



CLASS ACTION LITIGATION



REPORT

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Over the last 10 years, U.S. class actions involving international class members have been on the rise, writes notice expert Jeanne C. Finegan. “The global confluence of media and technology now allows legal notice experts to conduct highly complex, country-specific, measured international notice efforts,” she writes. This BNA Insight provides background on the current landscape of notice programs for class actions worldwide, and explores five key considerations for a successful international notice program.

Finegan’s company, The Garden City Group, developed some of the notice programs discussed in this Insight.

Five Key Considerations for a Successful International Notice Program

BY JEANNE C. FINEGAN

Over the last 10 years, due in part to globalization powered by the Internet and other media technologies, U.S. class actions involving international class members have been on the rise. The recent inter-

national credit crisis has turbo-charged this trend, as evidenced by the numerous international securities class actions filed at the end of 2008 and 2009. In these contexts, courts now are turning their attention more and more to what truly constitutes the “best practicable” notice.

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The global confluence of media and technology now allows legal notice experts to conduct highly complex, country-specific, measured international notice efforts as exemplified by *In re: Air Cargo Shipping Services Antitrust Litig.*, Master File 06-MD-1775 (JG) (VVP) (E.D. N.Y.)—a notice program that my firm, The Garden City Group, Inc. (“GCG”), and I designed and implemented. The *Air Cargo* notice program was arguably the largest, country-specific media outreach effort conducted thus far in a class action. The program employed country-specific syndicated research. Country specific research, similar to that used in the United States, allows courts to see the percentage of a target

audience estimated to be reached in each country by a notice program.

However, research is only one step in designing and implementing a successful international notice program. International notice can be complex and it's important to have a clear understanding of media preferences, cultural differences, and potential legal barriers in target countries in order to avoid notice-based pitfalls. With that in mind, this article will provide some background on the current landscape of notice programs for class actions worldwide, and will explore the following five key considerations for a successful international notice program: (1) potential legal barriers; (2) globalization and changed expectations for international notice; (3) unique challenges of international notice; (4) differences in media consumption, media habits and planning tools in countries outside the U.S.; and (5) the importance of using an experienced notice administrator to help ensure a successful outreach effort.

International Class Action Landscape. Though class action lawsuits are commonplace in the United States, a significant portion of the international community remains suspicious of this form of collective redress. While a number of countries are considering adopting some type of class action mechanism, many still reject the concept. Therefore, when a notice campaign requires legal notice outreach in countries with no real framework for class action, it is crucial to understand the complexities this absence can present to a successful notice program.

Outside the United States, Canada and Australia generate the most class actions worldwide.¹ Both Canada and Australia have well-developed class action laws,² and though their standards for what constitutes a reasonably calculated notice campaign have generally been less stringent than American standards, both share the American view that class actions are a legitimate means to redress group harms. In fact, over the last five years, Canadian courts have begun to recognize the importance of a comprehensive notice program based on media research. One such example is the Notice program I designed for *In Re: Nortel Networks Corporation Securities Litigation (Nortel I & II)*.³

¹ See W.A. Bogart, Jasminka Kalajdzic and Ian Matthews (2007). *Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society?* Presented at The Globalization of Class Actions Conference, Oxford University; Vince Morabito (2007). *Group Litigation in Australia – “Desperately Seeking” Effective Class Action Regimes*. Presented at The Globalization of Class Actions Conference, Oxford University.

² Australia's federal class action statute was adopted in the early 1990s, around the same time that Ontario and British Columbia, the first two provinces in Canada to adopt class action legislation, passed their laws. Eight of the ten Canadian provinces now have enacted comprehensive class action legislation. Nova Scotia's class action legislation is pending; Prince Edward Island has no class action legislation, and four of those laws contain specific guidelines for notice content (Saskatchewan, Manitoba, Alberta, and Quebec).

³ See slip op. at 4 (S.D.N.Y. Dec. 26, 2006). Regarding the B.C. Canadian Notice effort: *Jeffrey v. Nortel Networks*, [2007] BCSC 69 at para. 50, the Honourable Mr. Justice Groberman said:

The efforts to give notice to potential class members in this case have been thorough. There has been a broad media campaign to publicize the proposed settlement and the court processes. There has also been a direct mail campaign directed at

Brazil was also one of the first countries to adopt class action laws, with initial legislation enacted in 1985,⁴ and Brazilians, like Americans, tend to regard class action lawsuits as legitimate. Brazilian publishers are therefore less likely to be suspicious of legal notices published in their media when they come from American jurisdictions.

In contrast, class action litigation mechanisms in the rest of the world have been adopted much more cautiously. Class actions were permitted in China as early as 1991, but the suits are brought by specific consumer organizations, not by individuals. South Korea and Taiwan provide legal procedures for group litigation in securities fraud claims, but such claims are infrequent because Asian shareholders tend to be culturally averse to corporate confrontation. In Europe, American-style class actions have been criticized,⁵ though several European countries have slowly begun enacting provisions for collective action.⁶ For example, in July 2005, The Netherlands enacted the Dutch Act on Collective Settlements of Mass Damages, which allows for collective settlement of the claims of the members of a class. Under the Act, the Amsterdam Court of Appeals approved a securities fraud settlement between Royal Dutch Shell and its investors in May 2009 – one of three settlements that have recently been declared binding by the court. The Royal Dutch Shell settlement—supported by a notice program I designed and implemented—has been referred to as a “landmark development” in European class action law⁷, but it remains to be seen

probable investors. I am advised that over 1.2 million claim packages were mailed to persons around the world. In addition, packages have been available through the worldwide web site on the Internet. Toll-free telephone lines have been set up, and it appears that class counsel and the Claims Administrator have received innumerable calls from potential class members. In short, all reasonable efforts have been made to ensure that potential members of the class have had notice of the proposal and a reasonable opportunity was provided for class members to register their objections, or seek exclusion from the settlement.

⁴ See Humberto Dalla Bernardina de Pinho (2005). *Class Actions in Brazilian Law: General Aspects, Evolution and Some Controversies*, 20 Conn. J. Int'l L. 185.

⁵ See Stefano M. Grace (2006). *Strengthening Investor Confidence In Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 J. Transnat'l L. & Pol'y 281.

⁶ England was the first European country to establish a multi-party litigation procedure in 1999, though very few lawsuits have resulted. January 2008 marked the first instance of class action recovery when an English clothing company was ordered to compensate buyers of t-shirts in a price fixing case. Valerie Elliot (2008). *Thousands of football fans win 'rip-off' replica shirt refunds*, The Times. Retrieved June 20, 2008 from <http://business.timesonline.co.uk/tol/business/law/article3159958.ece>. Sweden adopted class action rules in 2003, and Italy's first class action statute went into effect January 2009. (2007). *Italy paves way for class action lawsuits*. Retrieved on June 15, 2008 from <http://www.businessinsurance.com/cgi-bin/news.pl?newsId=11613>. *Italy paves way for class action law suits*. Retrieved on June 15, 2008 from <http://www.businessinsurance.com/cgi-bin/news.pl?newsId=11613>. Under the new Italian statute, standing to sue doesn't belong to individuals, as in the United States, but to 16 accredited consumers' associations with the ability to bring suits on behalf of consumers.

⁷ See Kevin LaCroix (2009). *Does the Royal Dutch Shell Settlement Approval Portend a Rush of European Collective Actions?* Retrieved December 2, 2009 from <http://>

whether the settlement will generate greater acceptance of class action mechanisms in other European countries.

Potential Legal Barriers. While specific class action laws may be absent in many countries outside the United States, there are other laws that can impact the design of an international notice campaign. At the outset, it is important to understand that U.S. due process laws and federal rules⁸ govern class actions filed in the United States, so notice campaigns must meet these standards even if the same traditions are not required or understood in other countries. In other words, even if a particular method of notice is considered unnecessary in one country, it would still need to satisfy notice expectations of U.S. law if the action originated in the United States. Having said that, a general understanding of the legal requirements for publication in countries where notice is to be given will save time, money, and resources.

For instance, knowing that advertising is subject to strict censorship in China, and that certain procedures⁹ must be followed to publish notices, will enable a notice program in China to move forward much more efficiently. In Singapore, practitioners must be aware that the country's legal traditions do not include the same due process framework found in the United States, and that providing official court documentation verifying the requirement to publish notice is frequently necessary.

A number of countries including France, Italy, Spain, Germany, Switzerland, and a handful of Asian countries, require legal review of Summary Notices prior to publication. Some foreign publishers want input on even the most common legal terms because of strong cultural implications. For example, an Italian publisher may object to use of the word "conspiracy" in a civil legal notice because the Italian concept of "*cospirazione*" is only applicable in criminal matters. It is therefore critical to build extra time into a notice schedule to accommodate this kind of review. Such knowledge will minimize frustration and save valuable time and resources.

Cultural Considerations and Other Unique Challenges. In addition to legal barriers that can potentially derail an international notice effort, there are cultural considerations that must be recognized and other country-specific challenges that may arise.

www.dandodiary.com/2009/06/articles/international-d-o/does-the-royal-dutch-shell-settlement-approval-portend-a-rush-of-european-collective-actions/

⁸ Rule 23 of the Federal Rules of Civil Procedure

⁹ For a legal notice to be published, a notice expert must provide verification that the advertiser is licensed, that the advertiser's name is in the ad copy, and that the advertiser has an office in China.

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For example, in designing a notice program, it may be tempting to simply assume that Europeans use media in the same way that Americans do. But based on a wide range of media research surveys as well as independent research, it is evident that there are varying degrees of newspaper usage and readership across Europe: In Scandinavian countries as well as in Germany and the Netherlands, newspapers seem to be more heavily read;¹⁰ in contrast, newspaper consumption seems to be much lighter in Mediterranean and southern European countries.¹¹ Why?

Economic and cultural differences could be among the distinguishing factors—people in southern European countries often live with extended families and pass along newspapers to share, whereas people in northern European countries tend to live in smaller households and buy their own newspapers. Or, the difference could be due to different survey methodologies and measurement techniques. Whatever the underlying reason, the country-to-country differences in culture and media consumption behavior need to be acknowledged and taken into consideration when planning an international notice program. It may take a larger media budget to reach some European target audiences, but much less to reach others, depending on how much media a given target audience consumes within a market.

Other challenges have to do with the methods of dissemination of notice. In Europe, individual notification can be difficult to administer because of strict privacy laws that prohibit the collection and distribution of contact information. Where the United States has a National Change of Address database to assist with direct mailings, a pan-European National Change of Address database doesn't really exist. Only a handful of private companies offer address verification services for select EU member states, and for states not listed, verification or acquisition of addresses may be cost-prohibitive or impossible. Consequently, if a direct method of contact is not available, the burden of notice will fall squarely on the paid media portion of the outreach effort.

In order to clear these hurdles successfully and provide a best practicable international notice program,

¹⁰ The Netherlands (NOM Print Monitor); Germany (MA Presse); Sweden (Orvesto).

¹¹ Italy (Audipress); Greece (Bari Focus); Spain (EGM Press).

practitioners must work with experienced administrators and legal notice experts. Experts can facilitate a clear understanding of cultural and legal differences, as well as media research and media usage variations in each country.

Globalization Has Changed Expectations for International Notice. Consistent with media use in the United States, consumers around the world are customizing their media use to fit their lifestyles. This includes a shift from traditional media to online media. Importantly, the ability to measure both online and traditional media preferences worldwide has also increased. In contrast to international notice programs conducted in years past, where legal notice experts simply reported circulation and readership information, notice experts now have the ability to define international target audiences and their media consumption habits, based on their demographic characteristics and qualitative lifestyle habits in a reasonably similar fashion as that used in the United States. The integration of online advertising will become increasingly important in countries such as Japan and Australia, along with a number of western European countries, for example, where online usage is similar to that in the United States.

The ability to target audiences and measure their media consumption habits is exemplified by the notice program implemented in the highly complex, country-specific, measured international notice efforts my firm and I employed for *In re: Air Cargo Antitrust Shipping Litigation*. In *Air Cargo*, we measured media using syndicated media research against the relevant target audience in 15 countries where a majority of class members resided. The total outreach effort included notices published in 37 languages in more than 140 countries worldwide. A similar approach was used in the program I designed for *In Re: Nortel Networks Corporation Securities Litigation (Nortel I and II)*, which ranked among the largest securities class actions ever filed in both the U.S. and Canada. The approved notice program included publication in two languages in approximately 40 national and regional Canadian magazines and newspapers. Importantly, this program was designed using media research specific to Canada. In complex international class actions where U.S. jurisdiction includes foreign class members, an increasingly greater expectation will be placed on a more targeted and measured approach to media selection.

International Media and Consumer Behaviors. In the United States, target audiences for notice campaigns are most often identified using consumer media data

provided by syndicated media research companies¹². Qualified legal notice experts then submit to the court a quantitative analysis report of the outreach effort, using data provided by nationally syndicated media research bureaus. The media research is based on statistical projections of demographic characteristics and media consumption habits of various target groups. This research is commonly used by advertising agencies worldwide to help select appropriately targeted media. Based on these research tools, a notice expert is able to measure the percentage of a class estimated to be reached by the publication program and how many times they will have the opportunity to see a message (commonly referred to as a reach and frequency analysis).

However, practitioners should be aware that media research, consumer behavior, and the resulting performance of an international media program cannot be perfectly duplicated from one country to another. As noted above, this is particularly true in Europe where media usage tends to be a result of history, culture, and tradition. Although a “European Community” has blossomed, most countries still have very distinct cultural and language traditions that are reflected through media usage. In addition, most media research surveys are set up to serve only individual countries (e.g. MRI for the U.S., PMB for Canada, Media Analyse (MA) for Germany, etc.). This is why a direct cross-country comparison of results can be difficult. The survey methodologies, while similar, are never identical. Also, it might be necessary to use similar, but not exact, target audience definitions in each country. One way to make cross-country comparisons of media consumption easier is to use one of the so-called ‘Pan-European’ or ‘Pan-Asian’ surveys. These studies use the same survey methodology across all markets, making results directly comparable among countries.

The Importance of Using an Experienced Notice Administration Firm. International class actions are on the rise and, at the same time, the expectation for what constitutes the “best practicable” notice has become more sophisticated. It is critical for attorneys to work with notice administrators and legal notice media experts whose experience with international class actions has provided them with the knowledge of international notice requirements necessary to use the tools and research necessary to design notice programs that take into account the various legal, cultural and media structures of countries outside the United States. As a result, such experienced notice administrators and legal notice experts will efficiently and effectively design and implement notification programs that will withstand scrutiny in all affected countries.

¹² Such as Mediamark Research and Intelligence, LLC (MRI), and Simmons Research