

Time To Allow More Streamlined Class Action Notice Formats

By **Gina Intrepido-Bowden** (July 20, 2021, 5:14 PM EDT)

The content requirements for class notice established by Federal Rule of Civil Procedure 23 and the fourth edition of the Manual for Complex Litigation, as well as relevant state rules and codes, were last updated in 2018 to accommodate the proliferation of the internet and emerging methods of communication.

While the 2018 amendments remain applicable and reasonable for a long-form or detailed notice, I would argue that given today's fast-paced, "no time to read" world, these content requirements are inappropriate for short-form notices. 2021 raises the question: Is it necessary to include all required content in a short-form or summary notice?

Over the past decade — and notably, over the last year — there have been significant changes in the way we communicate and receive information. In developed countries, technology adoption is soaring.

People expect quick and easy communication, as indicated by the spread of the internet acronym TL;DR, meaning "too long; didn't read."^[1] This article provides four arguments in support of shorter short-form notices — after all, "short" is the name of the game.

1. Courts have already accepted some simplified notices.

Courts have recognized the need to accommodate technological advancements in how we communicate with class members, which has already resulted in shortened notices. As of Dec. 1, 2018, Rule 23 stipulates that best notice may be "by one or more of the following: United States mail, electronic means, or other appropriate means."^[2]

"Electronic" or "other appropriate means" may include emails, text messages and other electronic communications to come, as well as digital banner notices, which have become the foundation for notice programs designed to reach unknown consumer class members.

Courts today accept digital banner notices using a short, attention-getting headline with a direct link to the case website. After clicking through to the case website, class members have access to all of the information they need about the case, including the long-form or detailed notice. See image 1 for a sample of a short-form digital banner notice.



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Image 1 — Sample short-form banner ad

Courts have also approved radio and television notices that are designed to communicate a basic 15-, 30- or 60-second message. A sample 30-second broadcast script may consist of content such as:

If you purchased DRUG X, you may qualify to receive benefits in a class action settlement. To find out if you qualify for benefits in the DRUG X settlement, go to [website address] or call [toll-free number]. That's [website address] or call [toll-free number]. This message paid for by [ad sponsor].

If court-approved digital banner and broadcast notices do not include all required information, why must other short-form notices, such as publication and postcard notices?

2. Advertising has always supported the concept of "less is more."

As an advertising major, I recall "KISS" — "keep it simple, stupid" — being preached in my creative writing classes. One of the first rules in designing a print ad is: Don't say too much.[3]

Content should be limited to one key message, and your ad should have a lot of empty or white space.[4] White space is just as important as the copy, because it makes the ad more visually appealing and invites the reader in.[5]

Basically, a print ad should include a catchy and simple headline and subheading, brief and clear copy, eye-catching and relevant images, and an easy call to action.[6] Yet, the standard class action publication notice does quite the opposite. See image 2, to the right, for an example.

Publication summary notices overload content, provide very little white space, and more often than not, do not include an image. Wouldn't it be best practice for these short-form notices to observe the conventions of effective print ad design to more closely resemble the mainstream media that consumers have grown accustomed to?

LEGAL NOTICE

If you purchased DRUG X, you may be affected by a \$x million class action settlement

A federal Court -authorized this Notice.

This is not a solicitation from a lawyer.

Para una notificación en español, visite www.xxxx.com o llame 1-xxx-xxx-xxxx.

What is this about? Plaintiffs, John Smith and Mary Miller, allege that Defendant, Drug X Company, Inc., monopolized or attempted to monopolize and restrained competition in order to raise, fix, maintain, or stabilize the prices of Drug X at artificially high levels in violation of certain federal and state laws. Drug X Company, Inc. denies the allegations. Plaintiffs and Defendant have agreed to settle this action to avoid the uncertainties and risks of further litigation. The Court has not decided who is right or wrong. The Court appointed Law Firm X LLP as Class Counsel.

Who is affected? The Court certified a Settlement Class which includes all persons and entities in the United States who purchased Drug X during the period from Month x, 20xx to Month x, 20xx ("Settlement Class Members").

What does the Settlement provide? Drug X Company, Inc. has agreed to pay \$x million into a "Fund" to pay Settlement Class Members who submit a timely and valid claim, after \$x has been deducted to administer notice, up to \$x to pay attorneys' fees and costs and other expenses, and up to \$x in service awards to each of the Class Representatives. Settlement Class Members who submit a valid claim are entitled to receive compensation on a *pro rata* basis such that the Settlement Fund is exhausted.

How do you get a payment? Claim Forms must be submitted online or postmarked and mailed by **Month x, 2021**. Claim Forms are available at www.xxxxxx.com or by calling xxx-xxx-xxxx.

What are your other options? *Do Nothing:* You will not get a payment. You will give up your right to sue or continue to sue the Defendant for the claims in this case. *Exclude Yourself from the Settlement Class:* You will no longer be bound by the settlement. You will not receive any payment, but you will keep your right to sue or continue to the Defendant on your own for the legal claims in this case. *Object:* If you do not exclude yourself, you may tell the Court you don't like something about the settlement. You will still be bound by the settlement if your objection is rejected. Exclusion requests and objections must be postmarked and mailed by **Month x, 2021**.

When is the Fairness Hearing? The Court will hold a Fairness Hearing on Month x, 2021, at x:xx a.m. Eastern. At the hearing, the Court will consider whether to approve the settlement, attorneys' fees and expenses, and Class Representative service awards. You or your attorney may ask to appear at the hearing at your own expense, but you don't have to. The Final Approval Hearing is subject to change, so check the settlement website for updates.

Questions? This notice summarizes the proposed settlement. For more information visit www.xxxx.com, call xxx-xxx-xxxx, email info@wxxxx.com, or write to Drug X Antitrust Settlement c/o ABC Legal Administration, P.O. Box xxx, City, State, zipcode.

PLEASE DO NOT CONTACT THE COURT OR THE COURT CLERK'S OFFICE.

www.xxxx.com xxx-xxx-xxxx

Image 2 — Sample standard publication notice

3. Class members have immediate access to detailed information.

When I started in the legal notice industry over 20 years ago, case websites and email notice were nonexistent. Class members received case information by way of a traditional mailed or published notice, or through an inquiry to the call center, if necessary.

Case websites and email notice were irrelevant, because only 1% of U.S. adults had broadband internet access in 2000. But 77% have broadband access today.[7]

At that time, it was necessary for a summary notice to present all of the required information, because if it didn't, the only way class members could learn about their due process rights and options would be by requesting that a long-form notice be snail-mailed to them, or by calling the case-established toll-free telephone line.

Unlike then, today we have access to information anywhere, at any time. Smartphone ownership increased from 35% in 2011 to 81% in 2019, and 37% of U.S. adults say they mostly use a smartphone when accessing the internet.[8]

Basically, we have a gateway to information at our fingertips at all times, even while on the go. Consequently, why bombard class members with so many details?

Shouldn't a summary notice focus on simply capturing the attention and interest of class members, and providing the means to learn more if they so desire? Shouldn't class notice adapt for today's TL;DR society?

4. COVID-19 has normalized QR codes, another means for prompt case fact retrieval.

The COVID-19 outbreak has taken technological advancements a step further, as QR codes, or quick response codes, have become mainstream. Since the start of the socially distant, "don't touch" pandemic, these black and white square patterns can be found everywhere, particularly in the restaurant industry.[9]

To reduce exposure levels, QR codes have come to replace restaurant paper menus.[10] Patrons simply hold their smartphone camera over the displayed QR code until a link appears.[11]

The link then directs the patron to the desired website with the online menu. As of September 2020, nearly 47% of U.S. and U.K. consumers agreed that they had noticed an increase in QR code usage since COVID-19 shelter-in-place orders began in March 2020.[12]

With society's acclimation to this new information resource, we should see more of its usage in class communications too. By way of a QR code, printed summary notices can offer class members prompt retrieval of the case facts, similar to a banner ad.

The information is there for a class member to retrieve. They don't need to rifle through tiny print, wait for snail mail, or sit on the phone. A simple click gets them everything they need to know.

It's time to take the next step.

Thanks to the Federal Judicial Center's illustrative forms of class action notice, we've come a long way

since the pleading style notices of the 20th century. An example of a pleading style notice is provided in image 3 below.

LEGAL NOTICE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF STATE LEGAL NOTICE

Named Plaintiff A, Named Plaintiff B, Named Plaintiff C, Named Plaintiff D and Named Plaintiff E, individually and on behalf of all others similarly situated, Plaintiffs,

vs.

Defendant Company A, Defendant Company B, Defendant Company C, Defendant Company D and Defendant Company E, Defendants.

) Case No. 1:12-CV-0012345 ABC XYZ
) **NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, SCHEDULING OF HEARING AND RELEASE OF CLAIMS**

TO: ALL PERSONS OR ENTITIES WHO PURCHASED PRODUCT A, PRODUCT B, PRODUCT C OR PRODUCT D ("THE INCLUDED PRODUCTS") DURING THE PERIOD FROM MONTH 00, 0000 THROUGH AND INCLUDING MONTH 00, 0000 (THE "CLASS PERIOD");

The purpose of this Notice ("Notice") is to inform you of the proposed settlement ("Settlement") of this class action litigation (the "Action") against Defendant Company A ("Defendant A"), Defendant Company B ("Defendant B"), Defendant Company C ("Defendant C"), Defendant Company D ("Defendant D") and Defendant Company E ("Defendant E") (collectively "Defendants") pending in the United States District Court for the District of State in City (the "Court"). This Notice provides only a summary of the terms of the Settlement Agreement. A copy of the complete Settlement Agreement may be examined at United States Courthouse, 123 Broad Street, Anycity, AnyState 12345.

The Action concerns allegations by the Plaintiffs that Defendants violated 80 Stat. 1296, 15 U.S.C. §§ 1451-1461 of the Fair Packaging and Labeling Act. Plaintiffs further allege that Defendants unlawfully and purposely profited from consumers causing financial harm as a direct result of Defendants violation of 80 Stat. 1296, 15 U.S.C. §§ 1451-1461. Defendants deny these allegations. The Plaintiffs and Defendants have agreed to settle the Action to avoid the expense and risk of trial. Plaintiffs believe the settlement is fair, reasonable and adequate. As part of this litigation, the Court-approved Class Counsel has conducted an investigation and discovery into the claims of the Settlement Class Members and the defenses that might be asserted thereto. The investigation has included the deposition of a representative of the Companies; a review of certain relevant documents produced by the Companies; and an analysis of relevant legal issues. Based on this investigation, Class Counsel believes that the Settlement is fair, reasonable and adequate and in the best interests of the Settlement Class. Class Counsel have taken into account the expense and length of continued proceedings necessary to continue to prosecute this case through verdict, judgment and appeals and the uncertainty and risk of the outcome of continued litigation, especially in complex actions such as these as well as the difficulties and delays inherent in such actions. This Settlement was only achieved after lengthy arm's-length negotiations before the Court appointed Magistrate Judge.

I. YOU ARE HEREBY NOTIFIED that a Fairness Hearing will be held on Month 00, 0000, at 9:00 a.m., before the Honorable John A. Smith at the United States Courthouse, 123 Broad Street, Anycity, AnyState 12345 to determine: (1) whether the Action should be finally certified as a class action; (2) whether the Settlement should be approved as fair, reasonable and adequate; (3) whether the Action should be dismissed; (4) whether Class Members should be bound by the release contained in the Settlement Agreement; (5) whether Class Members should be barred from filing, commencing, prosecuting, maintaining, intervening in, participating in, or receiving any benefits from, any lawsuit or other proceeding in any jurisdiction based on or relating to the claims and causes of action covered by the release in this Action; (6) whether the application of Plaintiffs for an incentive award should be approved; and (7) whether the application of Plaintiffs' counsel for an award of attorney's fees and expenses should be approved.

II. You must decide whether you want to be part of the Settlement Class. If you are a member of the Settlement Class, you are automatically included in the Settlement and can apply for certain settlement relief described in this Notice. You may also exclude yourself from the Settlement or object to the Settlement. More detailed information about these options is contained in Section III, IV and V below.

III. In order to obtain a distribution of the Net Settlement Fund with respect to Defendant A, Defendant B, Defendant C, Defendant D and Defendant E, you must submit a Proof of Claim and Release form so that it is delivered such that it is received no later than Month 00, 0000, establishing that you are entitled to recovery. If you submit a Proof of Claim and Release form and the settlement becomes final and "non-appealable" you will be bound to the Judgment and Release of this proposed class action settlement and described herein. **IF YOU FAIL TO SUBMIT A TIMELY AND VALID PROOF OF CLAIM AND RELEASE FORM YOU WILL FORFEIT YOUR DISTRIBUTION AND WILL BE FOREVER BOUND AND BARRED BY THIS SETTLEMENT IF IT BECOMES FINAL AND NON-APPEALABLE.**

IV. Any objection to the settlement must be mailed or delivered such that it is received by each of the following no later than Month 00, 0000: Clerk of the Court, UNITED STATES DISTRICT COURT, District of State, 123 Broad Street, Anycity, AnyState 12345. Counsel for Plaintiff: NAMED PARTNER A, NAMED PARTNER B & NAMED PARTNER C, Adam A. Attorney, 456 Main Avenue, Suite 456, Anycity, AnyState 45678. Counsel for Defendants: NAMED PARTNER A, NAMED PARTNER B & NAMED PARTNER C, Elaine E. Esquire, 987 Massachusetts Drive, Anycity, Any State, 56789.

V. If you do not want to be included in the Settlement Class, you must request exclusion from the settlement class by Month 00, 0000. Otherwise, you will be bound by all terms of the proposed Settlement if the Court approves it. **IF YOU DO NOT EXCLUDE YOURSELF FROM THE CLASS, THE PROPOSED SETTLEMENT (IF APPROVED) WILL AFFECT YOUR RIGHT TO START OR CONTINUE ANY OTHER LAWSUIT OR PROCEEDING INVOLVING DEFENDANTS.** Additionally, you will be releasing the claims as set forth in this Notice. More detailed information is contained in Section VII below.

VII. **RELEASE OF CLAIMS**, under the terms of the Settlement, the Plaintiffs and the Settlement Class release and discharge any and all past, present and future claims, causes of action, demands, damages, attorneys' fees, equitable relief including but not limited to injunctive and declaratory relief, suits seeking damages, legal relief, and demands or rights, whether known or unknown, liquidated or unliquidated, accrued or unaccrued, fixed or contingent, or based on any statute, regulation or common law of any country, state, province, county, city or municipality that have been, could have been, may be, or could be alleged or asserted now, in the past, or in the future by the Plaintiffs or any member of the Settlement Class against Defendants, Defendants' Affiliates (which includes Defendants' past, present and future officers, directors, employees, agents, attorneys, representatives, shareholders, retailers, parents, subsidiaries, affiliates, predecessors, successors, assigns, and/or persons acting on behalf of any of the foregoing), and all other persons and businesses involved in the packaging and labeling of the Included Products (collectively the "Released Parties"), in this matter or in any other court action or before any administrative or regulatory body, tribunal or arbitration panel on the basis of, connected with, arising out of, or related in whole or in part in any way to: the claims in the Action and any and/or all of the acts, omissions, facts, matters, transactions, occurrences or representations that were directly or indirectly alleged, asserted, described, set forth or referred to in this matter including but not limited to, those regarding the marketing, sale, purchase, solicitation, pricing, descriptions regarding, or explanations regarding the Included Products. Any and all acts, omissions, facts, matters, transactions, claims handling, occurrences or representations relating to the Settlement Agreement and the Proof of Claim Process including, but not limited to, the claims released herein. This release shall not deprive Class Members of the class relief provided in this Settlement Agreement.

Image 3 — Sample pleading style notice

However, it's clear that we need to continue to adapt and evolve content requirements. The FJC model notices were developed in 2002, at the request of the Subcommittee on Class Actions of the U.S. judicial branch's Advisory Committee on the Federal Rules of Civil Procedure, to guide how the required information was presented in terms of the design and layout of a notice[13] — and what they did, as seen in image 4 below, was quite an improvement.

LEGAL NOTICE

If you were exposed to asbestos in Xinsulation, you could get benefits from a class action settlement.

A settlement of a class action lawsuit affects you if you were ever exposed to asbestos in Xinsulation, Xbestos, or other ABC Corporation products. The settlement will pay people who are suffering from an asbestos-related disease, as well as those who were exposed but not sick, who need medical monitoring. If you qualify, you may send in a claim form to ask for payment, or you can exclude yourself from the settlement, or object.

The United States District Court for the District of State authorized this notice. The Court will have a hearing to consider whether to approve the settlement, so that the benefits may be paid.

WHO'S AFFECTED?

Homeowners whose homes have or had Xinsulation (pictured and described to the right) are included in the settlement. Construction workers who installed, or worked around, Xbestos and other ABC products are also included, as described in separate notices. *You're a 'Class Member' if you were exposed to asbestos fibers in any ABC Corporation products any time before Month 00, 0000.*

WHAT'S THIS ABOUT?

The lawsuit claimed that ABC made and sold products knowing that the asbestos fibers contained in them posed a danger to the health and safety of anyone exposed to them. The suit claimed that exposure increased the risk of developing Asbestosis, Mesothelioma, Lung Cancer, or other diseases that scientists have associated with exposure to asbestos. ABC denies all allegations and has asserted many defenses. The settlement is not an admission of wrongdoing or an indication that any law was violated.

WHAT CAN YOU GET FROM THE SETTLEMENT?

There will be an Injury Compensation Fund of \$200 million for Class Members who have been diagnosed with an asbestos-related disease, and a \$70 million Medical Monitoring Fund for checking the health of those who were exposed but are not currently suffering from an asbestos-related disease. Compensation for injuries will be in varying amounts for specific diseases:

Medical monitoring payments will be \$1,000 or the amount of your actual medical expenses, whichever is greater.

DISEASE	MINIMUM	MAXIMUM	AVERAGE
MESOTHELIOMA	\$10,000	\$100,000	\$20,000-\$30,000
LUNG CANCER	\$5,000	\$43,000	\$9,000-\$15,000
OTHER CANCER	\$2,500	\$16,000	\$4,000-\$6,000
NON-MALIGNANT	\$1,250	\$15,000	\$3,000-\$4,000

Medical monitoring payments will be \$1,000 or the amount of your actual medical expenses, whichever is greater.

HOW DO YOU GET A PAYMENT?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. **Claim forms are due by Month 00, 0000.** For an injury compensation claim, you'll have to submit a statement from a doctor that describes your current medical condition and confirms that you have one of the diseases in the box above. For a medical monitoring claim, you'll have to show proof of your exposure to an ABC asbestos-containing product.



WHAT ARE YOUR OPTIONS?

If you don't want a payment and you don't want to be legally bound by the settlement, you must exclude yourself by **Month 00, 0000**, or you won't be able to sue, or continue to sue, ABC about the legal claims in this case. If you exclude yourself, you can't get a payment from this settlement. If you stay in the Class, you may object to the settlement by **Month 00, 0000**. The detailed notice describes how to exclude yourself or object. The Court will hold a hearing in this case (*Smith v. ABC Corp.*, Case No. CV-00-1234) on **Month 00, 0000**, to consider whether to approve the settlement and attorneys' fees and expenses totalling no more than \$30 million. You may appear at the hearing, but you don't have to. For more details, call toll free 1-800-000-0000, go to www.ABCsettlement.com, or write to ABC Settlement, P.O. Box 000, City, ST 00000.

1-800-000-0000 www.ABCsettlement.com

Image 4 — FJC model publication notice[14]

But the FJC model notices came at a time when we did not have access to the internet like we do today. It's time we communicate in a more immediate, attention-getting way.

Summary notices can and should take a cue from digital short-form notices. I would argue that a notice should be recognized as due process compliant if and when the notice clearly provides a case website address and/or QR code to facilitate immediate access to all the required information — i.e., a long-form notice. See image 5 below for an example.



Image 5 — Proposed sample publication notice

The Rule 23 amendments of 2018 advanced class notice by acknowledging and accepting electronic methods of communication as compliant, but we have yet to address changes in the actual content or message being communicated.

In other words, the "how" has been established, but the "what" is still open for debate. It's time for us to consider whether we are communicating in a way that is relevant to today's fast-paced, TL;DR society.

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[1] <https://www.howtogeek.com/435266/what-does-tldr-mean-and-how-do-you-use-it/>.

[2] Fed. R. Civ. P. 23(c)(2)(B), as amended.

[3] <https://businessresources.yip.ca/the-proven-value-of-print/9-rules-for-creating-more-effective-print-ads>.

[4] 10 Tips for Designing Static Ads | Design Shack.

[5] <https://www.thebalancecareers.com/how-to-write-effective-print-ads-39151>.

[6] <http://blog.bloomads.com/blog/how-to-create-more-effective-print-advertisements>.

[7] <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

[8] <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

[9] <https://www.bizjournals.com/bizwomen/news/latest-news/2020/10/qr-codes-get-popular-with-dining-other-retailers.html?page=all>.

[10] <https://2ndkitchen.com/restaurants/contactless-qr-code-menus/>.

[11] <https://www.shoocal.com/blog/how-to-scan-qr-code-for-menu>.

[12] <https://www.statista.com/statistics/199328/qr-code-scanners-by-age/>.

[13] <https://www.fjc.gov/content/301253/illustrative-forms-class-action-notices-introduction>.

[14] <https://www.fjc.gov/content/products-liability-class-action-certification-and-settlement-publication-notice-homeowners>.