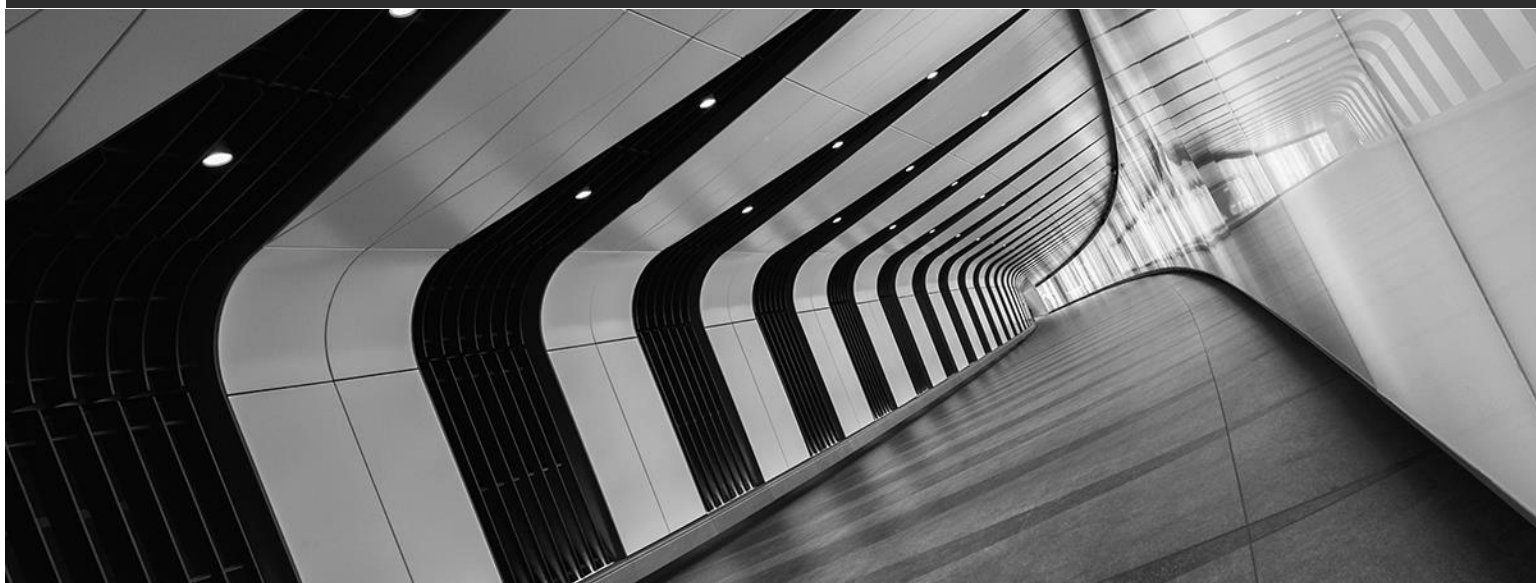


Providing Notice Required by CAFA



By Ryan C. Bykerk | February 20, 2020 | The Recorder

The Class Action Fairness Act of 2005 (CAFA) turns 15 years old on Feb. 18, 2020. But while CAFA is well known for expanding federal subject matter jurisdiction for class actions, it also requires defendants who settle any class action in federal court (not just those removed to federal court under CAFA) to provide notice of the settlement to the federal and relevant state governments. (See 28 U.S.C. §1711(2) (defining “class action” to include “any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a state statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action”).)

This obligation is easy to overlook, but it should not be forgotten: Failure to provide the required notice can allow class members to “refuse to comply with” and “choose not to be bound by” the parties’ agreement. (28 U.S.C. §1715(e).) This article provides a summary of what must be done and some pointers for how to streamline the process.

Who gets notice. CAFA requires defendants to provide notice to the “appropriate federal official” and “appropriate state official.” Both terms are defined in the statute, and the definitions should be carefully considered. In most cases, unless the defendant is a financial institution, the appropriate federal official will be the attorney general of the United States. Determining the appropriate state official is more difficult. The “appropriate state official” is defined as the official in the state who has “primary regulatory or supervisory responsibility” or

licensing authority over the defendant, if the class action had something to do with that person’s regulatory or supervisory role. If there is no such person, the appropriate state official is the state attorney general. Because notice must be provided to the “appropriate state official” of each state in which a settlement class member resides, a defendant could have to perform this analysis as many as 50 times.

What the notice must contain. The statute lists the required contents in detail, and they are set forth in the chart below. Most requirements, such as providing copies of the complaints and notice of scheduled hearings, are straightforward. But some require some real work, particularly with large-scale settlements. For example, defendants must provide the “appropriate state official” of each state with the names of the class members (or at least a reasonable estimate of the number of class members) who reside in that state, and the estimated proportionate share of the claims of those members to the entire settlement. (28 U.S.C. §1715(b)(7).) A defendant will have to perform calculations and create class lists unique to each state, which can be time-consuming and tedious.

Timing: the 10-day and 90-day deadlines. All this must be done (1) within 10 days after the proposed settlement is filed in court (28 U.S.C. §1715(b)), and (2) at least 90 days before final approval is granted (28 U.S.C. §1715(d)).

Typically, a proposed settlement is first filed in court along with the motion for preliminary approval. Given the detailed requirements, a defendant should be sure to have marshaled the data necessary for the CAFA notice before the preliminary approval motion is filed to avoid a rush to meet the 10-day deadline. If it is not possible to meet the 10-day deadline, options exist. Notably, the statute does not require notice within 10 days after the settlement is *first* filed, but when it is “filed.” Therefore, a defendant who does not provide notice within 10 days of the *first* filing, could *re-file* the proposed settlement and provide compliant CAFA notice within 10 days of that subsequent filing. Further, a handful of district court cases find that technical non-compliance with CAFA’s 10-day notice deadline does not allow class members to exempt themselves from the settlement. (See *Adoma v. Univ. of Phx., Inc.*, 913 F. Supp. 2d 964, 972-73 (E.D. Cal. 2012) (collecting cases; finding that “even if defendants are late in serving notice to state and federal officials, class members may not exempt themselves from a settlement so long as at least 90 days elapse between service of the notice and entry of an order granting final approval of the settlement”); *Jakosalem v. Air Serv Corp.*, No. 13-cv-05944-SI, 2015 U.S. Dist. LEXIS 117235, at *2-3 (N.D. Cal. Sep. 2, 2015) (“Courts have found that CAFA’s notice requirements have been substantially complied with when the relevant state and federal officials have had 90 days to review the proposed settlement, even when notice was sent out late”).)

The 90-day period is more rigid. The 90 days are intended to provide the state and federal officials time to review the settlement and, if necessary, file objections with the settlement court. (See *Adoma*, 913 F. Supp. 2d at 973 (describing 90-day period as “the statutory period to file objections with the court”).) Courts are far less likely to find the failure to satisfy this requirement a mere technicality. Defendants should ensure that the final approval hearing takes place at least 90 days after CAFA notice is provided.

Administrators. Settlement administrators have become the norm for most class settlements, and many offer to provide CAFA notice as part of administering the settlement. That sometimes presents efficiencies—it usually falls to the administrator to calculate final payments, so it may be also prudent to have the administrator use the same or similar data to prepare CAFA notices. But pitfalls exist here too. Initially, practically speaking, the administrator is not usually appointed until the court grants preliminary approval. Invariably, litigants can expect more than

10 days to elapse between the filing of the motion for preliminary approval (and the settlement), and a decision granting preliminary approval. Thus, unless other arrangements are made, the 10-day deadline will pass before the administrator is officially appointed by the court. Moreover, and more importantly, because the consequences for insufficient notice are significant, counsel should provide careful oversight to the CAFA notice process to ensure that administrators meet the requirements of the statute.

Below is a proposed CAFA checklist a defendant can use to efficiently prepare timely, compliant CAFA notice.

CAFA Checklist

There is no rule about when to begin compiling the information needed for your CAFA notice. However, with the volume of information required and the short 10-day deadline after preliminary approval, the sooner you get started, the better. Here is a sample checklist to help organize your efforts.

Obtain copies of the following:

- All Complaints filed in the action (including any amended complaints)
- The Settlement Agreement (including any amendments and exhibits thereto)
- Proposed or final notifications to class members regarding the proposed settlement and the status of class members' opt-out rights
- Notice of scheduled hearings, if any
- Side-agreements among counsel, if any
- Final judgment or notice of dismissal, if any
- Any written judicial opinion regarding notifications, the settlement, any side-agreement, and any final judgment or notice of dismissal, if any
- Obtain a complete class list with each class member's most recent address
- Sort the class list by the class members' state of residence and compile:

A list of all states in which class members reside

For each state, a list of all class members residing therein. *Tip: You'll be mailing these lists, and they can be long, so save pages by using columns and wide margins.*

Draft cover letter to the U.S. and state attorneys general. *Tip: Prepare this document as a template to allow for an easy—and time saving—mail merge.*

Obtain contact information for the U.S. attorney general and the attorney general of every state on your list of states in which class members reside (created in the third step, above). Consider working with your claims administrator or another third-party service, as needed. *Tip: Request that this list be prepared as tab delimited (CSV) file for mail merging.*

Prepare mailing labels and USPS certified mail receipts for each recipient. *Tip: Send CAFA notices via USPS certified mail, return receipt requested; many state attorney general offices receive mail through P.O. Boxes only, precluding delivery by certain other carriers.*

For each state in which a class member resides, calculate the following:

Settlement funds allocated to class members residing in that state

Proportionate share of the claims of class members in that state to the entire settlement

Compile your CAFA notice packet for each attorney general, including:

- Cover letter to that attorney general
- All complaints filed in the action (including any amended complaints)
- The settlement agreement (including any amendments and exhibits thereto)

- Proposed or final notifications to class members regarding the proposed settlement and the status of class members' opt-out rights
- Notice of scheduled hearings, if any
- Side-agreements among counsel, if any
- Final judgment or notice of dismissal, if any
- Any written judicial opinion regarding notifications, the settlement, any side-agreement, and any final judgment or notice of dismissal, if any
- The list of class members residing in that attorney general's state (created in the third step, above)
- The proportionate share of the claims of class members in that attorney general's state to the entire settlement.

- Mail out your CAFA packets. *Tip: Use the list of states (created in the third step, above) to track when packages are mailed, and use the same list track receipt of the certified mail receipts. Consider adding the U.S. attorney general to the list to ensure that isn't overlooked.*

About the Author:

Ryan C. Bykerk is an associate in global law firm Greenberg Traurig's Los Angeles office, and a member of the firm's labor & employment practice. He focuses his practice on helping clients develop strategies that meet their case-specific and larger business objectives, and has broad litigation experience in both federal and state court.

Atlanta-based shareholder **John R. Richards** contributed to this article.



Ryan C. Bykerk

bykerkr@gtlaw.com