

**NOTICE 2.0: HOW TECHNOLOGY IS CHANGING  
CLASS ACTION NOTICE PROCEDURES**

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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 a class action or settlement. The U.S. Supreme Court has held that the “best notice” requirement in cases involving claims for money damages requires that “individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

Historically, individual notice was accomplished in only one way: by first-class mail. Increasingly, however, parties are seeking to provide individual notice by e-mail. Not only is e-mail faster and significantly less expensive than first-class mail, in many situations it is the only way to provide individual notice. Although e-mail notice and other forms of electronic notice, such as text messages, are an effective, efficient way to achieve individual notice, many courts are still hesitant to employ these methods, especially as the exclusive form of individual notice. Parties hoping to use e-mail to provide notice to class members should be prepared to address courts’ concerns.

One of the principal benefits of e-mail notice is its low cost. The same qualities that make e-mail notice inexpensive, such as ease of copying and distributing, have also led some courts to reject e-mail notice.

For example, in *Reab v. Electronic Arts Inc.*, 214 F.R.D. 623, 630 (D. Colo. 2002), the court rejected an electronic class-notice plan in part because the court worried that electronic communications can be easily copied and forwarded to others via the Internet with added commentary that could distort the notice approved by the court. The court reasoned that electronic mail heightens the risk that large numbers of people could compromise the integrity of the notice process.

In addition, the *Reab* court feared that e-mail messages easily could be forwarded to nonclass members and posted to Internet sites.

Many of the concerns the *Reab* court raised can be addressed by having the e-mail notice only provide a brief message about the class action and a link to a website that contains the full notice. Not only are short e-mail messages more likely to elicit a positive response from class members, the fact that the notice itself is published on the “official” website means the content of the notice cannot be altered — ensuring that the notice that the court approved is the notice class members will review.

Counsel proposing to provide class notice in this two-step process should be prepared to address the objection that this does not qualify as “individual notice” since full notice is not sent directly to the class members. The court in *Chavez v. Netflix Inc.*, 162 Cal. App. 4th 43, 52-53 (Cal. Ct. App., 1st Dist. 2008), roundly rejected this objection.

The *Chavez* court concluded that directing class members to a website containing more detailed notice is a “perfectly acceptable” manner of giving notice since “using the capability of the Internet in [this] fashion was a sensible and efficient way of providing notice, especially compared to the alternative [objector] apparently preferred: mailing out a lengthy, legalistic document that few class members would have been able to plow through.”

E-mail has brought us inexpensive, fast communications, but it has also brought us spam. Spam forms the basis for another set of common objections to using e-mail notice.

In rejecting a plan that relied solely on e-mail, the court in *Karvaly v. eBay Inc.*, 245 F.R.D. 71 (E.D.N.Y. 2007), delineated several “flaws” in e-mail notice, including the possibility of class members may simply delete e-mails, or spam filters may reject e-mails because of the common practice of e-mail spoofing. These problems can be addressed by sending e-mails from an address from which class members expect to receive e-mails concerning the product or service at issue in the litigation. For example, the e-mails in *Chavez* were sent from [info@netflix.com](mailto:info@netflix.com), an e-mail address that Netflix historically used to communicate with customers. The likelihood of someone deleting an e-mail is greatly reduced when it comes from a source that the recipient expects to receive e-mails from.

In fact, e-mail notice can be more reliable than traditional mail because it can be effectively tracked. By linking to a website within an e-mail, it is possible to identify which class members have actually received the notice, visited the class website and even whether they downloaded documents from the site.

Tracking which class members have clicked on the e-mail notice allows parties to implement a two-prong notice program that can reach a much higher number of class members than first-class mail could alone. Indeed, this is precisely what the court in *Karvaly* did when it suggested to the parties that e-mail might be an effective individual notice if it required class members to take some affirmative step to acknowledge receipt and to waive formal, first-class-mail notice.

Even though e-mail is cheaper and often more effective, fact is, it is worthless for class members who do not have an e-mail address on file with the defendant. Ignoring this reality by relying solely on e-mail will likely lead to rejection of the notice plan.

For instance, in *West v. Carfax*, 2009 WL 5064143 (Ohio Ct. App. Dec. 24, 2009), the defendants provided individual notice of the proposed settlement by sending e-mail notice to the addresses of purchasers listed in the Carfax database after Oct. 27, 2003.

Although the e-mail effort achieved a 92 percent non-rejection rate of all e-mails sent, the court nonetheless reversed the trial court and found the notice plan was defective. The court said it was unreasonable to limit e-mail notice to identifiable potential class members after October 2003 given that “a large percentage of potential class members from as far back as 2000 might be reached by e-mail” or through the preferred, traditional-mail method.

In contrast, the notice plan used in *Browning v. Yahoo Inc.*, 2006 WL 3826714 (N.D. Cal. Dec. 27, 2006), was approved because it used e-mail notice only as the initial form of direct notice. In addition the notice plan required direct-mail notice for class members for whom the defendant had no e-mail address or the e-mail notice was returned as undeliverable. In light of these safeguards, and given that the case was particularly suited for e-mail

notification because Yahoo users were “familiar and comfortable with e-mail and the Internet,” the court’s approval of the notice plan was not surprising.

Although first-class mail may still be the most common way to satisfy the individual notice requirements to satisfy due process, increasingly, e-mail notice will become part of any class-action-notice program. The important thing for practitioners to remember is this: It is vital that e-mail notice be tailored to the situation and that there be backup methods for providing notice.