

THE INTERNET, INDISPENSABLE FOR PROVIDING CLASS ACTION NOTICE

PERSPECTIVE

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Due process requires that potential members of a class action be provided with "the best notice that is practicable under the circumstances" of the existence of a class action or settlement. Historically, using traditional mail and notice by publication have been seen as the "best notice practicable." In today's world, electronic notice is fast becoming a preferred and cost-effective method for doing so.

One of the first large-scale uses of Internet-based noticing occurred in the Phen-Fen diet drug settlement approximately 10 years ago. In that case, attorneys successfully supplemented newspapers and television notice with banner ads on search engines, portals and popular Web sites to locate class members and direct them to a central location. A Web site was built that included the settlement agreement and all settlement documents in English and Spanish. The Web site traffic was, at the time, extremely impressive. There were 1.7 million page views, 369,093 forms were downloaded, and 93,778 people registered on the Web site to receive notice packages by mail. By all accounts, the use of Web-based technology in the Phen-Fen case to provide notice was a success.

With the exponential growth of the Internet in the past decade, using the Internet to provide notice is no longer a novelty - it is a necessary component of most notice programs. There are presently more than 231 million Internet users in the U.S. and 81 percent of employed Americans have a personal or work e-mail account. As of May 2010, over 49 million Americans owned a smartphone capable of browsing the Web and reading e-mail.

While there are still certain cases in which mail notice is preferable (for example, when the class is comprised of readily identifiable employees in a wage and hour class action), it must be recognized that mail notice can be exorbitantly expensive and not fully effective. It is often impossible to get updated and complete addresses, given the mobile nature of the U.S. population.

By contrast, the Web can provide various methods for delivering notice at relatively low costs. E-mail, in its simplicity, is a tool that should always be examined as a method for providing notice to class members. In addition to being cost-effective, e-mail is often more reliable than traditional mail because it can be tracked and delivered to class members. Moreover, by linking to a Web site within an e-mail, it is possible to identify which class members have actually received the notice, visited the class notice Web site and even whether they downloaded documents from the Web site.

When the only interaction between the defendant and class members has been online, then e-mail notice is without question the "best notice practicable." For example, in *Chavez v. Netflix*, the primary means by which class members communicated with Netflix was through e-mail. Naturally, when a settlement was reached in the *Netflix* class action, notice was sent by e-mail from info@netflix.com that described the proposed settlement and explained consumers'

options as class members. In similar cases, when there is a reliable list of e-mail addresses, traditional mail cannot be deemed a viable alternative to e-mail notice.

Over time, judges and attorneys have addressed some of the potential shortcomings of using e-mail to provide class notice. To combat spam filters, attorneys should follow the example of *Chavez v. Netflix* and have the defendant's e-mail server to provide class notice. The Supreme Court has approved the procedure commenting that "a number of courts have required defendants in Rule 23(b)(3) class actions to enclose class notices in their periodic mailings to class members in order to reduce the expense of sending notice."

For the purposes of sending class notice via e-mail, class members are more likely to have previously agreed to receive e-mail from the defendant and are less likely to regard the e-mail as spam. However, in order to assure defendant's compliance, e-mail should always be an accepted method of communication between the class members and defendant.

For situations in which the identity of absent class members is unknown, the Internet provides other means to provide notice. Traditionally, courts have relied heavily upon notice that is contained in publications such as *Parade* magazine, *USA Today* and other publications. With our population relying more and more upon the Internet in lieu of traditional print publications, banner and keyword search ads are fast becoming a viable alternative to providing class notice. Indeed, in addition to placing banners over popular Web sites and search engines, Web-based advertisements now have the unique ability to find class members by anonymously crawling through the text of Web-based e-mail accounts, like Gmail and the using personal information they share with social networking sites like Facebook.

In a recent innovation, Web notice has been provided through social-networking sites such as Facebook, Twitter, blogs, mobile applications, and a wide array of interconnected sites that make information gathering and sharing easier and more efficient. Strikingly, Facebook has more than 100 million subscribers in the U.S., 60 percent of whom are 25 years of age or older - providing unheard of reach to a large segment of our population. The process by which social networks can be used to deliver class notice is as simple as adding a tag to a Web page that contains a press release or to a page within the class action Web site itself. This tag then gives readers and visitors the ability to distribute the information through interconnected groups of friends, colleagues and acquaintances thereby delivering class notice through third parties to class members that may have never received notice otherwise.

In formulating a Web-based notice plan, it is advisable to reach out to class administrators who have experience implementing notice through the Internet. For example, in *Mary Fallon v. E.T. Brown Drug Co.*, the parties reached out to Epiq Systems to help formulate and implement a notice plan that featured Facebook. Los Angeles County Superior Court Judge Michael C. Solner adopted the proposed notice plan that prominently featured the social networking site, agreeing with class counsel that "social media is the fastest way to reach, educate, and create bonds with a target audience; in this case, members of the Settlement Class." Significantly, large class administrators like Epiq Systems have the expertise from professionals who are well versed in using Internet based technology, and also the experience in having previously devised and implemented Web-based class notice programs.

In 2010, it is no longer an "option" to use the Internet as a key component of delivering class notice. At a minimum, it should be considered as a potentially vital and cost-effective component in virtually all class notice plans.

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