did not understand that only the ticked boxes applied to them (see **Appendix B** to this paper). As they grew frustrated with the process, some of the claimants wrote personal comments on their claims forms which clearly showed they were attributing all of their difficulties to the defendants (see **Appendix C** to this paper).

At a very minimum, claims form should not require any more information from the claimant than what is reasonably required in order to determine his or her eligibility for the particular benefit. In this regard, studies conducted in relation to use of mail in rebates show that "*if the redemption requirements are perceived to be too complicated or difficult, the redemption rate will be reduced*"[15]. The same applies in completing a claim form: the more you ask a person to do in order to claim a benefit, the less he or she will be likely to do. As a result, additional requirements such as documentary proof, receipts, the need to swear statutory declarations or gather additional information from third parties all add to the "cost" to the claimant in engaging in the claims process, and may ultimately deter participation. For example, there is absolutely no reason why a claims form should have to be completed using a specific colour of ink. Requirements such as having the claimant initial every answer provided in the claims form only add unnecessary complexity and drive up the administration costs (as the administrator will be required to check all signatures)[16]. Requirements that make the process seem to be "legalistic" have the risk of scaring claimants away from the process. If class members feel that they are becoming heavily involved in the legal system, which could be a mysterious matter to them, they could simply choose not to engage.

The availability of alternate means of completing and submitting a claims form, such as electronically, should be considered and adopted where feasible. Parties should be required to offer a principled basis for not making use of these new technologies.

Counsel settling a case which has already been settled in another jurisdiction should pay specific attention to the claims forms and process utilized in the prior settlement, as such forms and process will usually (and sometimes unfortunately) be considered the "benchmark". While sometimes some improvement can be negotiated, a long and

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[15] Peter K. Tat, "Rebate Usage: A Motivational Perspective".

[16] Telephone interview of Laura Bruneau of Bruneau Group on March 7, 2008. Ms. Bruneau was the settlement administrator in the Loblaws Hepatitis A and Air Transat Flight 236 settlements. Her website is www.bruneaugroup.com.

burdensome claims form will likely remain long and burdensome, as was the case in *Olson v. Behr Process Corporation*[17] ("Behr").

In *Behr*, a case involving allegedly defective wood sealants, the British Columbia settlement was reached after a settlement had already been reached in the United States. The U.S. claim form (inevitably) formed a benchmark for negotiations, particularly given that it had already been approved as fair and reasonable by a U.S. court. The claims form ultimately utilized in British Columbia was simpler than the one utilized in the United States, but was still complex (see **Appendix D** to this paper). The main body of the Cash Compensation Claims Form comprised 11 pages and took over 20 minutes to be completed. As part of the claims process, claimants were required to swear or obtain sworn statutory declarations from third parties, and supply documentary proof of purchase of the product for applications in areas greater than 300 square feet. The form also required claimants to provide their S.I.N. and to complete their forms using "blue or black ink". The resulting take up rate was very low: out of an estimated 184,000-274,000 users of the sealant, only 166 claimants received a benefit.[18]

A comparison of the claims form utilized in *Medtronic* (see **Appendix E** to this paper) and *Behr* highlights the difference in complexity. Some of this variation may be attributed to whether or not the defendant retains a residual interest in the funds (which as the case in *Behr*), or not (which was the case in *Medtronic*). Where the defendant pays a lump sum without a reversionary right, class counsel are more at liberty to design a simple plain language form. Where the defendant retains an interest, they have an interest in minimizing the take up rate by increasing complexity. Where the claims forms are negotiated after the basic business terms and compensation to class counsel, the incentives and respective bargaining positions can encourage the production of difficult claim forms. The court must guard against this problem through a careful review of the claim form to ensure that it is not one line longer and no more complex than absolutely necessary.

GOOD RELIEF

It goes without saying that the likelihood of making a claim will increase in the same proportion as the personal benefit to be derived by the claimant. While it is not always possible to create a settlement that provides sufficiently significant personal benefits, this factor should be taken into account when it comes time to devise the claims process and forms. Simplifying the claims process and forms can go a long ways towards making an otherwise unattractive process appealing to the claimants, thereby increasing access to justice. The amount of process required should be proportionate to the benefit received.

Equally important is the need to provide to the claimant an indication of the level of benefit he or she could receive as part of the settlement process, whenever possible. All

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[17] *Olson v. Behr Process Corporation*, 2003 BCSC 1252.

[18] However, it is not known how many of these actually suffered the problem that was the subject of the suit.

of the sample notice forms drafted by the Federal Judicial Center contain an indication of the minimum and maximum amount of benefits payable, and the average amount a claimant can expect to receive through the process. This allows the claimant to make an informed decision on whether he or she wants to participate in the process.

Difficult to use coupons and discounts are not good relief and not attractive to class members as they force the claimant to enter into another transaction with the defendant, and depending on the conditions attached to their use, provide for a whole other layer of work to be performed by the claimant prior to actually receiving the benefit.

In this respect, it must be noted that CAFA singles out some coupon settlements as being particularly unfair to class actions. Section 3 of CAFA provides for "judicial scrutiny of coupon settlements"[19] requiring a hearing on fairness and potential payment of a portion of unclaimed coupons to be made to charity (as agreed between the parties). As a means to prevent some of the perceived unfairness, Section 3 of CAFA[20] also provides that attorney fees can only based on coupons redeemed: *"If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed."*

Redemption rates can be very low in cases involving coupons. The average redemption rates in the United States on food and beverage coupons have consistently been between 2% and 6%[21].

Given the perceived concerns associated with the use of coupons in class action settlements, the Federal Judicial Center has issued the following direction for judges managing these cases[22]:

> Determine whether the proposed coupons are transferable; whether they have a secondary market in which they can be discounted and converted to cash (*see In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation,* 55 F.3d 768, 809–10 (3d Cir. 1995)); whether they compare favorably with bargains generally available to a frugal shopper (*see, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 292 F. Supp. 2d 184, 186–88 (D. Me. 2003)); whether class members are likely to redeem them (*see id.*); and whether attorney fees are being calculated on the face value of the coupons. CAFA calls for judicial scrutiny of coupon settlements and restricts the use of unredeemed coupons in calculating fees for class counsel. *See* 28 U.S.C. § 1712 (2005). Coupon settlements were rare even before the passage of CAFA. They

[19] CAFA, 28 U.S.C. (2005), § 1712(e).

[20] CAFA, 28 U.S.C. (2005), § 1712(a).

[21] *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged*, Dickerson and Mechmann (2000).

[22] Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide For Judges* (2005).

will be even less likely to occur now. Note that under the proper conditions (e.g., with transferability, a secondary market, and/or a class of repeat users of a low-cost product), coupons might serve both the class and the defendant and thereby increase the overall value of a settlement (*see, e.g., In re Mexico Money Transfer Litigation,* 267 F.3d 743, 748 (7th Cir. 2001) (finding that in-kind transferable coupons useful to a class of repeat consumers had an estimated value of 10%–15% of their face value)).

The analysis for a court in Canada may be somewhat different because in Canada costs are payable by the unsuccessful party, and that may form the basis for a payment even where the payments through the claims process are modest. However, the general concepts that courts should carefully scrutinize the nature of any coupons, the notice, the claims process and the fee request to ensure that class members have been well served by their counsel are clearly applicable in the Canadian context.

EASE OF PROCESS

It is no surprise that the greater the amount of work one has to do in order to make a claim, the less likely it is that the claim will be filed. A close analogy can be drawn to the use of mail-in rebates. Typically, everyone considers the rebate price when deciding whether to purchase the specific product, but whether he or she actually claims the rebate following the purchase depends on the amount of work required to do so: *"there is a negative relationship between a consumer's perceived time and effort required in rebate redemption and his / her rebate usage"*[23].

Similarly, as the potential benefit to be gained by the claimant increases, so does the claimant's willingness to work for it, but up to a limit: *"there is a positive relationship between a consumer's perceived self-satisfaction derived from redeeming rebates to obtain the savings and his / her rebate usage"*[24]. The amount of satisfaction necessary to encourage a claimant to work for his or her benefit is often monetary, but not necessarily so. A sense of "principle" or "justice" may also provide the requisite motivation. However, by and large, the greater the amount of work a claimant is required to do, the less likely he or she will be to make a claim. Looking at it from this perspective, a complicated claims process can provide substantial roadblocks to access to justice.

Not surprisingly, we see high take-up rates in cases where direct payment is effected, such as pension surplus cases or cases involving direct payment to brokerage or bank accounts. Assuming the defendants have sufficient information to calculate the claimants' individual entitlement, there is no good reason not to proceed in this manner.

The use of multi-tiered settlements where claimants can access a base amount through a relatively simple and straightforward process, and thereafter choose whether or not to

[23] Peter K. Tat, "Rebate Usage: A Motivational Perspective"

[24] Peter K. Tat, "Rebate Usage: A Motivational Perspective"

engage in a more complex process to claim a greater benefit should be considered where appropriate. This is particularly useful in cases involving claims of very personal nature, such as sexual abuse claims, where the claimant may not wish to "relive" the experience by engaging in the claims process (such as for example the Indian Residential Schools settlement), but is just as useful in a case where a small number of claimants are entitled to greater compensation upon proof of greater damages.

With respect to documentary proof or extraneous information, the less that is required, the better. Counsel should consider the likelihood of the claimants possessing the required information, and whether or not they can obtain it through other means. For example, in *Reid v. Ford*, the terms of the settlement required that claimants provide in the claims form the VIN for their vehicles, which in some cases were 20 years old and likely no longer in their possession. While (again) Canadian counsel were somewhat stuck with the process because of a past judicially approved settlement in the United States, class counsel investigated how claimants could obtain this information from insurance records and provincial licensing authorities, and inserted a "how to" explanation in the claims forms.

In terms of process, specific attention should be paid to the administration of the settlement. Wherever possible, a third party administrator should be engaged and auditing rights should be provided to both parties. An under-staffed call centre with limited operating hours will prove frustrating and discouraging to many claimants. In this respect, it must be noted that many claimants will imply a connection as between the defendant and the administrator, and any hassles experienced with the process will be credited to the defendant, negating the opportunity to regain the customer's confidence through the settlement process. Ideally, claimants should have various options for making a claim, and these options should take full advantage of technology.

A fixed settlement sum with no reversionary rights is preferable to a claims made settlement, as it provides no financial incentive for the defendants to establish a cumbersome process.

CONCLUSION

Given the impact that notice and the claims process have on access to justice, our courts should carefully scrutinize these details prior to approving a proposed settlement, and in doing so, should insist on as simplified a process as possible under the circumstances. This is a classic example of the "devil being in the detail". The "Schedule F" claim form should probably be the first document reviewed during any settlement approval hearing, not the last, as is often the case presently.

Courts should demand an accounting of the number of claims made and approved at the end of the claims period. At that point, the court could require a right to consider whether or not to extend the claim period or make further directions as to additional notice. Publication of the results of each class action settlement or judgment on the National

Class Action Registry[25] could also be considered as a means of comparison, audit and education.

[25] www.cba.org/classactions