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*presents*

# **Class Action Notification With Electronic Media: Emerging Legal Issues**

**Strategic Use of E-mail, Google, Social Networks and Other  
E-Media to Communicate with Class Member**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

Shannon Wheatman, Vice President, **Kinsella Media**, Washington, D.C.  
Mark P. Rapazzini, Senior Vice President, **Rust Consulting**, San Francisco  
Matt C. Bailey, Partner, **Pollard/Bailey**, Beverly Hills, Calif.  
David Jay, Shareholder, **Greenberg Traurig**, Florham Park, N.J.

**Wednesday, September 8, 2010**

The conference begins at:

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**12 pm Central**

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## Reality Check: The State of New Media Options for Class Action Notice

Reports on emerging technologies, the popularity of mobile devices, and the demise of traditional media dominate media news. Traditional advertising vehicles – television, newspaper, magazines, and radio appear to have lost their luster. Even banner ads on the Internet, considered until recently to be a dominant new trend in advertising, are under fire.<sup>1</sup>

Evaluating traditional versus “new media” is an effort to understand, measure, and compare the effectiveness of existing and emerging options. Not surprisingly, new media itself accounts for much of the noise about the demise of traditional media, as start-up business models try to rake advertising and marketing dollars away from media Goliaths by promoting their own venues as attractive alternatives. In addition, “old” media companies are facing the business realities of shifting audiences. The result has been the appearance of uncertainty about the degree to which these choices should be considered for the paid media component of class action notice programs.

What are these “new media” options, and how are people using them? Are they rapidly replacing traditional media? And in the class action context, do these new options necessitate a completely different approach to media-based notice programs? This article provides practitioners with answers to those questions and others, to help guide future planning and development of class action notice programs.

“Not surprisingly, new media itself accounts for much of the noise about the demise of traditional media...”

<sup>1</sup> Katherine Kinsella, President, Kinsella Media, LLC  
Maureen Gorman, Senior Media Analyst, Kinsella Media, LLC



## ▲ New Media Options: What Are They and Do They Change the Game?

Identifying class members by demographic characteristics has long been the first step in developing a media-based class action notice program.<sup>2</sup> A notice provider analyzes media usage and selects appropriate media based on demographics of the target audience. Understanding the media usage of the members of a specific class is paramount in designing a strategic and efficient paid media program to reach them. It's equally important to examine both the strengths and the weaknesses of each media choice in order to select the most appropriate methods for reaching a class. This process and methodology remain the same as new media options are introduced and gain popularity. New media options that have prompted the most interest include the Internet, mobile media, and social media.

### INTERNET

As an advertising vehicle, the Internet has existed since 1994,<sup>3</sup> which makes it practically traditional by today's standards. Banner ads and keyword search ads (the "sponsored links" results a user sees at the top of a search engine results list) are used in the class action context in many notice programs, especially those directed at consumers.

Paid Internet advertising is included in class action media program in cases in which demographics suggest class members may be effectively reached by it. The notice provider places banner ads in varying sizes on individual sites, portals, and networks. A short and clear ad provides immediate connection to a case website with a single click. But with the thousands of sites Internet users visit, it is difficult to cost effectively achieve extensive reach of a target audience through placement of banner ads alone. However, through new and emerging measurement tools, the reach of banner ads can now be measured against a host of demographics, allowing the Internet reach of a paid media notice program to be included in calculations of notice adequacy and increasing the efficiency of advertising via this medium.

Virtually any class action that has an informational website can benefit from keyword search ads, although they do not contribute to the measurable reach of a notice program the way banner ads do. Every major search engine accepts paid keyword links. This unique form of advertising guarantees that a site will appear near the top of the page when a user searches for targeted keyword terms. Unlike banner ads, which are delivered to specific web pages, keyword search ads require a class member to know what he or she is looking for. They are therefore not notice, but rather are cues to find the website that contains case information and notice materials. These ads are especially useful if a class action certification or settlement generates media coverage beyond paid advertising, as "earned media" is less likely to contain specific contact information, such as the website or toll-free telephone number, that a summary notice appearing as an advertisement does.

As a now-common component of many contemporary class action notice programs, online banner advertising has matured. However, new and exciting media forms such as mobile devices and social media are evolving. These channels have exhibited explosive growth and much interest recently. But beyond the hype, are these innovations viable for class action notice?

### MOBILE MEDIA

Mobile devices are those that allow connectivity virtually anytime and anywhere. As a media type, "mobile" is now touted as the seventh mass media, behind print, recordings, cinema, radio, television and the Internet.<sup>4</sup>

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In 1983, the first mobile phone was introduced with only one single function: voice calls to communicate with another phone. Mobile phones have evolved into multi-function devices that support voice calls, text messaging (SMS), multimedia messaging (MMS), games, Internet, camera, video, music, Bluetooth, and navigational systems (GPS). The introduction of high-speed technology and “smart” phones (integrated phone and PDA devices) is indeed revolutionizing communication.

The prospect of using these devices for class action notice is tantalizing but currently few options have the potential to significantly broaden the reach of a paid media program.

*Mobile Internet*

Globally, nearly 4.1 billion people have a mobile phone.<sup>5</sup> In the United States alone, there are 234 million mobile subscribers out of a total population of 307 million. Of these subscribers, nearly 65 million, or 21% of the population, are active users of mobile Internet during a 30-day usage period.<sup>6</sup> With the growth of mobile subscribers fueled by smart phones, which speed up and simplify the mobile Internet experience, mobile Internet is forecasted to reach 134 million users in the US in 2013.<sup>7</sup>

Advertising opportunities to reach the mobile Internet audience include mobile web banners, content placement and search. These applications permit advertisers to target advertising to mobile phone users by their geographic location, demographics, day of week, and time of day. In December 2009, 62 million unique mobile users visited a mobile website. While Google search is the leading site, the email portals: Yahoo; Gmail; MSN/Hotmail; and AOL Email hold 4 of the other positions in the top 10 mobile Internet sites. Other mobile destinations accessed via mobile Internet mirror the total Internet in rank, if not size, with social networks, news, weather and sports sites performing well.<sup>8</sup>

*Text Messaging*

Short Message Service (SMS), also known as text messaging, is a mobile communication that has taken the world by storm. This feature allows the exchange of short text messages (maximum of 160 characters) between mobile devices. In 2009, more than 1.5 trillion text messages were sent over carrier networks in the US, more than doubling the amount from the previous year. This translates to more than 4.1 billion SMS messages being sent daily.<sup>9</sup>

As demonstrated by the chart below, text messaging is the most commonly used mobile data service, used by 63% of mobile subscribers.<sup>10</sup> In an average month, U.S. subscribers are actually texting 75% more than making phone calls.<sup>11</sup>

MOBILE CONTENT USAGE 3 MONTHS ENDING DEC. 2009 VS. 3 MONTHS ENDING SEP. 2009 TOTAL U.S. AGE 13+ SOURCE: COMSCORE MOBILENS			
	Share (%) of U.S. Mobile Subscribers		
	SEP-2009	DEC-2009	POINT CHANGE
<i>Total Mobile Subscribers</i>	100.0%	100.0%	N/A
Sent text message to another phone	61.0%	63.1%	2.1
Used browser	26.0%	27.5%	1.5
Played games	21.4%	21.6%	0.2
Used downloaded apps	16.7%	17.8%	1.1
Accessed social networking site or blog	13.8%	15.9%	2.1
Listened to music on mobile phone	11.7%	12.1%	0.4

Although text messaging appears to have an extraordinary potential to reach consumers with advertising, the Telephone Consumer Protection Act<sup>12</sup> prohibits commercial text messaging unless the consumer has an existing commercial relationship with or gives permission to the advertiser to text a message. This prohibition severely limits any consideration of SMS in class action notice plans, with the exception of “short code” messaging, when a consumer consents to receiving a text message. “Short code” involves an assigned short number that consumers may text to request further information, and has promising applications for class actions.

As has already been done in a few national consumer class actions, a publication notice may include a short code (e.g., #12345) among the other contact options such as a toll-free number and website address. A class member may then text a keyword (e.g., “drugsettlement”) to the short code and receive a text message back with the case website address (e.g., “For complete information visit www.drugsettlement.com or call 1-800-123-4567.”). While this procedure has the potential to quickly and easily deliver the case information directly to class members, the class member must first be aware of the case to request it. It depends on the class member seeing the summary notice or a news story in traditional media first.

How can we gauge the effectiveness of mobile media as a way of reaching consumers? Consumer surveys such as Nielsen Mobile and comScore M: Metrics, similar to those used for decades to measure traditional media, are evolving to track mobile usage. These reports currently provide insight into consumers’ mobile and offline media usage. They are increasingly more sophisticated in offering details on mobile usage along with behavioral, psychographic, demographic and product usage of mobile subscribers allowing media planners to understand the mobile landscape.

But mobile measurement is still in the formative stages and falls short of providing a complete picture of specifically who is being reached by advertising delivered through the device. More precise electronic measurement of usage through direct device monitoring is still in the future.

#### **SOCIAL MEDIA**

“Social media” is an umbrella term coined to define the various online activities that bring together media technology and social interaction. Social media such as blogs and social networks offer a variety of user-generated content (UGC), from photo albums and movie reviews to comments on products and services.

In the early years of Internet development, UGC was viewed as a far-off scenario in which entire communities would spring up based upon common interests. In those days, Internet users would compose thoughts and comments on their websites in web-logs (blogs). As speed and ingenuity took hold, personal blogs led to the envisioned communities: websites where people congregate to connect to friends and strangers and share everything from thoughts to images to résumés. They began as outlets for niche groups such as college students and mothers but have ballooned into a sub-media category incorporating people of all ages and walks of life. Social media giant Facebook, for example, started in 2004 as an online community for college students, but as of January 2010 had grown to over 100 million members in the US alone, more than 60% of which are 25 or older.<sup>13</sup>

Overall, social media use is growing at an astonishing rate, both in terms of the number of users and the amount of time spent on the websites. As of April 2009, as noted in the chart below, users logged almost 300 million minutes on the micro-blogging site Twitter, compared to just 7 million in 2008. As of December 2009, the average time a U.S. user had spent on Twitter increased 368% from December

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2008, and the site's unique users hit 18.1 million, an increase of 579% over December 2008.<sup>14</sup> Globally, at least 10% of all time spent on the Internet is on social media sites.<sup>15</sup>

TOP 10 SOCIAL NETWORKING AND BLOG SITES RANKED BY TOTAL MINUTES FOR APRIL 2009 AND THEIR YEAR-OVER-YEAR PERCENT GROWTH (U.S., HOME, AND WORK)			
SITE	APR-2008 TOTAL MINUTES (000)	APR-2009 TOTAL MINUTES (000)	YEAR-OVER-YEAR PERCENT GROWTH
Facebook	1,735,698	13,872,640	699
Myspace	7,254,645	4,973,919	-31
Blogger	448,710	582,683	-30
Tagged	29,858	327,871	998
Twitter	7,865	299,836	3712
Myyearbook	131,105	268,565	105
Livejournal	54,671	204,121	273
Linkedin	119,636	202,407	69
Slashkey	N/A	187,687	N/A
Gaia online	173,115	143,909	-17

However, extrapolating the future of individual social media networks is problematic because the wave of popularity may wane quickly. Consider for example that as Facebook and Twitter have grown, MySpace, which led the pack by a substantial margin in 2008, dropped off considerably in 2009 and has had to re-evaluate their strategy, now focusing efforts to be a social gathering place for music interests.

In addition to social networks, blogs continue as a growing element of social media. Among active Internet users (those who use the Internet every day or every other day) globally, 73% have read a blog, and 36% think better of companies that have blogs.<sup>16</sup> Thirty-four percent of bloggers write about their opinions of products and brands.<sup>17</sup> These statistics point to why social media has seen such a meteoric rise; it taps into a consumer's emotional need to be heard by giving them the ability to comment.

As social media grows and diversifies, it will have a role to play in class action notification, but there are distinct limitations. Blogs offer opportunities to get in front of narrow, niche audiences, appealing to a specific interest or opinion. Although valuable in reaching a very focused audience, blogs can have uncontrolled and controversial content that can be problematic when trying to present neutral notice.

While participating in blogs and social networks offer opportunities to communicate with consumers, traditional media such as television or national print publications remain the more efficient media vehicles to reach large mass consumer audiences due to how ads are delivered. Unlike print media, where each and every reader has an opportunity to see an advertisement, the advertising on social media sites, as with all Internet websites, is delivered to one user at a time. The frequent user of the website will be the most likely to be exposed to the messages and most ads are delivered to the heaviest users. For a paid media notice program, sites must be selected based on their ability to reach specific target audience segments. Therefore, the cost of accumulating significant mass audiences on individual sites can be prohibitive.

However, social media – both blogs and social networks – provide interesting opportunities for non-paid notice. Outreach to bloggers with a press release and a brief explanation of the relevance of a case to the blog's target audience can result in postings explaining the settlement and links to the case website. And social

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networks have preexisting defined groups that can be quite useful in distributing information about a case. For example, in *The Authors Guild, Inc. v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y.), information on the proposed settlement was provided to author and writer groups on the professional networking site LinkedIn.

Social media also offers additional avenues to drive traffic to a case website through individuals – the online equivalent of “word of mouth.” Many social networks like Facebook, LinkedIn, and Digg offer ways to share links by simply adding a line of code to a settlement website. Users can click on the links to share the site with their social networks via functions such as a “newsfeed” or “local activity.” As their friends and connections see the link, they will also be informed about the settlement and determine if their rights are affected. This also serves as organic growth to the reach of sites, similar to the pass-along effect of traditional print advertising.

Advertising dollars spent on social media are growing exponentially, nearly 34% annually to a projected \$3.1 billion by 2014.<sup>18</sup> With membership numbers and spending expanding so significantly, social media can play a role in certain class action notification programs that involve class members heavily engaged in online activity. But it will not be able to be effective without the assistance of traditional media, which still provides the greatest reach of class members in consumer cases.

## ▲ New Media: Customizing Expanded Access to Information

New media options provide an array of choices for gathering and sharing information as well as for watching and listening to entertainment and getting news and other updates. The Internet and mobile media are increasing consumer connections to one another and to businesses trying to serve them. As a result, there are shifts in consumer behavior as media options multiply.

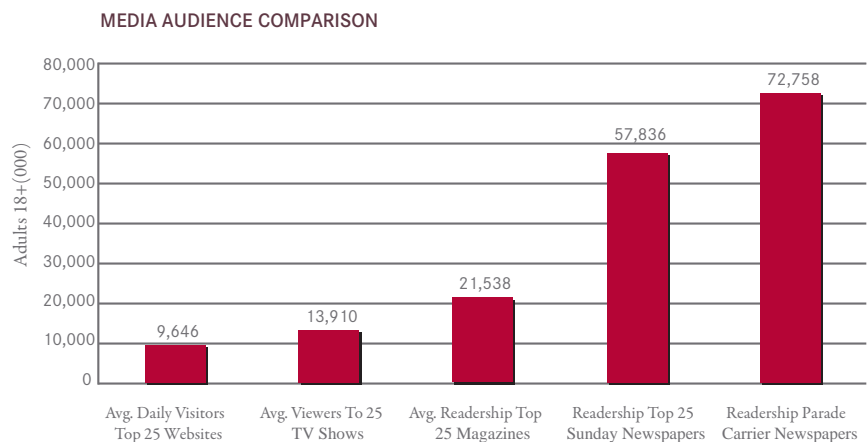
With these increased choices, overall media usage is predicted to reach an all time high in 2010. The U.S. Census Bureau reports the total number of hours spent outside of work with all forms of media exceeds 9.5 hours per person per day.<sup>19</sup> Add to this the use of Internet at work and of mobile phones, in general, and it is evident that opportunities to communicate with consumers are growing dramatically. But does this mean that new media is more effective in reaching various audiences and that traditional media is now less effective and on the verge of extinction? As it turns out, no.

## ▲ Traditional Media: “The Reports of My Death Are Greatly Exaggerated.”

Declines in print circulation and broadcast ratings, along with the emergence of new media outlets and usage patterns are spawning rumors about the demise of traditional media. But today, people still spend the largest share of their media time with traditional media – particularly television, which accounts for 45.8% of all media usage.<sup>20</sup> As of February 2010, 90% of television households subscribe to cable or some form of satellite TV,<sup>21</sup> meaning viewers have hundreds of channels from which to choose. Not only are there more and better programming choices, new devices like DVRs and smart phones give consumers access to television programs without time or place constraints, further fragmenting specific program audiences. The challenge is now how to effectively deliver advertising messages to those consumers who have the tools to avoid these messages simply by fast forwarding past them.

But what about the much-discussed impending death of newspapers? Due to financial challenges and declining circulations, many analysts are rightly concerned about the future of the industry.<sup>22</sup> However, an immediate death is not even remotely probable given that so many consumers still turn to their daily newspaper for news and information. While newspaper readership has declined about 13% in the past five years, currently 50% of all adults still read a newspaper more than 22 times each month.<sup>23</sup> Newspapers remain a tangible, trusted source of information for young and old alike.<sup>24</sup> The heaviest users of newspapers are older adults and many notice plans, therefore, use newspapers to reach this target audience. More than 50% of U.S. adults are 45 and older, and 58% of them still read a Sunday newspaper.<sup>25</sup>

Overall, even today, with audiences fragmented by the magnitude of the choices that users have online and on television, Sunday newspapers and leading magazines can get more readers than the average daily website or television show.



Source: Website, Magazines, Newspaper and Parade: MRI Doublebase 2009, Television: Nielsen Season Average 2008–2009 Prime Time Live +7

Historically, newspapers have not been as good at reaching young adults, and the biggest decline in newspaper readership is in the 24-44 year-old demographic, precisely the group that leads the way in embracing new media. Currently 40% of this target still reads a Sunday newspaper,<sup>26</sup> so print advertising should continue to be used to reach them in combination with the new media options their demographic has so eagerly espoused. However, the newspaper business models must find ways to appeal to younger audiences that will grow up more comfortable with electronic media. Newspapers are evolving to embrace their growing online audiences and to incorporate the distribution of content through social networks and the new wave of devices such as Kindle, iPad, and Android. Time will tell if traditional media will successfully find the key to merging the old with the new.

## ▲ Conclusion: Traditional Media Trumps New Media for Mass Reach

However dazzling, convenient, and fun we find the 24/7 connectivity and speed of the new devices and the social networks, media buying is still based on the demographics of specific target audiences and the media those audiences consume. Paid media programs that must provide significant reach of any target audience, particularly in consumer cases, continue to require traditional media components and credible audience measurement. As new media options become available, audiences' attention is divided among the rapidly multiplying media choices and it becomes more difficult for any new media source to reach a significant portion of a target audience. Media sources that provide mass reach, therefore, will become even

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more valuable in class action notice programs. For now, those mass reach sources are traditional, reliably measurable, media types. While people are certainly using new types of media to get their information, it will take time for their measurement metrics to mature before the courts can rely on them for reach estimates.

New media, however, has a role to play by providing a collection of niches to complement the mass audience reach of traditional media. New media can be expected to evolve in importance over time as new channels are introduced for exposing class members to notice and providing new avenues through which to respond and access information.

New media options are numerous and growing and each one is taking a slice from other competitors. Consumers, especially younger consumers, “increasingly want their information and their entertainment in the on-demand format of online or on any mobile device”<sup>27</sup> and they will drive the evolution of new media and its measurement. But, for the foreseeable future, traditional media outlets will still dominate the media landscape while new media looms on the horizon.

<sup>1</sup> Kathryn Koegel, *It's D-Day: The State of Digital Display*, May 12, 2009, at <http://www.primaryimpact.com/blog/?p=70>.

<sup>2</sup> See Chapter 20.A, “Quantifying Notice Results in Consumer, Mass Tort, and Product Liability Class Actions—the Daubert/Kuhmo Tire Mandate.”

<sup>3</sup> David Weir, *The First Banner Ads, Fifteen Years Later*, Oct. 27, 2009, at <http://industry.bnet.com/media/10004796/the-first-banner-ads-fifteen-years-later/>.

<sup>4</sup> Michael Martin, *How to Get Started With Mobile Marketing*, May 6, 2010, at <http://searchengineland.com/how-to-get-started-with-mobile-marketing-41032>.

<sup>5</sup> Press Release, International Telecommunication Union, *New ITU ICT Development Index compares 154 countries, Northern Europe tops ICT developments*, Mar. 2, 2009, at [http://www.itu.int/newsroom/press\\_releases/2009/07.html](http://www.itu.int/newsroom/press_releases/2009/07.html).

<sup>6</sup> Press Release, comScore, *comScore Reports December 2009 U.S. Mobile Subscriber Market Share*, Feb. 8, 2010, at [http://www.comscore.com/Press\\_Events/Press\\_Releases/2010/2/comScore\\_Reports\\_December\\_2009\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2010/2/comScore_Reports_December_2009_U.S._Mobile_Subscriber_Market_Share).

<sup>7</sup> eMarketer, *Getting to Know the Mobile Population*, August 25, 2009, at [http://www.emarketer.com/Article.aspx?R=1007236&Ntk=getting+to+know+the+mobile+population&No=0&xsrc=article\\_head\\_sitesearchx&N=0&Ntk=basic](http://www.emarketer.com/Article.aspx?R=1007236&Ntk=getting+to+know+the+mobile+population&No=0&xsrc=article_head_sitesearchx&N=0&Ntk=basic).

<sup>8</sup> Nielsen Mobile, *Mobile Audience Mirrors Total Internet as Search, Email, Social Networking Drive Traffic*, Feb. 2, 2010, at [http://blog.nielsen.com/nielsenwire/online\\_mobile/mobile-audience-mirrors-total-internet-as-search-email-social-networking-driving-traffic/](http://blog.nielsen.com/nielsenwire/online_mobile/mobile-audience-mirrors-total-internet-as-search-email-social-networking-driving-traffic/).

<sup>9</sup> Press Release, CTIA – The Wireless Association, *CTIA – The Wireless Association® Announces Semi-Annual Wireless Industry Survey Results*, Mar. 23, 2010, at <http://www.ctia.org/media/press/body.cfm/prid/1936>.

<sup>10</sup> Press Release, comScore, *supra* note 6.

<sup>11</sup> The Nielsen Company, *In US, SMS Text Messaging Tops Mobile Phone Calling*, Sept. 22, 2008, at [http://blog.nielsen.com/nielsenwire/online\\_mobile/in-us-text-messaging-tops-mobile-phone-calling/](http://blog.nielsen.com/nielsenwire/online_mobile/in-us-text-messaging-tops-mobile-phone-calling/).

<sup>12</sup> 47 U.S.C. § 227.

<sup>13</sup> Peter Corbett, *Facebook Demographics and Statistics Report 2010 – 145% Growth in 1 Year*, Jan. 4, 2010, at <http://www.istrategylabs.com/2010/01/facebook-demographics-and-statistics-report-2010-145-growth-in-1-year/>.

<sup>14</sup> Lance Whitney, *Twitter, Facebook use up 82 percent*, Feb. 22, 2010, at [http://news.cnet.com/8301-1023\\_3-10457480-93.html](http://news.cnet.com/8301-1023_3-10457480-93.html).

<sup>15</sup> The Nielsen Company, *Global Faces and Networked Places*, Mar. 9, 2009, at [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen\\_globalfaces\\_mar09.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf).

<sup>16</sup> Universal McCann, *Power to the People – Social Media Tracker Wave 3*, Mar. 2008, at <http://www.slideshare.net/mickstravellin/universal-mccann-international-social-media-research-wave-3>.

<sup>17</sup> *Id.*

<sup>18</sup> MarketingCharts.com, *Forrester: Interactive Marketing to Hit \$55b by 2014*, July 10, 2009, at <http://www.marketingcharts.com/interactive/forrester-interactive-marketing-to-hit-55b-by-2014-9744/>.

<sup>19</sup> U.S. Census Bureau, *2010 Statistical Abstract (Table 1094: Media Usage and Consumer Spending: 2004 to 2012)*, at <http://www.census.gov/compendia/statab/2010/tables/10s1094.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> The Nielsen Company, *Television Audience 2009*, at [http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA\\_2009-for-Wire.pdf](http://blog.nielsen.com/nielsenwire/wp-content/uploads/2010/04/TVA_2009-for-Wire.pdf).

<sup>22</sup> Marcel Fenez, et al., *PricewaterhouseCoopers, Moving into Multiple Business Models: The Outlook for Newspaper Publishing in the Digital Age*, Apr. 2009.

<sup>23</sup> Data from Fall 2009 MRI Survey. Mediarmk Research & Intelligence (MRI) surveys a large sample of U.S. adults about the media they see and hear and about the products they use. Participants in the survey are identified by age, occupation, income, education and by where they live, among other things. They are asked what magazines and newspapers they read, what TV shows and cable channels they watch, and are asked among 500 categories and 6000 consumer brands.

<sup>24</sup> Belo Interactive, *Online Credibility Survey*, 2004, at <http://www.dallasnews.com/sharedcontent/dws/spe/credibility/>.

<sup>25</sup> Fall 2009 MRI *supra* note 23.

<sup>26</sup> *Id.*

<sup>27</sup> Koegel *supra* note 1.



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August 6, 2010

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## ► Don't Forget the Notice! Managing Notice Costs In Class Action Suits

*David Jay and Jason H. Kislin*

Class Actions are becoming an almost unavoidable cost of doing business for even the most careful and risk-averse companies today. The growing plaintiffs class action bar is vigilant, creative and sophisticated, and sometimes unpredictable. Class action cases are on the rise in various areas, including consumer fraud/false advertising, employment, securities, civil rights and health care, to name just a few. Since the passage in 2005 of the [Class Action Fairness Act](#), 28 U.S.C. §§ 1332(d), 1453 ("CAFA"), more and more of these cases are landing in federal court because of the relaxed federal diversity requirements.<sup>1</sup> Indeed, in a 2008 report to the Judicial Conference Advisory Committee on Civil Rules, it was noted that the number of diversity class actions filed per month as original proceedings in the federal courts in the post-CAFA period tripled. See [Impact of CAFA on the Federal Courts](#): Fourth Interim Report, Federal Judicial Center, April 2008. With the Supreme Court's decision in *Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance Co.*, No. 08-1008, practitioners can expect this trend to continue.<sup>2</sup>

Many companies prefer to litigate class actions and other complex cases in federal court for a variety of reasons, including streamlined discovery procedures and more developed class certification jurisprudence. Indeed, potential removal is an important threshold decision in every class action, and many other complex cases, filed in state court today. That said, federal courts can present their own hurdles in class actions, particularly if a case becomes ripe for settlement. When dealing with settlements in federal courts, practitioners often face added scrutiny, overall distrust of coupons or similar relief, and more rigorous notice requirements.



This article focuses on the more onerous notice requirements in federal court, and specifically the due process requirement of direct notice to settlement class members in actions certified pursuant to [Fed. R. Civ. P. 23\(b\)\(3\)](#) where the primary relief to the class is monetary compensation. The article concludes with suggestions for formulating a notice program and avoiding some of the pitfalls that can derail your settlement. With federal judges paying increased attention to notice plans, examples of settlements being rejected for insufficient notice are not hard to find. See *Karvaly v. Ebay, Inc.*, 245 F.R.D. 71 (E.D. N.Y. 2007) (disapproving notice plan where e-mail notice and website link were only forms of notice); *Larson v. Sprint Nextel Corp.*, 2009 WL 1228443 (D. N.J. April 30, 2009) (disapproving of notice plan where proposed direct notice did not provide information required by Rule 23(c)(2)). Failure to understand federal court notice requirements and plan effectively can be extremely costly, if not fatal to the settlement process. If mishandled, notice requirements can result in costs that dwarf the actual relief to the settlement class, and can make an otherwise favorable settlement unpalatable.

### Notice requirements under the Federal Rules

There are several notice provisions in the Federal Rules of Civil Procedure regarding notice to absent class members of the pendency of a certified class action or settlement. The notice requirements vary depending upon the type of class action at issue. For those class actions seeking primarily injunctive relief under Rule 23(b)(1) or (b)(2), "the court may direct appropriate notice..." Where a class action seeks money damages and alleges that common issues of fact and law predominate under Rule 23(b)(3), the court must "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort..." For both types of class action settlements, the court is required to "direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(e)(1).



In *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), the seminal case on adequate notice for Rule 23(b)(3) class actions, the Supreme Court interpreted Rule 23(c)(2) and the constitutional requirement of due process to require individual direct mail notice for each class member “whose names and addresses may be ascertained through reasonable effort.” *Id.* at 173. In *Eisen*, the certified class consisted of over six million members, of which 2,225,000 could be identified through reasonable effort. Despite the extraordinary cost of direct mail notice, and the plaintiff’s insistence that the case would likely be unable to proceed as a class action in the face of such costly notice, the Court found that “individual notice...is not a discretionary consideration to be waived in a particular case.” *Id.* at 176. Indeed, the Court found that such notice was “an unambiguous requirement of Rule 23” and necessary to afford absent class members the right to opt out of the class and pursue separate claims, or remain in the class, but actively participate in the management of the case. *Id.*

While *Eisen* did not involve the certification of a settlement class, the requirements set forth in *Eisen* routinely have been applied to settlement classes where certification of the class and approval of the settlement are sought simultaneously. See *Grunewald v. Kasperbauer*, 235 F.R.D. 599, 609 (“In this case, where the parties seek to simultaneously certify a settlement class and settle a class action, the elements of Rule 23(c) notice (for class certification) are combined with the elements of Rule 23(e) notice (for settlement)”; see also *Zimmer Paper Products, Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90-91 (3d Cir. 1985) (holding that Third Circuit courts favor maximum notice in class action contexts and that first-class mail and publication satisfy notice requirements). Indeed, in *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), the Circuit Court reversed an order granting approval of a class settlement and certifying a settlement class where settlement class members could be identified through a reasonable search but notice was only provided through publication. *Id.* at 951-2. Citing Rule 23(c)(2) and *Eisen*, the *Molski* Court held that “[b]ecause no individualized efforts were undertaken...the notice provided to the class was inadequate and failed to comport with the requirements of due process.”

#### Eisen Meets the 21st Century: Direct Notice Requirements Coming of Age

While federal courts have not lost sight of *Eisen*’s direct notice requirement, they have loosened the reigns on the form of such notice. Specifically, electronic mail (“e-mail”) and the Internet have gained popularity in recent years as forms of notice. The Courts remain reluctant, however, to approve e-mail notice as the only form of individual notice. In cases where e-mail notice has been approved, it typically has been a part of a more comprehensive notice plan that also includes direct mail.<sup>3</sup> A well known class action treatise, McLaughlin on Class Actions, found ten cases from 2001 through 2005 approving internet or e-mail notice as part of a more comprehensive notice plan that included some direct mail. 1 McLaughlin on Class Actions § 5:78 at n. 9 (6th Ed.). Although no more current empirical data was located, the use of e-mail and the Internet as components of notice programs has increased exponentially since 2005 and is becoming commonplace.

In *Browning v. Yahoo! Inc.*, 2006 WL 3826714 (N.D. Cal. Dec. 27, 2006), a California District Court approved e-mail notice as the initial form of direct notice for those class members for whom the defendant had an e-mail address. The notice plan, however, required direct mail notice for those class members for whom defendant had no e-mail address or for whom the e-mail notice was returned as undeliverable. The Court noted that the case was particularly suited for e-mail notification because, as Yahoo! users, the class members were “familiar and comfortable with e-mail and the Internet.” *Id.* at \*8; see also *In re Sony SXRDRear Projection Television Class Action Litigation*, 2008 WL 1956267, \*4 (S.D. N.Y., May 1, 2008)(approving notice program consisting of publication in USA Today, establishment of settlement website, and initial direct notice through e-mail referring class members to settlement website followed by standard mail where e-mail returned as undeliverable or no e-mail address available).

In another case, the Eastern District of New York refused to allow e-mail notification as the only method of individual notice. *Karvaly v. Ebay, Inc.*, 245 F.R.D. 71 (E.D. N.Y. 2007). The Court found that “while...there are remarkably few cases addressing this issue, the Court is not persuaded that notice...by electronic mail, though clearly more convenient and less expensive for the parties, is an adequate substitute for the traditional method of...first-class mail.” *Id.* at 91. The Court pointed out several flaws in e-mail notice, including the possibility of class members simply deleting e-mails, or spam filters rejecting e-mails because of the common practice of e-mail spoofing. Ultimately, the Court directed the parties to come up with an alternative notice plan, suggesting that e-mail might be effective individual notice if it required the class members to take some affirmative step to acknowledge receipt and waive formal, first-class mail notice. *Id.* at 93.

More recently, in *Larson v. Sprint Nextel Corp.*, 2009 WL 1228443 (D. N.J. April 30, 2009), the District of New Jersey upheld an objection to a notice plan because it failed to provide individual notice to class members who were readily identifiable. The Court determined that direct notice to such individuals was required, but invited the parties to explore alternative means of contacting individual class members, including e-mail or text-messaging. *Id.* at \*15. The Court found that “[t]his case presents the interplay between a large class, stringent individual notice requirements, and different

forms of available technology.” The Court continued to suggest that “Sprint and Class Counsel are free to devise a notice plan that meets Rule 23(c)(2) standards while at the same time utilizing the cost and efficiency savings that come from features such as electronic mail or text messaging.” *Id.*<sup>4</sup>

#### Developing an Effective Notice Plan

Because federal courts still require direct notice in 23(b)(3) actions under Eisen, companies need to carefully plan their notice programs and account for the attendant costs. One option available in some situations to avoid the costs associated with direct notice is to structure a settlement to include primarily injunctive relief under Rule 23(b)(1) or (b)(2), as direct notice is not mandatory for such class settlements. In many cases, however, plaintiff’s counsel may insist on monetary relief for the class and certification under this part of Rule 23 may not be an option.

To the extent that certification under 23(b)(1) and (b)(2) is unavailable, the parties may consider whether state court is a better venue for the class settlement, particularly if meaningful settlement discussions occur early in a case when a venue change is still viable. Certain states have somewhat more relaxed notice requirements than the federal courts, and there may be less scrutiny of the notice program, if not the settlement itself. For example, neither New Jersey, Pennsylvania, nor New York expressly require direct notice to individuals. New Jersey R. 4:32-2(b)(2), the equivalent of Fed. R. Civ. P. 23(c)(2), provides that “the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due process of law.” The Pennsylvania class notice requirements, set forth in Pa. R. Civ. P. 1712, provide that, “[i]n determining the type and content of notice to be used and the members to be notified, the court shall consider the extent and nature of the class, the relief requested, the cost of notifying the members and the possible prejudice to be suffered by members of the class or by other parties if notice is not received.” New York’s CPLR 908 requires a class to receive “reasonable notice...in such manner as the court directs” and allows the court to consider the costs involved, the resources of the parties and the likelihood that class members would seek to be excluded from the class when determining appropriate notice. Other states may also relax the specific direct notice requirement and/or allow its courts to consider the cost-benefit calculation of providing direct notice to every class member.

For classes certified in federal court pursuant to Fed. R. Civ. P. 23(b)(3), however, Eisen still requires individual notice to all class members for whom an address is reasonably accessible, regardless of the costs involved in disseminating such notice. Although first-class mail may still be the most common, and the presumptive, way to satisfy this requirement, the cases cited above indicate a willingness by federal courts to approve notice plans that do not rely solely on first-class mail. Because every case is different, there is no magic formula for a cost effective, yet legally sufficient, notice program, but the best practice is to package some form of direct notice with other less expensive types of notice to create an overall program that effectively and efficiently gets the message out to the class members. In doing so, companies should consider the following:

- **Plan Ahead:** Go into settlement negotiations with a notice plan in mind. Study the options available to your company, inquire about pricing in advance of any settlement discussion, and understand your company’s capabilities and options. Planning ahead for the notice discussion allows you to direct the negotiation where you want it to go and avoid surprises regarding costs after-the-fact that can derail your settlement.
- **Raise Notice Early:** Many attorneys tend to avoid discussion of the notice issues until other terms have been fully negotiated. Raising notice early may give you a significant advantage because a plaintiff may show more flexibility with respect to notice terms before all other aspects of the settlement are resolved.
- **Acknowledge Common Ground:** When it comes to developing notice programs plaintiffs and defendants have a common goal. Both sides must structure a notice program that effectively gets word out to the class and therefore passes muster with the court. At the same time, plaintiffs have every incentive to keep notice costs in check, leaving more funds available to pay the class members and their counsel.
- **E-mail!!!** E-mail is coming of age in the courts. Although there is still some resistance, it is hard to dispute that most people are tied to their email even more so than their mailboxes. E-mail is a fraction of the cost of first-class mail, particularly if your company can send the communications itself. To the extent a company has email addresses for some or all of the putative class members, using this method of communication can significantly reduce the overall cost of the notice program.
- **Be creative:** Make sure to consider a wide variety of options when putting together your notice package. While traditional first-class mail and publication methods still may have a place, e-mail, website postings, dedicated websites, Internet banners, store signs, and bulk or post-card mailings may all be appropriate for your needs. Consider whether a specific trade publication effectively reaches your putative class at a lower cost than national newspapers or

magazines. In some situations, it may also be appropriate to incorporate your notice into mailings already being sent to your customers in the ordinary course, such as monthly bills or advertisements.

FOOTNOTES:

1. CAFA provided federal courts with jurisdiction over putative class actions consisting of at least 100 proposed class members, in which the citizenship of at least one proposed class member is diverse from that of one defendant, and the amount in controversy, after aggregating the sum or value of each proposed class member's claim, exceeds \$5 million, exclusive of interest and costs.
2. In *Shady Grove*, the Supreme Court held that whether a matter can be maintained as a class action in federal court is purely a question of federal procedure to be resolved pursuant to Fed. R. Civ. P. 23. The decision called into question whether certain state laws specifically prohibiting class actions can be enforced in federal court.
3. One case in which e-mail was allowed as the sole form of individual notice was *Todd v. Retail Concepts*, 2008 WL 3981593 (M.D. Tenn. Aug. 22, 2008). There, without any analysis, the court approved notice through e-mail, a posting on the defendant's website and postings in the defendants retail locations. In overruling an objection to the adequacy of the settlement, which was entirely coupon based, the Court noted that because of a change in the relevant law during the pendency of the action, it was likely that the plaintiffs would have had no claim but for the defendant's willingness to comply with the settlement agreement. This may have factored into the Court's lenient approach to the notice program.
4. The underlying issue in this class action related to the propriety of early termination fees for wireless service contracts, which explains, in part, the Court's suggestion of using text messaging to provide individual notice.

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