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NOTICE

CLASS ACTIONS

Class action practitioners need to be aware of issues associated with inadequate notice to class members, including techniques such as extreme frequency capping and artificially inflated reach, notice experts Cameron Azari and Stephanie Fiereck say in this BNA Insight. The authors offer a primer on these issues, and advice on how to avoid traps.

What You Need to Know About Frequency Capping In Online Class Action Notice Programs

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Today, the average American spends more than 20 hours per week online.[1] In 2012 alone, advertisers delivered nearly 6 trillion display ad impressions (number of times a digital ad appeared) across the web,[2] including notices to alert potential class members of their legal rights as part of class action settlements.

Judges regularly approve legal notice plans that incorporate digital advertising, typically in the form of banner advertisements. But how can counsel be confident a digital media plan will actually be effective? A thorough understanding of *reach* and *frequency* is essential for savvy counsel looking to demonstrate adequate class action notification efforts to courts.

Importance of Reach and Frequency

Beyond the overwhelming usage statistics supporting digital advertising, banner ads are appealing as an extremely cost-effective way to provide measurable notice

[1] "The 2013 Digital Future Project, Surveying The Digital Future," USC Annenberg School Center for the Digital Future, accessed May 13, 2014, http://www.digitalcenter.org/wp-content/uploads/2013/06/2013-Report.pdf.

[2] "U.S. Digital Future in Focus 2013," comScore, accessed May 13, 2014, http://www.comscore.com/Insights/Blog/2013_Digital_Future_in_Focus_Series.

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to potential class members. Some of the most monumental class action settlements in recent history included banner ads as part of their court approved notice programs. In the BP oil spill class action, *In Re: Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico, on April 20, 2010*,[3] and the $7.25 billion antitrust settlement with Visa Inc. and MasterCard Inc., *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*,[4] hundreds of thousands of dollars in banner ads were a strategic advertising element providing notice to class members.

Similar to traditional print, the ''reach'' and ''frequency'' of banner advertising can be measured, either on its own or as part of an integrated multimedia program. Reach and frequency are the most fundamental principles for planning an advertising campaign and facilitate the quantification of a campaign's potential effectiveness. Virtually all of the nation's largest advertising agency media departments utilize, scrutinize and rely upon data and tools used to calculate reach and frequency, to guide the billions of dollars of advertising placements that we see today. This is important to legal notice experts who must demonstrate to judges that a recommended notice plan has been created using industry-accepted measurements and methodologies, used and supported by other experts in the field.

Reach is by far the more familiar term to experienced class action practitioners and it is easily understood. Reach is defined as the estimated percentage of an audience exposed to a notice, factoring in any duplication among people who may have been exposed more than once. Reach is generally measured against a specific audience in order to ensure that the most efficient media is selected. For example, ''the proposed plan is estimated to reach 80 percent of adults who own a Ford truck,'' or sometimes more generally, ''the proposed plan is estimated to reach 80 percent of adults age 54 and older.'' Reach is the number judges expect to see, and the presumed sufficiency of a notice plan is often based solely on it.

However, frequency is an essential component and cannot be overlooked. Frequency is defined as the estimated average number of times that those reached by a notice will have the opportunity to view a notice. Some people may see the notice more times than others and some fewer. Although reach does garner more attention, the two measurements must be used in tandem to be meaningful.

In fact, seminal advertising industry studies suggest that unless an individual is exposed often enough within a short enough interval, there is little point in reaching him or her at all.[5] Building in enough frequency to make the reported reach of a notice plan effective, is what drives an adequate response. In our experience, an average frequency of three times per individual reached is a reasonable goal—not so much as to be cost prohibitive, and not so little as to be meaningless. The challenge with banner advertising is reaching the correct audience efficiently, but with enough frequency, using the more than 900 million websites Americans can choose from the Internet.[6]

Despite the astounding success of digital advertising, there are traps that attorneys and judges need to be aware of and avoid falling victim to at all costs. Unfortunately, no one may be telling you what you need to know about Internet advertising.

The Frequency Capping Trap

One of the newest traps that attorneys and judges need to look for is excessive ''frequency capping.'' Frequency capping on its own is a valid way for advertisers to restrict the number of times an ad is displayed to an individual user. For banner advertising, this is achieved by using cookies on each visitor's computer to track the number of times a given banner ad is served to them.

For example, a reasonable frequency cap for a banner ad could be three appearances per user over a 24-hour period, meaning once the ad has displayed three times to a visitor, it will not be displayed again during that 24-hour period. Setting a frequency cap allows advertisers to optimize website visitors' opportunities to see an ad, but not ''waste'' impressions on individuals who visit a specific website excessively in a single day. It is also a technique that helps avoid ''banner burnout,'' where overexposure to an ad actually causes the viewer to become annoyed by the ad and less likely to respond.

What a frequency cap is not intended to do is allow the cap to be set so low that hardly anyone has an opportunity to see and respond to an ad at all. This is the trap. Unfortunately, in the legal noticing arena some notice providers have discovered that by manipulating the reach and frequency measurement tools they can set an extremely low frequency cap for the banner ad component of a notice campaign and artificially inflate the overall reach.

For example, instead of setting a reasonable cap to more efficiently distribute the ads, frequency is capped at one appearance of the ad for each user, for the life of the notice campaign. This technique forces the measurement tools to assume the ad can be spread more broadly (if possible) in order to meet the budgeted number of impressions and can result in a higher hypothetical reach for a lower budget. In reality, this practice produces reported reach numbers at the planning stage that may not be achievable at implementation and creates such a low average frequency that response will almost certainly be depressed.

Why would any advertiser who intends to reach their audience do this? Normally, they wouldn't. It goes against all best practices for reach and frequency planning in the advertising industry. What this practice does represent, is a deliberate manipulation of the online measurement tools solely to allow a vendor to misrepresent the performance and adequacy of a legal notice effort, in order to win business as the low-cost provider. This practice puts a notice plan at risk of objection from a third party with a real, qualified legal notice expert at

[3] *In Re: Oil Spill by the Oil Rig ''Deepwater Horizon'' in the Gulf of Mexico, on April 20, 2010,* MDL No. 2179 (E.D.L.A.) (2012).

[4] *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, MDL No. 1720 (E.D.N.Y.) (2012).

[5] Hubert Zielske, ''Remembering and Forgetting of Advertising,'' Journal of Marketing 23 (1959): 239-43; Leon Jakobovits, ''Semantic Satiation and Cognitive Dynamics,'' American Psychological Association Meeting Paper (Sept. 1966); Valentine Appel, ''The Reliability and Decay of Advertising Measurements,'' National Industrial Conference Board Meeting Paper (Oct. 1966).

[6] ''May 2014 Web Server Survey,'' Netcraft, accessed May 13, 2014, http://news.netcraft.com/archives/2014/05/07/may-2014-web-server-survey.html.

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their disposal, and worse, jeopardizes an entire settlement by potentially rendering the notice effort so ineffective that claims and general response are glaringly inadequate.

Judges and attorneys who are accustomed to focusing only on the reach of a notice effort may not realize that a given reach is artificially inflated, unless they take into account the established frequency of the notice effort. In 2010, the Federal Judicial Center released the *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, which covers in detail myriad factors for courts to consider when evaluating a proposed notice plan.

Yet most practitioners focus almost solely on the one sentence that reads, ''The lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%.''[7] This is why the frequency capping trap works and why some vendors, out of inexperience or deceptive intent, try to manipulate the reach number for short-term business gain.

Because of this, lawyers should be particularly careful when reviewing proposed notice plans. It should raise a red flag if a plan purports to reach a high percentage of class members with an online plan, with little or no print publications. Don't be fooled by plans that present a high reach for a bargain price, or ones that quote the reach of the Internet in general, rather than the reach of the proposed plan to the specific target audience. Instead, compare competing plans and understand the reach and frequency methodology used. You may find if you compare competing plans side by side that one is apples and one is oranges. If something does not add up, ask that the proposing notice provider explain their rationale and methodology in detail. Ask about other plans they have implemented and how often they have testified in support of them.

Disappearing Digital Ads

To make matters worse, recent studies have found that digital ads are not always viewable to the intended audience. From May 2012 to February 2013, of thousands of ad campaigns with digital advertising, an alarming 54 percent of the display ads were not displayed to anyone, according to a study conducted by comScore, a leading Internet technology company that measures what people do as they navigate the digital world.[8] These results are attributed to technical glitches, poor positioning of ads, user habits and fraud.

These issues include slow loading ads, which the user closes before the ad appears, and ads that display on a part of the screen not visible to the user without scrolling to see the ad. Examples of fraud include websites that have malicious software built in that generate fake website traffic results, and ads displayed on hidden web pages behind the window visible to the user, so the user never actually sees the ad. In these examples, the appearances are counted in the number of impressions served.[9]

Although studies like the one by comScore can be disconcerting, it in no way means digital advertising should be abandoned for legal notice plans. These problems make it all the more important that an online plan include a sufficient average frequency so that the reported reach of the program actually translates into people having the ability to see the ad.

Due Process Considerations

Does extreme frequency capping violate due process requirements? The simple answer is, in most cases, yes. Due process rights are ignored when a plan diminishes the frequency of ads to a mere gesture of notice. Rule 23 of the Federal Rules of Civil Procedure requires for any class certified under Rule 23(b)(3) that the court must direct to class members the best notice that is practicable under the circumstances.[10] The court must also ensure that notice to class members satisfies the requirements of due process under the United States Constitution, including the desire-to-actually-inform requirement as established by the United States Supreme Court in *Mullane*.[11]

Legal notice experts must follow the guidance for satisfying due process as gleaned from the United States Supreme Court's seminal decisions, *Mullane* and *Eisen*. The Court set forth two essential principles for legal notice. First, notice must actually inform potential class members. Second, it must be demonstrated that notice is reasonably calculated to actually inform. ''But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness, and hence the constitutional validity of, any chosen method may be defended on the ground that it is, in itself, reasonably certain to inform those affected. . . .'' *Mullane*.[12] ''[N]otice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,' '' *Eisen*.[13]

What You Can Do to Avoid the Traps

Lawyers and judges should rely on a qualified legal notice expert; an expert who uses scientifically proven methods of calculating reach and frequency to design a notice program. Contrary to an emerging trend, working for a class action settlement administrator in an operations, sales or marketing role does not make someone a legal notice expert by default. The Supreme Court set the bar much higher for being a court-appointed expert in *Daubert* and *Kumho*. A given expert must use the ''same level of intellectual rigor that characterizes

[7] Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide 2010,'' Federal Judicial Center, accessed May 13, 2014, http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

[8] ''Viewability Benchmarks Show Many Ads Are Not In-View but Rates Vary by Publisher,'' comScore, last modified June 28, 2013, https://www.comscore.com/Insights/Blog/Viewability_Benchmarks_Show_Many_Ads_Are_Not_In-View_but_Rates_Vary_by_Publisher.

[9] Suzanne Vranica, ''Web Display Ads Often Not Visible,'' *The Wall Street Journal Online*, June 11, 2013.

[10] FRCP 23(c)(2)(B).

[11] *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 315 (1950).

[12] *Id.*

[13] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) citing *Mullane* at 339 U.S. 314.

the practice of an expert in the relevant field.''[14] In performing the role of ''gatekeeper,'' a trial judge must ensure that ''an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.''[15]

Qualifying as an expert that a federal judge can rely on requires actual expertise and demonstrated experience in the subject at hand. This expertise and experience should be reflected in a CV with examples of previous court appointments, articles written and relevant speaking engagements. Relying on a person whose expertise is based on self-proclamation or irrelevant experience can lead to trouble.

Conclusion

Although media-based legal noticing programs that are unusually inexpensive while proclaiming to reach a high percentage of potential class members can be enticing, remember, due process requires actual notice, not just a mere gesture. Without a qualified expert, it will be up to counsel to explain to the court how a vulnerable notice program actually reached the class and answer any questions that may arise. In the end, if notice is challenged or objected to (or if response is so low that the court is left asking questions), defending a notice plan built on a shaky premise is not worth the risk.

It is only a matter of time until judges call out the issues associated with providing inadequate notice to class members by using such techniques as extreme frequency capping and artificially inflated reach. In settlements that rely on media to provide notice, the goal is not to ''appear to be providing notice'' to class members. It must be to ''actually provide notice,'' with established media measurement techniques used by media professionals in the way they were intended. In the end, as the old adage says, ''if it sounds too good to be true, it probably is.''

[14] *Kumho Tire Company, Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999).

[15] *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579, 597 (1993).

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