

FOR BETTER OR WORSE:
THE NEW CAFA NOTICE REQUIREMENTS

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PART II

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WHO IS THE APPROPRIATE FEDERAL AND STATE OFFICIAL?

The “appropriate Federal official” is the Attorney General; however, special rules apply to federal financial institutions. In the case of “a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution” that is a subsidiary of one of the foregoing institutions, notice must be provided to the person “who has the primary Federal regulatory or supervisory responsibility” over the defendant “if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.” 28 U.S.C. § 1715(a)(1)(B)⁴.

The state provision is more ambiguous and requires that notice providers perform continual research on state regulatory institutions. The “appropriate State official” is “the person in the affected state who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person.” 28 U.S.C. § 1715(a)(2). In the absence of such a person, notice must be given to the State attorney general. In the case of Federal depository institutions, notice to the appropriate Federal official is required and state notice is waived.

⁴ The Senate report provides an example: If, for example, “a national bank were sued over its lending practices, notice would have to be provided to the Comptroller of the Currency. If it were sued in a nationwide lawsuit regarding the food in its cafeterias, notice would be provided to the Attorney General.” S. Rep. No. 109-14, at 33-34 (2005), reprinted in 2005 U.S.C.C.A. 3, 33.

The Senate report provides some guidance. In a case involving claims against an insurance company, for example, “involving insurance practices, such as how premiums are calculated, notice would be required to the state insurance commissioner in each state where the company is licensed and where class members reside. If some class members reside in states where the company does not do business and therefore is not subject to regulation, then notice would be given to those states’ attorneys general. Similarly, if the company at issue were a toy manufacturer, which is not licensed by a particular regulatory body, then notice would have to be given to the state attorney general of each state where plaintiffs reside.”⁵

State regulatory and licensing agencies differ widely from state to state. Some states have a plethora of agencies to regulate everything from insurance to oriental medicine practitioners. Other states have fewer regulatory and licensing agencies. In addition, the regulatory agency that regulates the business of a defendant may differ from state to state. (See Appendix B – A Sampling of Texas Regulatory and Licensing Authorities.)

While notice providers will undoubtedly be providing research and information on state regulatory authorities, this burden will lie most heavily on the defendant which is subject to the regulation or supervision. In this instance, legal judgments about the reach of state regulatory or supervisory functions will be required.

⁵ Id. at 34, 2005 U.S.C.C.A.N. at 33.

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