

THE CRITICAL ROLE OF ADVERTISING MEDIA PLANNING
IN FEDERAL "RULE 23" CLASS ACTION NOTICE

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Abstract

The purpose of this study is to provide a scholarly analysis of mass media notice in federal Rule 23(b)(3) class actions, the most prevalent form of class action in the federal courts today. The research question is how can contemporary advertising media planning theories, methods and data be utilized to evaluate and implement mass media notice plans in compliance with the requirements of constitutional due process and applicable civil rule provisions? The goal is to propose a normative framework that federal trial courts might utilize when evaluating for approval the mass media component of class action notice plans, specifically paid advertising. The approach is demonstrated by applying state-of-the-art advertising media planning data and procedures to an actual court-ordered notice plan. Implications are drawn for standards of constitutional due process and federal Rule 23, which requires the “best notice practical under the circumstances.”

Introduction

Courts have long used class actions as a procedural means of resolving similar legal claims of many individuals. Class actions often involve thousands, even millions of people, with aggregate claims soaring into the billions of dollars. Massive class actions related to antibiotic drugs, asbestos, breast implants, airline ticket prices, tobacco products, and the chemical defoliant “Agent Orange” are recent examples that have grabbed national headlines.

A key issue in class action litigation is how best to provide legally sufficient notice to the “absentee” class members, meaning those class members who are not named as parties. These class members often are not aware of the class action that is being litigated on their behalf. In

cases with large numbers of class members, courts often rely on mass media advertising to advise absentee class members of their legal rights and obligations in the litigation (Newberg, 1992). Failure to provide legally sufficient notice can violate the requirements of the federal class action rule and, more importantly, constitutional due process.

Federal courts often have ordered class action notice plans that include paid advertising in a variety of mass media, including print and broadcast vehicles, and these advertising plans can be complex and expensive. However, federal courts seemingly have paid scant attention to how best to evaluate the effectiveness of advertising notice plans, either before or after such plans are executed, in terms of reaching and communicating with absentee class members.

This study explores how established advertising media planning theories, methods and data might further inform the jurisprudence of class action notice and aid in more informed judicial consideration of advertising notice plans. The study outlines a framework of criteria for such analyses that is guided by pertinent constitutional due process principles and court rules. The framework is then demonstrated by applying it to data pertaining to an actual class action notice program ordered by a federal court.

Background

An advertising media plan can be an important component of a notice program in a large class action. For instance, a current consumer class action practice guide indicates that notice plans have “varied from the largely perfunctory legal notices to aggressive advertising campaigns involving television and radio spots, full-scale newspaper advertising, and posting notice on products involved in the lawsuit” (Rosmarin & Edelman, 1995, p. 106). The classes of media that currently are being used in class action notice plans include print media, such as direct mail, newspapers, magazines, and trade publications; and broadcast media, including over-

the-air and cable television (Newberg, 1992). Computer-delivered content such as the Internet and World Wide Web are increasingly being touted as a means of providing class action notice to absentee class members (Fischer, 1996).

However, unlike an advertising campaign developed for a consumer product or service, a class action notice plan is not judged on criteria like increased brand recognition or sales. Instead, class action notice plans must comply with pertinent civil procedure rules and, ultimately, principles of constitutional due process (see generally *Eisen v. Carlisle & Jacquelin*, 1974; *Mullane v. Central Hanover Bank & Trust*, 1950). The significance of mass media notice plans in class action litigation is underscored by the applicable constitutional due process and civil rule requirements, including the means by which class members are notified about the class action, such as the use of paid advertising in mass media.

The complexities and potential problems involved with notifying thousands or millions of individuals in class actions have perplexed a number of courts. The role of legal notice by mass media publication remains a crucial issue in discussions of the propriety of using massive class actions to resolve legal disputes. Individual notice by targeted, direct mail is the preferred means of notice in class actions when the names and addresses of class members are known or can be obtained with reasonable effort. Indeed, the Supreme Court has held that mass media advertising as a means of class action notice is not a constitutional substitute for direct mail as to known or reasonably identifiable absentee class members (*Eisen v. Carlisle & Jacquelin*, 1974). Often, however, direct mail may be impossible or inadequate in large class actions involving millions of class members whose names and addresses are not known and can not be ascertained with reasonable effort. Under these circumstances, mass media advertising can provide a

supplementary or alternate means of notifying class members about the litigation and their rights and obligations.

Federal Rule of Civil Procedure 23 (“Rule 23”) governs class action litigation in the federal courts and is the model for most state class action rules. This study focuses on the most common type of class action, the type brought under subdivision (b)(3) of Rule 23 (Newberg, 1992). This is the type of class action that applies in situations in which the plaintiffs seek primarily money damages (see for example, *Simer v. Community Services Administration*, 1981; Comment, 1968; Weber, 1988). Rule 23(b)(3) was drafted to accommodate circumstances like a fraudulent scheme that is perpetrated similarly on numerous individuals (1966 Advisory Committee’s Note). In addition, class actions under this subdivision have been permitted for product liability, securities fraud, antitrust, and Federal Truth-in-Lending Act cases, among others (see generally American Bar Association, 1976).

Other examples of Rule 23(b)(3) class actions include mass tort actions (Newberg, 1992), such as the recent highly publicized litigation involving widespread personal injury claims related to asbestos exposure (Baughman, 1991), and silicone breast implants (Johnson, 1996). One of the most famous Rule 23(b)(3) cases is the massive class action filed on behalf of thousands of veterans who claimed health injuries from exposure to the chemical defoliant Agent Orange during the Viet Nam war (*In re “Agent Orange” Product Liability Litigation*, 1987; Schuck, 1987; Cohen, 1987). In that case, the US Court of Appeals for the Second Circuit approved in 1987 a \$180 million settlement reached on behalf of nearly 250,000 Viet Nam war veterans (*In Re Agent Orange*, 1987).

This study will not deal directly with class actions in which plaintiffs seek primarily non-monetary relief, like an injunction or a declaration of rights. These types of class actions are

governed by other provisions of Rule 23 and have different notice requirements. Also, this study will leave for future research class actions brought under state rules. Most state class action rules are based on the federal model, so the conclusions of this study could be useful to the discussion of state class action rules, particularly as to notice issues. For instance, the notice provisions of the Florida class action rule are almost identical to those in the federal rule (Fla. R. Civ. P. 1.220(d)(2)). State class actions are governed by federal constitutional due process requirements as well. A review of the federal case law indicates that state case law has not been influential with federal judges deciding notice issues under Rule 23 (Hoefges, 1998).

Types of Federal Class Action Notice

Mandatory notice in class actions litigated under Rule 23(b)(3) is called for in two subdivisions of the rule – Rule 23(c)(2) and (e). Discretionary notice is allowed by Rule 23(d)(2) on such occasions as the trial judge may deem fit, although this discretionary notice is not a major factor because of the stringent mandatory notice requirements (Newberg, 1992).

Certification Notice

In a Rule 23(b)(3) class action, the court must order notice to all class members before the action is formally certified as a class. This notice is required under subdivision (c)(2) of Rule 23 and often is referred to as “certification notice.” Certification notice is important because it is the means by which class members usually become aware of the action that is being litigated on their behalf (Newberg, 1992). Certification notice also is important because class members have only a limited window of opportunity to exclude themselves from the class litigation and pursue an individual action, perhaps in a federal or state court in their state of residence, for instance. Class members who do not affirmatively exclude themselves from the class action, which is commonly referred to as “opting out,” must abide by the result in the case, whether favorable to

them or otherwise, and may not pursue an individual action based on the same circumstances. In addition, class members who choose not to opt out have the opportunity to appear in the class litigation with legal counsel of their choosing instead of accepting representation of class counsel already in place.

Under subdivision (c)(2) of Rule 23, certification notice in a (b)(3) class action, the trial judge must “direct to the members of the class the best notice practicable under the circumstances” and must include “individual notice to all [class] members who can be identified through reasonable means.” This language leaves much to the discretion of the federal trial judge in terms of the means of notice, including the use of paid advertising in mass media vehicles. On this point, the author of a prominent class action practice guide has stated:

While the language of [Rule 23(c)(2)] itself makes notice mandatory in a Rule 23(b)(3) damages suite, the nature and extent of *how* that mandate is to be carried out are not predetermined in the rule. ...[A] controversial aspect of Rule 23(c)(2) has been the determination of the proper construction of the requirement for ‘the best notice practicable under the circumstances ...’ ...[C]onsiderable precedent has been generated, including the initial sally by the Supreme Court into the complexities of class action notice. *Unfortunately, no single set of rules or factors has yet emerged, and courts continue to revisit and refine the illusive issue of reasonable notice* (Newberg, 1992, § 8.02, at 8-5 to 6 (internal citations omitted) (emphasis added).

Official judicial guidelines set out for federal trial judges provide little guidance on how to implement the “best notice practicable under the circumstances” standard in terms of mass media publication. Also, neither the federal appellate courts nor the US Supreme Court have attempted to set guidelines of general applicability, instead leaving the creation and implementation of mass media advertising plans largely within the discretion of federal trial judges (Hoefges, 1998). Current class action practice guides do not offer significant advice on how mass media advertising schedules might be devised and evaluated in the class action setting (Newberg, 1992).

Settlement Notice

Rule 23 also requires notice to class members before a settlement is approved and a final judgement is entered. This notice, which often is referred to as “settlement notice,” is required by subdivision (e) of Rule 23 (Newberg, 1992). Unlike subdivision (c)(2) of Rule 23, which requires the “best notice practicable under the circumstances,” subdivision (e) requires “notice ... to all members of the class *in such manner as the court directs*” (Fed. R. Civ. Pro. 23 (e)) (emphasis added).

The settlement notice is important because class members who have not opted out still have the opportunity to appear and voice objections to a proposed settlement in the case prior to its final approval by the court. Federal trial courts have temporarily certified class actions under Rule 23 in which a settlement agreement was already reached by the parties before certification (Hoefges, 1998). These controversial “settlement classes,” as they have come to be known, often involve the use of a “combination” or “simultaneous” certification and settlement notice aimed at absentee class members (Newberg, 1992). The combination notice must fulfill the requirements of both subsections (c)(2) and (e) and often is the only notice issued in such cases (Newberg, 1992).

Constitutional Due Process Requirements

Under provisions that were added to Rule 23 in 1966, the results in a (b)(3) class action are binding on all individuals who are defined as class members. Under the original 1937 version of the rule, the results in such a class action were only binding on class members who affirmatively “opted in.” The mandatory notice provisions that apply in Rule 23(b)(3) class actions were added, also in 1966, to comply with constitutional due process requirements (Newberg, 1992). The Constitution states that government may not “deprive any person of life,

liberty, or property without due process of law.” Supreme Court holdings indicate that in order for the results in a class action to be binding on all class members, notice and the right to opt out of the proceedings are necessary to satisfy due process requirements (*Hansberry v. Lee*, 1940, *Mullane v. Central Hanover Bank & Trust*, 1950, and *Eisen v. Carlisle & Jacquelin*, 1974). Still, as one commentator recently stated, the type of notice to absent or putative class members that is required by due process is an issue that remains “uncertain” and “much avoided by the Supreme Court” (Rutherglen, 1996, p. 264).

Class Action Notice in Practice

Although a number of legal scholars have written on federal class actions, a review of this literature indicated that none have addressed the issue of how the advertising component of a notice plan might be best evaluated under the requirements of due process and Rule 23 (Hoefges, 1998). For example, in a recent article calling for a complete overhaul of Rule 23, including the notice provisions, the author did not discuss design, evaluation, or implementation of mass media notice plans (Bone, 1994). Official guidelines for federal judges handling complex litigation like class actions provide only scant information on this issue. Two recent empirical studies of federal class actions provide insights, but fall far short of providing evaluative guidelines for federal judges considering for approval the advertising component of a notice plan.

Neither the provisions of Rule 23 nor the drafters’ comments explain how federal courts should evaluate and consider mass media notice plans in class actions. It is indisputable, however, that notice to the class is an important issue for federal trial judges in Rule 23(b)(3) cases. For instance, the current *Manual for Complex Litigation*, published by the Federal Judicial Center as a guide for federal courts, states that “[c]ommunicating with the class is a major concern in the management of class actions” (Federal Judicial Center, 1995, p. 223).

Despite this, the *Manual* provides only minimal guidance on the issue of notice by mass media publication. The *Manual* states:

Publication in newspapers or journals may be advisable as a supplement [to individual notice]; it is necessary if class members are not identifiable after reasonable effort. Publications that are likely to be read by class members should be selected. Financial and legal journals or sections of newspapers, while useful to a degree, are not likely to be read by many members of the general public. ... The manner in which notice is given can be a source of controversy in class actions. It implicates issues of cost and fairness to the parties and class members and potential prejudice to one side or the other. The manner of giving notice can encourage or discourage the assertion of certain claims, or can be so costly and burdensome as to frustrate plaintiffs' ability to maintain the action (Federal Judicial Center, 1995, pp. 225-226).

Aside from reiterating the importance of notice in class actions, this passage raises two critical points. First, it advises federal trial judges that one evaluative criteria for mass media notice plans is whether the plan's media selection incorporates publications and sections within publications that are likely to be read by class members. However, it does not make a distinction between publication readership and the more important notice readership, which is well documented to be the smaller of the two "effects". Second, the cost of a notice plan can be an impediment to plaintiffs in maintaining the action (Yeazell, 1997). Although this suggests that federal trial courts should consider the cost of a notice plan, no guidelines are provided. This is a particularly difficult issue for courts since the proportion of class members likely to receive and read a notice typically is directly related to the cost of the notice program. The linkage among the amount spent on notice, the level of communication with the class and the preservation of due process are inescapable.

There have been two published empirical studies of class actions, and both raised notice issues. Willging, *et al.* (1996) examined class actions that recently concluded in a select sample of four federal districts chosen for their relatively large number of certified class actions. The

authors found that in the districts studied, the Rule 23(b)(3) class action was the most frequently certified type of class action. They also found that federal trial courts frequently employ mass media notice plans as a means of supplementing individual notice and that print media were more frequently used than electronic media.

Bartsh *et al.* (1978) studied a single class action and at least one federal trial judge has cited the Bartsh study as support for the effectiveness of notice by mass media publication (*In re Domestic Air Transportation Antitrust Litigation*, 1992, p. 550). The study is significant as perhaps the only published retrospective study of an actual notice plan in a federal class action. The authors analyzed the notice plan in terms of cost-effectiveness and found that although class members claimed to prefer mail notice, newspaper notice was actually more cost effective. They also found television relatively ineffective as a means of providing information about the case due to the lack of an “organized television campaign.”

Although Willging, *et al.* (1996) and Bartsh, *et al.* (1978) examined notice plans *retrospectively*, neither study addressed the issue of how a federal trial court might evaluate a proposed mass media plan *prospectively*. Overall, the scholarly and legal literature and the federal case law have yet to articulate an evaluative framework for determining whether a proposed mass media notice plan satisfies constitutional due process and constitutes the “best notice practicable under the circumstances.”

Normative Framework for Assessing Class Notice

The published notice decisions of the federal appellate and trial courts have demonstrated *ad hoc* or case-by-case applications of the “best notice practicable” standard to mass media notice plans in Rule 23(b)(3) cases. Among these decisions, there are examples in which federal trial judges relied upon the input of professional media planners (Woodward v.

Nor-Am Chemical Co., 1996; Carlough v. Amchem Products Inc., 1993; In re Domestic Air Transportation Litigation, 1992). However, an analysis of all of these published decisions did not yield a consistent theory or approach to applying the vague “best notice practicable” standard to the mass media component of class action notice plans (Hoefges, 1998).

Several individuals who have served as media notice experts in a variety of class actions have published brief articles in the legal press in an effort to provide guidance to class action attorneys and courts (Hilsee, 1996; Kinsella, 1997 ; Pines, 1994). The concepts and procedures described in these articles, however, have focused generally on estimating publication coverage, among other issues, and not on estimating actual notice coverage and readership.

What follows is a summary framework based on media planning theories, methods and data that might be used to inform courts when they are considering class action notice plans. This framework will then be demonstrated using an actual, court-ordered publication schedule.

Target Audience

The target audience sets out the “desired or intended audience for advertising as described or determined by the advertiser” (Sissors & Bumba, 1996, p. 498) and this is the group against which the effectiveness of advertising efforts typically is evaluated. The target audience concept is not unlike the class definition in class actions. The current *Manual for Complex Litigation* states that the class definition “is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) *entitled to notice in a Rule 23(b)(3) action*” (Federal Judicial Center, 1995, p. 217) (emphasis added). Thus, the class definition defines who is entitled to notice and the target audience is used to focus mass media advertising campaigns for that purpose. Consequently, the definition of the target audience in a class action media schedule should be as close as possible to the class definition as set out by the

court. When available mass media audience data do not match exactly the class definition, then the target audience should be defined broadly enough to include the “universe of class members” (*In re Domestic Air Transportation Antitrust Litigation*, 1993, p. 546).

Media Selection

Advertising literature suggests broadly that print media are considered more appropriate than broadcast media for delivery of complex and lengthy messages, particularly large amounts of text, as is the case for class action notices. Indeed, a leading class action practice guide describes the notices themselves as “court documents” (Newberg, 1992, § 8.06, at 8-20).

A systematic study of cases indicated almost exclusive use of print media when mass media were used for notice in the Rule 23 class actions (Hoefges, 1998). These findings are consistent with the current *Manual for Complex Litigation*, which states “[p]ublication in newspapers or journals may be advisable as a supplement [to notice by direct mail],” and “it is necessary if class members are not identifiable after reasonable effort” (Federal Judicial Center, 1995, pp. 225-226). An exception to this was the asbestos litigation in which the court discussed and approved a notice plan that utilized broadcast media to provide information announcing the publication of the notice in the print media campaign (*Carlough v. Amchem Products, Inc.*, 1993).

Therefore, it appears that print media (including direct mail, newspapers, magazines and Web/online services) are almost uniquely suited for mass media publication of notice in class actions. However, broadcast media can be used as a means of increasing awareness of a class action, including advising class members where published notices are available (Newberg, 1992).

Audience Measurement

Substantial data are available documenting that the circulation of a publication typically is less than its total readership. This is because there often are multiple readers-per-copy circulated. Readership data against the class notice target audience should be used when available. This information is provided for major consumer publications by such services as Simmons Market Research Bureau, Mediamark Research, Inc., Scarborough, and Mendelsohn, for example.

When readership data are not available, audited circulation figures should be used in conjunction with estimates or norms for target audience readers-per-copy. Audited circulation data are available from the Audit Bureau of Circulations (ABC), Business Publications Audit of Circulation (BPA International), Certified Audit of Circulations, Inc., and Verified Audit Circulation Corporation, among others. Un-audited circulation figures should be used as a last resort and with appropriate skepticism. These data are available directly from publications themselves or from Bacon's directories, for example.

Broadcast audience estimates are available from Nielsen Media Research, Arbitron, RADAR, and Strategic Accuratings, among others.

Message-Vehicle Gaps

There is considerable data available documenting the smaller size of advertising audiences versus the audiences of publications or programs containing advertisements or versus the size of direct mail lists. Services that provide these data include Nielsen Media Research, Simmons Market Research Bureau, Roper-Starch Worldwide, Gallop & Robinson, Harvey Research Organization, Readex and the US Postal Service, among others. It is obvious that evaluations of notice plans at broad levels, such as publication readership, program exposure or

mailing list size, will significantly overstate notice coverage. This is because publication readers and program viewers or listeners do not fully attend to every advertisement, nor does every person on a direct mail list actually receive a mailing or open and read every piece of mail received.

Consequently, courts should insist upon notice plan evaluations based on likely notice readership and not the upper bound suggested by overall publication readership, program coverage or the size of direct mail lists. Furthermore, broadcast notice coverage should not be confused with notice readership since 15, 30 or 60 second broadcast advertisements can contain only abbreviated notice or instructions on how to obtain the notice. A broadcast component of a notice plan, therefore, should be evaluated in terms of its supplemental impact on actual notice readership and this can be difficult to measure.

Notice Reach

“Reach” is a measure heavily relied upon within the advertising industry and is used to assess the unduplicated audience of a media plan. Typically reach is expressed as the number or percentage of target audience members exposed at least once to the vehicles or messages in a schedule. Estimating reach generally requires software that can account for duplicated audiences within and between vehicles in a media plan. Advertisers and agencies may use software developed in-house, or purchase or lease it from a variety of companies that specialize in such products for various media categories and combinations, including Telmar Information Services Corp., Interactive Market Systems (IMS), Media Management Plus (MMPlus), and TapScan, among others. These software packages typically estimate vehicle audience duplication based upon data provided by most of the syndicated data services listed previously.

Courts should demand notice reach estimates rather than the more common practice in class action litigation of simply adding together the circulation or readership of the publications in a plan. Such gross figures, while often large and impressive, mislead courts by creating inflated expectations as to number or proportion of a class who are likely to receive and read a notice.

Cost Efficiency

Courts can be apprised of the efficiency of alternate plans and vehicles within plans using cost-per-thousand (CPM) vehicle and message impressions. CPM is simply the ratio of notice cost at various levels divided by vehicle or message impressions (in thousands) at those levels. For example, publications, media categories, and entire plans that have relatively high CPM figures might be replaced by alternatives with lower CPM.

In general, the total cost of a notice plan will determine the proportion of the class who are likely to receive and read the notice. Setting a budget will determine maximum feasible coverage assuming the most efficient media have been selected. Any inefficiency in media allocation will lower the potential coverage of the notice plan, given a fixed budget. Likewise, setting a notice coverage goal will determine the minimum cost of notice assuming efficient vehicles have been selected. The use of inefficient vehicles will raise the cost of the plan given fixed goals.

Advertising management literature generally favors the goal setting (task-objective) approach given constraints. This, however, puts courts in the untenable position of explicitly stating and justifying notice coverage goals less than 100 percent if budget limitations also are part of the notice plan.

However a plan is chosen by a court, in so doing it establishes both total cost and likely effectiveness, whether or not these have been fully estimated and evaluated before hand. What follows is a case study that vividly illustrates these points and demonstrates that courts can expect reasonable *a priori* estimates of likely notice reach of publication plans.

Case Analysis

Based on the proposed normative framework, what follows is an analysis of a court ordered publication notice plan. The publication plan was obtained from a recently certified Rule 23(b)(3) class action. In *Shores v. Publix Super Markets, Inc.* (January 27, 1997), the trial judge approved a mass media notice plan that included paid advertising in local newspapers aimed at reaching a class of women in four Southern states. This notice plan was selected for analysis because it is considered typical of the types of plans that federal courts have ordered. The mass media notice plan relied exclusively on print media, specifically newspapers, to reach absentee class members who could not be individually notified. Also, this plan was selected because it offered the opportunity to analyze a plan in which a specific segment of the adult population was targeted (*i.e.*, women in four Southeastern states). The purpose of this analysis is to demonstrate how a publication schedule might be analyzed in the context of notice in a Rule 23(b)(3) class action using state-of-the-art theories, methods and data. Consequently, the schedules were analyzed in terms of vehicle reach, notice reach, notice cost, and notice cost-per-thousand (CPM).

In *Shores* (January 27, 1997) the trial court certified a preliminary settlement class under Rule 23(b)(3) that included some 160,000 women who worked for a grocery store chain at any of its stores in Alabama, Florida, Georgia, or South Carolina between 1991 and 1997. The suit alleged the grocery chain had discriminated against female employees. The case remains one of

the largest gender bias class actions in US history. In order to settle the claims of the class, the grocery chain agreed to pay \$81.5 million.

The *Shores* court ordered simultaneous certification and settlement notice by hand delivery (payroll notification to current employees), direct mail, and publication in the form of paid advertising in newspapers published in Alabama, Florida, Georgia, and South Carolina. The court did not estimate in its notice order the number of women expected to be reached by hand delivery and direct mail. As to the paid advertising component of the notice plan, the *Shores* court required notice “published in each [selected] newspaper a total of three times once per week on three consecutive weeks,” and “one of these publications shall be in the Sunday edition of each newspaper if such newspaper has a Sunday edition.” The insertions were half-page, black-and-white advertisements. The notice plan included a total of 62 newspapers in four states including Alabama (1), Florida (39), Georgia (15) and South Carolina (7). The court did not in its notice order estimate the reach of the publications among class members in terms of either vehicle or notice reach.

Method

Using published data available at the time of the court’s notice order, the publication plan was analyzed in each of the subject states by Designated Market Area (DMA). A DMA is a media market that contains a unique cluster of counties surrounding a metropolitan area (Sissors and Bumba, 1996). Every county in the US is included in one and only one DMA, including each county in Alabama, Florida, Georgia, and South Carolina. The *Shores* plan was analyzed by DMA because most daily newspapers have significant reach throughout the DMA in which they are published. For DMAs that straddle state lines, the DMA was assigned to the state that accounted for the largest percentage of the adult female population within the DMA.

Most of the newspaper circulation figures were obtained from SRDS *Circulation 98*, which provides audited newspaper circulation totals both by DMA and by state. This source included 1997 data from the Audit Bureau of Circulations. Circulation figures were obtained from *1998 Working Press of the Nation* for a few smaller newspapers not covered by SRDS.

Marketer's Guide to Media (1998-99) reports 2.326 and 2.377 total readers per daily and Sunday newspaper copy respectively. These averages were applied to each newspaper in the notice plan to estimate its total readership. The proportion of adult women in each DMA was applied to each newspaper's total readership in each DMA to estimate adult female readership and ratings.

According to the Newspaper Advertising Bureau (1984), for adult women the average probability of exposure to a half-page, black-and-white advertisement, given exposure to a newspaper issue containing it, is 19.8 percent. This percentage is applied to each newspaper rating against adult women to obtain an estimate of the message or notice rating.

Non-discounted cost data for advertising insertions in each newspaper were obtained from a recent edition of *Snapshots 1997-1998*, a multi-volume source that provides extensive market and media data for each DMA in the US. This source also provides data on the adult female (18+) population in each DMA. Cost data for smaller newspapers not covered by this source were obtained from *Bacon's Newspaper Directory* (1997).

The publication plan was analyzed against the adult female population in each selected DMA, against adult females for all selected DMAs in a state, and against adult females in all 20 selected DMAs in the four states combined. The audience and cost data were analyzed using ADplus™ (Lancaster, 1998), a multi-media reach-frequency computer program that is distributed by Telmar to advertisers, agencies and media organizations worldwide. ADplus™ evaluates

newspaper schedules, among 16 other media categories plus combinations, using all of the vehicle and message data described previously. The program generates an array of standard media evaluation factors, including vehicle and message reach, taking into account duplication estimates among newspapers within a DMA.

Results

Table 1 displays the results of the analysis, including the adult female population, newspaper and notice reach, plus notice cost and CPM for each DMA, state and for all four states combined. A discussion of this table follows.

Table 1 About Here

The publication plan approved by the court in *Shores* included one Alabama newspaper, located in the Huntsville-Decatur-Florence DMA. Approximately 30 percent of adult women in the DMA received at least one issue of the newspaper containing the notice while 9.8 percent of adult women in the DMA are likely to have seen the notice.

The publication schedule included 39 Florida newspapers. Table 1 indicates that across the nine Florida DMAs approximately 35.1 percent to 55.3 percent of adult women received a newspaper issue containing the notice, for an average of 48.7 percent for the state as a whole. The percentage of adult women who are likely to have seen the notice ranges from 11.7 percent to 21.7 percent across the nine DMAs, for a state average of 18.2 percent. It appears that the percentages of newspaper and notice coverage in Florida are substantially greater than those achieved in the three other states.

The Georgia publication schedule included 15 newspapers. Across the six Georgia DMAs approximately 1.9 percent to 43.2 percent of adult women received a newspaper issue containing the notice, for an average of 30.8 percent for the entire state. The percentage of adult

women who are likely to have seen the notice ranges from 0.6 percent to 15.1 percent across the six DMAs, for a state average of 10.4 percent. The publication schedule did not include any newspapers in the Columbus DMA. Consequently, the low newspaper and notice reach percentages for this DMA are based on the spillover circulation of three newspapers in the schedule originating from other Georgia DMAs.

The South Carolina publication schedule included seven newspapers. Across the five South Carolina DMAs approximately 3.5 percent to 45.9 percent of adult women received a newspaper issue containing the notice, for an average of 29.9 percent for the state as a whole. The percentage of adult women who are likely to have seen the notice ranges from 1.2 percent to 15.5 percent across the five DMAs, for a state average of 10.3 percent. The publication schedule did not include any newspapers in the Florence-Myrtle Beach DMA. Consequently, the low newspaper and notice reach percentages for this DMA are based on the spillover circulation of two newspapers in the schedule originating from other South Carolina DMAs.

Overall, the four-state publication schedule included 62 newspapers across 20 DMAs. The last row in Table 1 indicates that approximately 40.6 percent of the 10,295,150 adult women in the 20 DMAs (4,179,831) received at least one issue of a newspaper containing the notice while 14.7 percent of adult women in the 20 DMAs (1,513,887) are likely to have seen the notice. Conversely, this means that approximately 59.4 percent of adult women in the 20 DMAs (6,115,319) did not receive a newspaper issue containing the notice while 85.3 percent of adult women in the 20 DMAs (8,781,763) probably did not see the notice.

The four-state notice plan is estimated to have cost \$768,314, with the bulk of the money (\$540,004 or 70.3 percent) earmarked for Florida. By using up to three insertions in the top daily newspapers in each DMA, the relative efficiency of the newspapers is a moot point. However,

Table 1 indicates substantial variation in efficiency across DMAs, with Panama City at \$118 versus Gainesville at \$442 and Miami at \$434. Had the court been unsatisfied with the levels of coverage in the plan, depending on the dispersion of Publix supermarkets, it might have ordered additional publications and insertions in DMAs with relatively low CPM, thereby maximizing notice coverage associated with the additional expense.

It should be noted here that after implementation of the notice plan, in its final order approving the settlement, the *Shores* court concluded on evidence presented by the parties that some 149,095 of an estimated 160,750 class members had received individual notice by payroll notification or direct mail (*Shores v. Publix Super Markets, Inc.*, May 23, 1997). The final determinable cost of the entire notice plan was \$401,011.86, with 73.7% or \$295,657.86 having been spent on newspaper advertising. However, neither the ultimate coverage of the individual notice program nor the actual discounted cost of the publication plan were known by the court when the notice plan was originally approved prior to implementation.

Conclusions and Implications

The publication plan in the *Shores* case was analyzed using data and procedures routinely available to media professionals. The analysis indicates that across the selected DMAs in the four states combined, nearly six of 10 adult women (59.4 percent) in the target audience did not receive a newspaper containing the published notice. Furthermore, the analysis estimated that more than eight of 10 adult women (85.3 percent) did not see the notice that was published in the selected newspapers. If it is assumed that class members in the *Shores* case were randomly dispersed throughout the DMAs reached by the publication plan, these results can be applied to the class to conclude that more than eight of 10 class members probably did not see the published notice.

The provisions of Rule 23 are intended to ensure due process for absentee class members who are the target of publication notice. However, the vagueness of the standard for the “best notice practicable under the circumstances,” leaves much to the discretion of the courts. Had the court in *Shores* had the benefit of the analyses presented here it is difficult to imagine that the ordered newspaper publication plan would have been considered an effective or efficient means of notifying a significant portion of class members. Certainly, the publication plan could have included additional vehicles, including daily, weekly and community newspapers, as well as magazines plus broadcast and Internet components. However, even if these additional measures had been taken, it is likely that a substantial proportion of the class still would not have received or read the published notices.

In the *Shores* case, the ineffectiveness of the publication plan in notifying a significant portion of the class arguably was mitigated by the actual high coverage of the individual notice component of the plan (payroll notification and direct mail). Specifically, the *Shores* court concluded after the notice plan had been completed that approximately 93% of the class had received individual notice. Since there is no requirement of duplicate notice, the publication plan ultimately was unneeded as to this large percentage of the class. This suggests that the publication plan was needed only to reach the small percentage (approximately 7%) of the class that did not receive individual notice and, based on the analysis above, paid advertisements in the selected newspapers likely were ineffective at delivering notice to a significant number of those women. Consequently, the actual discounted cost of newspaper advertising in *Shores* (\$295,657.66) was highly disproportionate to the cost of individual notice (\$105,354.42) in terms of notice reach achieved among class members.

An issue that has not been resolved by this study is how the effectiveness of the advertising component of a notice plan ought to be evaluated in conjunction with the use of individual notice, including direct mail. The analysis of this issue must be guided by an estimation of the percentage of class members who *cannot* be reached with direct mail. For example, there appears to be an inverse, non-linear relationship between the level of notice reach achieved by a targeted direct mail campaign and the need for notice by paid advertising in mass media. The lower the percentage of class members who may realistically be reached with direct mail, the stronger the need for utilizing paid advertising in mass media, taking into consideration the likely duplication between published and direct notice. In the absence of data, at a minimum the amount of duplication can be estimated on the basis of chance, a subject left for future research.

In cases in which mass media publications are the sole or primary means of providing notice to absentee class members, an evaluative approach like that discussed in this paper arguably is critical to ensuring the “best notice practicable” standard is achieved. In cases in which mass media publications are used to supplement individual notice by direct mail, estimations of notice coverage of the direct mail campaign and the mass media campaign again can help inform judicial determination of whether a proposed notice plan meets this required standard. The trend toward increasingly large, complex, and costly multi-media notice plans likely will result in a need for more sophisticated analyses and increased input from media planning experts in class action notice litigation.

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Table 1: Summary of *Shores* Notice Plan Coverage and Cost

State/DMA	Adult Females	Reach 1+		Notice Cost	
		Paper	Notice	Total	CPM
Alabama	329,197	30.0	9.8	\$8,017	\$194
Huntsville-Decatur-Florence	329,197	30.0	9.8	8,017	194
Florida	5,737,556	48.7	18.2	540,004	368
Miami-Ft. Lauderdale	1,441,639	46.4	17.3	148,949	434
Tampa-St. Petersburg-Clearwater	1,425,149	55.3	21.7	170,018	384
Orlando-Daytona Beach-Melbourne	1,025,614	46.8	17.2	86,581	359
West Palm Beach-Ft. Pierce	584,215	47.6	17.5	34,471	246
Jacksonville-Brunswick	503,735	48.1	17.3	41,744	344
Ft. Myers	315,234	51.6	19.7	31,876	370
Tallahassee-Thomasville	228,203	37.4	13.2	14,481	354
Panama City	114,266	35.1	11.7	2,057	118
Gainesville	99,501	48.8	16.8	9,827	442
Georgia	2,716,998	30.8	10.4	144,415	353
Atlanta	1,663,753	31.2	10.4	97,076	406
Savannah	265,916	33.1	11.4	16,725	409
Augusta	233,640	43.2	15.1	15,000	319
Macon	212,955	40.6	13.7	10,393	274
Columbus	198,678	1.9	0.6	0	0
Albany	142,056	27.3	9.1	5,221	295
South Carolina	1,511,399	29.9	10.3	75,878	323
Greenville-Spartanburg-Asheville-Anderson	725,376	29.8	10.6	40,871	401
Columbia	326,666	36.7	12.2	18,304	354
Charleston	234,546	45.9	15.5	16,703	351
Florence-Myrtle Beach	224,811	3.5	1.2	0	0
Four States Combined	10,295,150	40.6	14.7	\$768,314	\$352