

“Best Notice Practicable” in the Twenty-First Century

I. Introduction

Since the mid-1990s, the number of Internet users has grown at a frenetic pace. In 1995, there were an estimated 26 million people with Internet access.¹ By the end of 1998, that number had risen to approximately 150 million.² In September 2002, the estimated number of Internet users exceeded 605 million worldwide, including over 182 million in the United States and Canada alone.³ For each of these individuals, the World Wide Web offers an unprecedented amount of information available within a few keystrokes and mouse clicks.

While the Internet continues on its glorious rise, the reach of the traditional newspaper suffers through an incremental deterioration. Since at least the early 1990s, newspaper circulation as a percentage of the population has declined significantly.⁴ The Internet’s attractive offer of up-to-the-minute news coverage has led many newspaper subscribers to turn first and foremost to cyberspace to obtain their news. Reacting to this trend, many newspapers now offer online versions of their fare to entice Web-savvy consumers back into their fold.⁵ These trends have ushered in an era in which

¹ See Nua, “Nua Internet How Many Online Worldwide,” at http://www.nua.ie/surveys/how_many_online/world.html (last visited Feb. 6, 2003).

² See *Id.*

³ See Nua, “Nua Internet How Many Online?,” at http://www.nua.ie/surveys/how_many_online/ (last visited Feb. 6, 2003).

⁴ See World Press Trends: On Circulation, available at <http://www.wan-press.org/ce/previous/2001/congress.forum/wpt/circulation.html> (last visited Feb. 4, 2003).

⁵ There are several prominent examples of this phenomenon. See, e.g., <http://washingtonpost.com>, <http://www.latimes.com>, <http://www.nytimes.com>. Even local town papers have gotten in on the act. See, e.g., <http://www.poncacitynews.com>. Many of these online papers require memberships.

information is more accessible and is disseminated more widely electronically than in print.

While businesses and individuals actively seek to harness the Internet's extensive mass communication ability, the federal judiciary has been slower to react. Even in cases where an intended audience is widespread, such as in large consumer class action lawsuits, the Internet is used inefficiently and infrequently, while the newspaper remains the default standard of constructive notice.⁶ In class action lawsuits maintained under Rule 23(b)(3),⁷ Rule 23(c)(2) of the Federal Rules of Civil Procedure ("FRCP") requires federal courts to "direct to the members of the class the **best notice practicable** under the circumstances, including individual notice to all members who can be identified through

⁶ See, e.g., *Presidential Life Insurance Co. v. Milken*, 946 F.Supp. 267 (S.D.N.Y. 1996) (noting over 200 publications of notice in periodicals; *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F.Supp. 450 (D.N.J. 1997) (referring to a publication campaign in newspapers nationwide); *Collier v. Montgomery County Hous. Auth.*, 192 F.R.D. 176 (E.D. Pa. 2000) (mentioning publication of notice to class members in two local newspapers of general circulation); *Fry v. Hayt, Hayt, & Landau*, 198 F.R.D. 461 (E.D. Pa. 2000) (holding that a notice plan including one time publication in a newspaper was adequate). See also *Manual for Complex Litigation* (SECOND ed.), Pt III § 30.211 (1985) (suggesting the use of newspapers and journals for constructive notice where individual notice is not available). But see David M. Levine and Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1, 48 n.258 (1998) ("The Internet has replaced newspaper print as the standard for publication.") (referring to securities class actions).

⁷ To maintain a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, Rule 23(b)(3) requires that the class meet the numerosity, commonality, typicality, and adequacy of representation elements of Rule 23(a) and in addition:

[T]he court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Class actions maintained under Rule 23(b)(1) are for actions in which "adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interests. . . ." Rule 23(b)(2) is applicable where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

reasonable effort” (emphasis added).⁸ Given that the rule explicitly requires the “best notice practicable under the circumstances” of the case, and that the Internet offers such a large audience, it follows that the Internet should be used with great regularity and purpose to satisfy the requirements of Rule 23(c)(2). Nevertheless, the rules of the federal courts generally do not require the posting of notices to class action members on the Internet. The one notable exception is the U.S. District Court for the Northern District of California, whose jurisdiction includes Silicon Valley, arguably the home of cyberspace. In 1997, the Northern District of California adopted Local Rule 23-2, which requires Internet posting for securities class actions to an online clearinghouse maintained by Stanford Law School.⁹

Thus, in viewing the federal judiciary’s current practices and decisions regarding class actions maintained under Rule 23(b)(3) of the Federal Rules of Civil Procedure, the issue arises as to whether federal courts are complying with the best notice practicable requirement of Rule 23(c)(2). Given the generally inconsistent and inefficient use of the Internet in class action lawsuits by the courts, it appears that the judiciary is out of compliance with the rigorous standards of Rule 23(c)(2). To understand the problem, it must first be understood what the “best notice practicable” standard is, and how the courts have applied it. Next, this article explores why the courts’ current use of the Internet is inadequate, and finally proposes a solution to bring the courts back into compliance with the requirements of Rule 23(c)(2).

⁸ Fed. R. Civ. Pro. Rule 23(c)(2). This subdivision further explains what information must be contained in the notice.

⁹ See Joan Lambert, *Stanford Law School’s Securities Class Action Clearinghouse: Securities Litigation Meets the Web*, 11 NO. 7 INSIGHTS 14 (March 25, 1997). Stanford’s clearinghouse website is <http://securities.stanford.edu>.

II. What is the “Best Notice Practicable?”

The purpose of the “best notice practicable” requirement of Rule 23(c)(2) is to maximize the likelihood (subject to reasonable limitations) that absent class members whose rights will be determined by the judgment of the court will receive notice of the proceedings and their rights in accordance with the principle of due process inherent in the Fifth and Fourteenth Amendments to the United States Constitution.¹⁰ “[R]ule 23(c)(2)’s mandate . . . is consistent with [the] criterion [that “[t]he essence of due process is that ‘deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case’] and indeed goes beyond it.”¹¹ Thus, the rule “can comport with constitutional standards of due process only if there is a maximum opportunity for notice to the absentee class members”¹²

The most influential case on the “best notice practicable” requirement of FRCP 23(c)(2) is *Eisen v. Carlisle & Jacqueline*.¹³ In *Eisen*, the Supreme Court held that the express language and intent of the “best notice practicable under the circumstances” requirement of Rule 23(c)(2) mandated that individual notice must be provided to those class members who are identifiable through reasonable efforts.¹⁴ The Court reached this conclusion in a case in which the prospective class included some six million individuals, institutions, and intermediaries, where an estimated two million of these investors could be identified by name and address through the comparison of several million computerized records, and where an additional 250,000 investors who had participated in

¹⁰ The Fifth Amendment, which applies to the federal government, is the amendment most principally implicated in federal class action lawsuits.

¹¹ *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088, 1103-04 (5th Cir. 1977) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

¹² *See Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831 (3d Cir. 1973).

¹³ 417 U.S. 156 (1974). The seminal case on the constitutional adequacy of notice is *Mullane*, *supra* n.11.

a special investment program could also be identified with reasonable effort. In reaching its decision, the court looked to the Advisory Committee’s description of subdivision (c)(2) as “not merely discretionary” and the statement that the “mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject.”¹⁵ The Court also held that the representative plaintiff(s) must bear the costs of the notices, even where this requirement would effectively prevent the class action from going forward.¹⁶ The Court held,

[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather an unambiguous requirement of Rule 23. . . . Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.¹⁷

The Court went on to hold that the notice requirement cannot be disregarded even though the cost might be prohibitively high and even though no prospective class member has a large enough stake in the matter to justify the separate litigation of an individual claim.¹⁸ Many would claim, as the plaintiffs did in *Eisen*, that identifying over six million individuals through the thorough cross-verification of millions of records, the provision of notice to such individuals, and the costs imposed therein constituted neither “reasonable effort” nor “practicable notice;” yet, the Court rejected the argument. Thus, although the “best notice practicable” standard on its face intimates a balancing act

¹⁴ *Id.* at 176.

¹⁵ *Id.* at 173 (citing 28 U.S.C. APP. 7765, 7768).

¹⁶ *Id.* at 178. Not all states interpret their own class action rules in adherence to *Eisen*. For instance, California consumer legislation provides that judges may impose the costs of notice on defendants. Cal. Civ. Code § 1781(d).

¹⁷ *Id.* at 176.

¹⁸ *Id.*

between best notice and practicability, *Eisen* seems to indicate that the scales of consideration between the two should be weighted heavily towards best notice.

Later, in *Oppenheimer Fund, Inc. v. Sanders*, the Court stepped back somewhat from *Eisen*'s rigorous cost-allocation stance by giving district courts the discretion to order a defendant to perform tasks, such as identifying class members or compiling their addresses, if the defendant could do so at less cost than the plaintiff class representatives, as well as the discretion to allocate related costs to the defendant.¹⁹ *Oppenheimer Fund* thus provides some relief to plaintiffs in terms of cost bearing. Nevertheless, *Oppenheimer Fund* does not suggest that the Court has altered its position regarding the relatively little weight to be given to practicability in the "best notice practicable" analysis.

Although *Eisen* made clear that the best notice practicable requirement of subdivision 23(c)(2) requires that notice must be given to those individuals who can be identified through the Court's concept of "reasonable effort," there is no rule or standard for determining what constitutes the best notice practicable under the circumstances where individuals cannot be identified through reasonable effort. "[W]hat is 'the best notice practicable under the circumstances' and what constitutes 'reasonable effort' is a determination of fact to be made in the individual litigation."²⁰ Over time, the standard scheme for the "best practicable" notice has included direct notice to individuals identified through reasonable efforts, and some sort of newspaper publication. One appellate court stated the general attitude well: "It is well settled that in the usual

¹⁹ 437 U.S. 340, 356-58 (1978).

²⁰ *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718 (D.C.N.Y. 1983), cert. denied 100 F.R.D. 735, mandamus denied 725 F.2d 858, aff'd 818 F.2d 145, cert. denied 108 S. Ct. 695, and on remand, 689 F.Supp. 1250.

situation first-class mail and publication in the press fully satisfy the notice requirements to class members of both Fed. R. Civ. P. 23(c) and the due process clause.”²¹

III. Why the Internet provides the “best notice practicable”

Some courts have gone further by indicating what is NOT required by the best notice practicable requirement of FRCP 23(c)(2). In *Mangone v. First USA Bank*, the district court asserted, “There is no requirement under due process or the federal rules requiring dissemination of [court pleadings or other] information over the Internet or the telephone. Rather, all that is required by F.R.C.P. 23 is that Notice be provided to the class by the most practicable means available. . . .”²² Unfortunately, the rule articulated by the *Mangone* court is different than that envisaged in subdivision 23(c)(2). The explicit language of subdivision 23(c)(2) is that the notice must be the “*best notice practicable under the circumstances*,” not notice “by the *most practicable* means available” (emphasis added). The latter standard erroneously prioritizes the practicability of notice above the quality of the notice, which is the primary emphasis of the former standard.²³

While the two doctrines may overlap to a large extent, they are not entirely congruent. In *Eisen*, the Supreme Court expressed little concern about the practicability of the notice, so long as it was the best notice. In fact, the Court required the painstaking search and comparison of several million records to obtain the names and addresses of more than two million investors. Notice through publication in the Wall Street Journal

²¹ *Zimmer Paper Prods., Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 90 (3d Cir. 1985).

²² 206 F.R.D. 222, 233 (S.D. Ill. 2001).

²³ See *Eisen*, 417 U.S. at 176. Arguably, the Court likewise misread Rule 23(c)(2) by overlooking the “practicability” requirement.

and other financial publications were likely far more practicable than such an exhaustive search, yet the Court rejected similar arguments made by the plaintiff.

Furthermore, the *Mangone* court's claim that the class action rule of FRCP 23(c)(2) does not require dissemination over the Internet is defective. Admittedly, there are some notice schemes in class actions maintained under subdivision 23(b)(3) that Internet posting does not significantly improve, such as class actions in which individual notice is both possible and practicable. However, where constructive notice is necessary to reach the members of a class who are not identifiable on an individual basis, the many advantages the Internet offers virtually mandate that cyberspace should be used as a means of providing the best notice practicable. The Internet can offer a more effective mode of transmitting notice to a broad spectrum of people in class actions maintained under subdivision 23(b)(3), which often consist of members who share certain characteristics, but are nonetheless difficult to identify and notify with traditional means and technology.

Large consumer class actions are a good example of the customary difficulty with delivering notice to class members. In these situations, courts regularly rely on the legal fiction that publication in newspapers which class members are somewhat more likely to read is sufficient to put class members on notice of the pending action and their rights.²⁴ This notice is typically buried in the back of newspaper sections, especially in newspapers with the largest circulations, because of the high cost of purchasing print

²⁴ See Manual for Complex Litigation, *supra* n.6, at § 30.211 (suggesting that when using newspaper or journal publication, both publications with general circulation and specialized circulation should be considered, giving attention to the probable interests and characteristics of members of the class).

space.²⁵ Some courts have even held that a notice scheme including one-time publication in a newspaper constitutes sufficient notice to members of the class.²⁶ As a result, actual notice by traditional publication to absent class members depends heavily on the serendipitous confluence of person, place, and time, but with little real sense as to the likelihood of the happenstance occurring.

A. The Internet provides greater targeting ability to class members

The advent of the Internet, however, now presents courts with a better alternative. The Internet can offer the publication of notice that is more narrowly tailored to its intended audience in several ways. First, many individuals freely provide personal information to websites, including their names, addresses, ages, occupations, and interests. Often, this information is given to the individual's Internet Service Provider (ISP), such as America Online (AOL) or Excite. Furthermore, individuals can allow websites to place "cookies" on the user's computer, which allows the website to "remember" the individual and track such information as spending habits, time spent on the website, and other identifying characteristics.²⁷ Some third-party websites, such as

²⁵ See N.D. CAL. CIV. L.R. 23-2, Commentary, available at <http://securities.stanford.edu/lr.html#23-2> ("Notification to class members traditionally involves a combination of mailings and newspaper advertisements that are expensive, employ small type, convey little substantive information and that may be difficult for members of the class to locate.").

²⁶ See, e.g., *Fry v. Hayt*, 198 F.R.D. 461 (E.D. Pa. 2000) (holding that a notice plan including one-time publication in a newspaper was adequate).

²⁷ The privacy issues raised by the Internet are both real and significant. This article does not endorse all uses of an individual's private information, but an in-depth discussion of the privacy question is beyond the article's scope. For a more detailed discussion of the issue, see Michael R. Siebecker, *Cookies and the Common Law: Are Internet Advertisers Trespassing on Our Computers?*, 77 S. CAL. L. REV. (forthcoming 2003); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002); Elbert Lin, *Prioritizing Privacy: A Constitutional Response to the Internet*, 17 BERKELEY TECH. L.J. 1085 (2002); Michelle Z. Hall, *Internet Privacy or Information Piracy: Spinning Lies on the World Wide Web*, 18 N.Y.L. SCH. J. HUM. RTS. 609 (2002); Rachel K. Zimmerman, *The Way the "Cookies" Crumble: Internet Privacy and Data Protection in the Twenty-First Century*, 4 N.Y.U.J. LEGIS. & PUB. POL'Y 439 (2000).

DoubleClick²⁸ and Marketscore,²⁹ pool the information to provide statistical data on Internet users and usage.³⁰ This information is extremely valuable to companies seeking to market their products or services to individuals. Companies use the information to post advertisements to individuals who are more likely to be interested in and purchase their products.

The information can also be helpful to courts in assuring that notice is provided to absent class members. Taking into account the probable interests and characteristics of class members, plaintiffs could purchase interactive advertising space that would appear when individuals with the particular interests or characteristics are using the Internet. The “appearance” of this notice could either be a banner ad on a website, or as an advertisement that “pops up” in a new window on the user’s screen.³¹ An example of a service that uses pop-up ads quite effectively is The Gator Corporation, Inc. (TGC).³² Gator software allows an individual to quickly and automatically fill-in her personal information on forms on the Web. In return, the individual agrees to allow pop-up ads from TGC regarding special offers from its advertising partners. A visit to a content-related website or a request for information on the Internet related to the partner triggers

²⁸ <http://www.doubleclick.com>.

²⁹ <http://www.marketscore.com>.

³⁰ This practice is also not without controversy. See *In re Doubleclick, Inc. Privacy Litigation*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001).

³¹ While the author is not particularly fond of pop-up ads, a so-called “pop-under” ad could be used instead, to minimize distraction to the computer user.

³² <http://www.gator.com>.

an ad to pop up.³³ Such a service would allow the courts to target absent class members to a degree well beyond the capabilities of most newspapers or journals.³⁴

In addition, plaintiffs could prominently place the notice on websites devoted to the class members' probable shared interests and characteristics. For example, in a class action where members were all residents of city X from year A to year B, notice of the class action could be posted to a website aimed at the residents of the city.³⁵ Publication of the notice in the local newspaper may have a high likelihood of reaching members of the class who still reside in the city. Nevertheless, the global reach of the Internet is far more likely to provide notice to absent class members who have since moved away from the city, but still make some effort to keep apprised of events in their former home.

In securities and consumer class actions, the defendant company's website offers a particularly targeted location to post notice of the pending lawsuit. Since almost every major corporation now has its own website, posting notice to absent members on such a site in a suit where the defendant is a corporation provides a more focused opportunity for actual notice than nearly any newspaper or journal can offer. Of course, the most effective use of defendant's websites for notice is where an unknowing class member would be visiting the site for some non-class action related reason. Thus, defendants that offer their services or products to online shoppers are particularly suited for use of their website as notice.

³³ The difference with a "pop-under" ad is that rather than becoming the active window on the desktop like a pop-up ad, a pop-under advertisement opens behind the computer's active window to minimize interference with the user's Web surfing experience.

³⁴ However, TGC's particular ad practice may violate certain copyright and trademark protections. See Brenda Sandburg, *Pop-up Web Ads Prompt an IP Battle*, LEGAL TIMES, Aug. 12, 2002, 8, 8.

³⁵ Although this website could be the city government's or chamber of commerce's website, it is more likely to be maintained by another party. A good example of a popular website devoted to members of particular cities is <http://www.citysearch.com>.

Even Internet search engines provide the courts with a specialized ability to target absent class members. When someone inputs a query into a search engine, the search engine uses an index built from a search of metatags to display results that it considers the likely or related object of the individual's search. Webopedia defines a metatag as:

A special HTML tag that provides information about a Web page. Unlike normal HTML tags, meta tags do not affect how the page is displayed. Instead, they provide information such as who created the page, how often it is updated, what the page is about, and which keywords represent the page's content. Many search engines use this information when building their indices.³⁶

When search engines display the results, they will often include "sponsored" or "featured" links from their advertising partners in prominent places, usually at the top or right of the screen. Plaintiffs could pay a nominal fee to have the notice of publication be a sponsored or featured link directed to individuals performing a search related to the parties of the class action, the subject matter of the class action, or any of the other characteristics or shared interests of the class action or its class members. For example, an individual stricken with mesothelioma, a rare form of cancer associated with exposure to asbestos, could perform a search on "mesothelioma." When she inputs the term, the sponsored link to an asbestos class action would appear next to the rest of her search results, thereby making her aware of her potential status as a class member. No other technology or means of communication currently in general use has the same ability to target individuals who are otherwise unidentifiable.

B. The Internet provides a greater potential audience

The Internet's advantages in class actions are not limited to its diverse means of individually targeting absentee class members. One of the main enticements of

newspapers is access to a large number of individuals over a given geographic area. This is especially true for newspapers such as USA Today, The Wall Street Journal, and The New York Times, the three largest newspapers in the United States, whose circulations on any given day reach a national audience numbering into the millions. Nevertheless, the Internet has overtaken print newspapers as the standard of mass communication in legible media. As of September 30, 2001, the combined daily print circulation of the three largest newspapers was 5,122,761.³⁷ The number of unique visitors over the month of April 2002 to each of the three largest Internet sites, AOL, MSN, and Yahoo! was 256,907,000, for a daily average of 8,563, 566 visitors.³⁸ The Internet now provides a much greater audience than do traditional newspapers, and if current trends are any indication, that gap will continue to expand rapidly in the future. The use of the Internet has reached a point where it is simply erroneous to argue that newspaper notification by itself can suffice as the best notice practicable within the meaning of subdivision 23(c)(2) of the Federal Rules of Civil Procedure.

The Internet also enjoys the benefit of permitting a greater longevity of the class action notice than newspapers can afford. Rather than a one-time placement in a local or national newspaper for a day, the Internet can offer the same size notice placement or larger for weeks at a time. Advertisement space on a website is more cheaply purchased than in most newspapers, in part, because there are only nominal associated print costs.

Furthermore, if the notice is posted as an article or news release as opposed to an advertisement, it may have additional viewing duration. Many websites archive articles

³⁶ http://www.webopedia.com/TERM/M/meta_tag.html. Webopedia is a widely recognized online dictionary for Internet and computer-related terms.

³⁷ <http://www.freep.com/jobspage/links/top100.htm> (last visited Nov. 14, 2002).

³⁸ <http://www.jmm.com/xp/jmm/press/mediaMetrixTop50.xml> (last visited Nov. 19, 2002).

after they have run, allowing for retrieval of the article through a database search. For example, *Business Wire*,³⁹ an online service for distributing news releases to the financial media, permits retrieval of news releases at least seven days after they are released. In *Greebel v. FTP Software, Inc.*,⁴⁰ the District Court for the District of Massachusetts held that *Business Wire* satisfied the Private Securities Litigation Reform Act's ("PSLRA") requirement that securities class action notice "be published, in a widely circulated national business-oriented publication or wire service."⁴¹ The *Greebel* court asserted that an investor subscriber to *Business Wire* "is not subject to the happenstance of purchasing a paper on the day that notice appears, for the press release may remain accessible on the database for a substantial period of time."⁴² Common sense dictates that the longer the notice is available to be viewed, the more likely it is to be seen by absent class members to provide them with actual notice. Thus, the greater longevity of the class action notices is yet another reason why the Internet is essential to provide the best notice practicable.

C. The Internet offers interactivity not possible with traditional publication

The advantage of the Internet as a means of notice is not limited to its reach and specificity. Internet notice also has the ability of simplifying the process for class members who wish to contact the class's legal counsel. Publication of notice to the Internet can provide e-mail links that allow members of the class to communicate with the class attorneys directly and instantly. In such a situation, a class member is potentially more likely to make herself known to counsel and provide contact information

³⁹ <http://www.businesswire.com>. *Business Wire's* network, according to its website, "delivers news simultaneously and in real-time directly into the newsroom editorial systems at newspapers, wire services, television and radio programs, magazines and online news services."

⁴⁰ 939 F. Supp. 57, 62 (D. Mass. 1996).

⁴¹ 15 U.S.C.S. § 78u-4(a)(3)(A)(i) (2003).

⁴² 939 F. Supp. at 63.

for any future notices regarding the lawsuit. This ease of communication with counsel may also encourage an individual to act as representative plaintiff in the suit, perhaps a position she would not have otherwise considered. Even where an individual does not choose to contact counsel immediately through a proffered e-mail link, the e-mail can quickly and easily be saved to an electronic address book for future reference.

In addition, class action notices posted on the Internet could contain a link to a court-approved opt out form to make it easier for a class member to protect her individual interest in a separate adjudication.⁴³ Just as an individual might save the e-mail for future reference, an individual could electronically save the opt out form in case she decides to exercise her right to opt out of the class prior to the court-appointed cut-off date.

D. The Internet is comparatively inexpensive

One other advantage of the Internet that should not be overlooked is its relative cost-effectiveness. One district court has already recognized the Internet's superior ability to deliver widespread notice at a low cost.⁴⁴ Websites are often hungry for advertising money, and have comparatively inexpensive rates for advertising space in comparison to traditional newspapers and journals. In addition, search engine website operators will often charge those who wish to place an ad or notice on their site in proportion to the number of keywords with which they desire their posting to be

⁴³ Plaintiffs' attorneys in class actions are not often fond of increasing the means of communication for class members, as it usually works to the attorneys' detriment. Logically, the size of the class is generally proportional to the potential attorney's fee award and the amount of pressure on defendants to settle. Thus, the more class members who opt out of a settlement means less potential bounty for the class's "advocates." Arguably, this creates a perverse incentive for plaintiffs' attorneys to limit actual notice and means of communication for potential class members, so long as the court does not find the notice so defective as to prevent the case from going forward.

⁴⁴ See N.D. CAL. CIV. L.R. 23-2, Commentary, available at <http://securities.stanford.edu/lr.html#23-2> ("The rapid growth of Internet technology provides a valuable means whereby extensive amounts of information can be communicated at low cost to all actual or potential members of a class, as well as to other members of the public.").

associated. This practice appears to reduce the cost to those wishing to place advertisements. Furthermore, the Internet can avoid many of the costs associated with print publication, as the communication is electronic. The Internet completely avoids the high price tag of printing millions of paper copies, or, at a minimum, shifts that cost to web surfers who print the desired information from their own printers. Thus, the marginal cost of distribution of notice to an additional individual is *de minimus*. The result is that websites are able to charge less for their advertising space, because they generally have a smaller initial cost to recoup.

IV. Inadequacies of Current Internet Postings of Class Action Notices

The District Court for the Northern District of California is a leading example of how federal courts have tried to harness the power of the Internet in distributing notice to potential class members. On March 25, 1997, the Northern District of California unanimously approved Local Rule 23-2, which requires that specified public filings in class action securities fraud cases also be sent to a Designated Internet Site for posting.⁴⁵

In fact, the rule mandates much more than simple notice of the class action: it provides for the “Internet posting of such documents as pleadings, briefs, declarations or affidavits relating to class certification, designation of a lead plaintiff, expert witness reports, pretrial conference statements, filings concerning approval of a settlement, and filings related to requests for attorneys’ fees.”⁴⁶ To comply with the rule, lawyers need only send documents that have been filed with the court to the Clearinghouse, either on a

⁴⁵ Available online at <http://securities.stanford.edu/lr.html#23-2> (last visited August 4, 2003).

⁴⁶ Lambert, *supra*, n.9, at 16.

diskette or via e-mail.⁴⁷ Thus, the additional cost to litigants is negligible. As a result of the database, the general public has a great deal of access to information on securities class actions pending in the Northern District of California, as well as any other plaintiffs or courts that choose to post information to the Clearinghouse.

Despite the significant advancement in the use of the Internet that the Northern District of California's Local Rule 23-2 represents, the move nevertheless underutilizes the potential of the Internet for providing the best notice practicable for class actions maintained under subdivision 23(b)(3) of the Federal Rules of Civil Procedure. First, the rule only requires notice of securities fraud class actions, not necessarily any other class action to which subdivision 23(c)(2) applies.⁴⁸ Moreover, while the Stanford Clearinghouse may be gaining some notoriety in legal circles, it is safe to say that most individuals are not aware of its existence. The resulting limitation is that the Clearinghouse does little to provide notice to class members of the lawsuit other than those who are the most likely to discover the class action in some other way.

This shortcoming is not limited to Local Rule 23-2. A large number of the notices of class actions published on the Internet are posted on obscure sites where only legal mavens are likely to find them. Two examples are <http://www.legallink.com> and <http://www.notice.com>. Another prominent example is the website for Milberg Weiss Bershad Hynes & Lerach LLP, the plaintiff class action megafirm, which posts information for class actions where the firm acts as counsel.⁴⁹ Not only does such a

⁴⁷ *Id.*

⁴⁸ It appears that Local Rule 23-2 is limited to securities fraud class action litigation, because of Congress' intent to promote the use of "electronic or computer services" to notify class members under the PLSRA. H.R. Conf. Rep. 369, 104th Cong., 1st Sess. 34 (1995). See N.D. CAL. CIV. L.R. 23-2, Commentary, available at <http://securities.stanford.edu/lr.html#23-2>. It is not clear why the court did not apply the same approach to other types of class actions.

⁴⁹ <http://securities.milberg.com>.

plaintiff counsel's site languish in obscurity from the point of view of providing notice to absent class members, there is the added risk that the information is more concerned with the firm's self-aggrandizement than actually informing the class members of the underlying facts of the notice.⁵⁰

Even *Business Wire*, which is the online publisher of choice for most plaintiffs in securities class actions,⁵¹ does not approach the full use of the Internet in providing the best notice practicable. First, the *Business Wire* database is only accessible to those who subscribe to *Business Wire*.⁵² Second, the subscriber must target the particular company who is a defendant in the class action for a specific search.⁵³ Third, the potential member of the class must maintain a personal file on the site in which the results of the targeted searches are retained.⁵⁴ Combined, these three factors significantly reduce the likelihood that a potential class member will obtain notice directly from the site. Another weakness of *Business Wire* is that the success of posting to the site for notice purposes depends upon the receiving news medium running the release without cutting any of the notice information required under subdivision 23(c)(2).

Perhaps the most effective and efficient Internet notice practice currently employed by several federal courts is posting the notice to the defendant's website in a prominent location. This pragmatic approach makes use of a site of which class members are at least more likely to be aware and visit for reasons other than a generalized hunt for legal proceedings. This is particularly true where potential class members are already

⁵⁰ See *Ravens v. Iftikar*, 174 F.R.D. 651 (N.D. Cal. 1997).

⁵¹ See Harold Bloomenthal & Samuel Wolff, *Selection of Lead Plaintiff – Content of the Notice*, 3C SEC. & FED. CORP. LAW § 16:104 (2d ed. 2002).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

making at least occasional use of the defendant company's website for a non-lawsuit related purpose. Examples of such uses include online shopping, product and warranty information, account status and information, and online bill pay services.⁵⁵

Nonetheless, federal courts' current use of the Internet for directing notice to class members falls well short of utilizing the Internet's true ability to reach class members. The *Mangone* court correctly noted that class action notice on the Internet is not expressly required by the "best notice practicable standard" of subdivision 23(c)(2) of the Federal Rules of Civil Procedure.⁵⁶ However, the Internet's rapidly expanding audience, its superior ability to target potential class members, and the greater interactivity that it affords lead to the conclusion that where individual notice to all class members is not available, the Internet must be viewed as a virtual prerequisite for the courts to ensure that the "best notice practicable" requirement of 23(c)(2) is met and that fundamental notions of due process are satisfied.

V. The Proposed Solution

The understanding that many of the court-approved notice schemes in class actions maintained under subdivision 23(b)(3) of the Federal Rules of Civil Procedure are failing to meet the best notice requirement of subdivision 23(c)(2) places a heavy responsibility on the judiciary's shoulders to bring such notice schemes into compliance. In *Erhardt v. Prudential Group, Inc.*, the court stated, "It is the responsibility of the court in a class action to direct the 'best notice practicable' to class members . . ."⁵⁷

⁵⁵ Online bill pay services are becoming increasingly popular among companies providing ongoing or regular service to their customers. Prominent examples of industries utilizing this service are telephone companies, utilities, and credit card companies.

⁵⁶ *Mangone v. First USA Bank*, 206 F.R.D. 222, 233 (S.D. Ill. 2001).

⁵⁷ 629 F.2d 843, 846 (2d Cir. 1980).

To make this possible, federal courts should at least take immediate steps to assure that technology is properly included in the notice scheme to class members by enacting local rules that require the posting of the class action notice to the Internet. These local rules will help make explicit what is already implicit in the “best notice practicable” requirement, without having to resort to the drastic measure of changing FRCP 23(c)(2). The local rule should include all class actions maintained under 23(b)(3), not just securities class actions.⁵⁸ Since notice given in all class actions must comport with established standards of due process,⁵⁹ courts may wish to include class actions maintained under other subdivisions of Rule 23(b), as well.⁶⁰ Each court’s local rule should designate an Internet site (“Designated Internet site”), which will serve as a repository for all class actions brought within the court’s jurisdiction. Although as a practical matter such a site may not significantly improve the provision of the best notice due to relative obscurity, a Designated Internet site will help to form an online repository of current and past class actions.⁶¹

Furthermore, over time, such a Designated Internet site may become more generally familiar to the public at large. This could be accomplished because as the database grows and more potential class members learn of its existence – perhaps through direct notice of a class action or through a sponsored link on a search engine – the likelihood is increased that future notices posted on the site will be able to reach plaintiff

⁵⁸ Thus, even the District Court for the Northern District of California would need to adopt a new local rule, as their Local Rule 23-2 is limited to securities class actions. Civ. L.R. 23-2.

⁵⁹ See *Mullane v. Central Hanover Bank & Trust. Co.*, 339 U.S. 306, 316 (1950).

⁶⁰ Although class actions maintained under Rules 23(b)(1) and 23(b)(2) are not explicitly bound by the “best notice practicable standard” of Rule 23(c)(2), they are nonetheless subject to the broad concerns of due process and the fair adjudication of individual rights. Therefore, while class members are often more readily ascertainable in actions maintained under subdivisions 23(b)(1) and 23(b)(2), the Internet still may offer some advantages to address those concerns, depending on the circumstances in the individual litigation.

members of future class actions. Ideally, the federal judiciary would jointly choose the same Designated Internet site to increase the utility of the site as a one-stop class action reference source, and to increase the probability that such a site would gain some degree of notoriety among the general public. FRCP 23(c)(2) could even be amended to select a universal Designated Internet site.⁶² The Stanford Clearinghouse is one possibility, although the courts could freely choose another host site. Adopting the local rules will help assure that the Internet is being utilized at least minimally as a notice resource to class members; however, such a rule should in no way preclude the courts from incorporating additional use of the Internet where it is necessary to obtain the best notice practicable under the circumstances.

Once the courts have adopted the local rule, an analytical framework is helpful to aid courts in determining whether the plaintiffs' proposed notice scheme qualifies as the "best notice practicable under the circumstances" in accordance with FRCP 23(c)(2). First, the court must decide whether individual notice is possible in accordance with the Supreme Court's decision in *Eisen*.⁶³ Although individual notice generally refers to direct first-class mail to class members whose names and addresses are ascertainable,⁶⁴ individual notice can also have alternative forms. A common method of distributing notice in class actions where the defendant maintains a regular correspondence, such as

⁶¹ The online repository could help facilitate research regarding class actions. *See Lambert, supra* n.9 at 16.

⁶² Amending FRCP 23(c)(2) would achieve uniformity; however, the Judicial Conference may be able to reach some unanimity without resorting to the formal amendment of the Federal Rules of Civil Procedure. Moreover, technology is moving at such a rapid pace that foreseeably a new mode of communication may soon arrive necessitating further amendment to conform with the "best notice practicable" standard. Thus, a formal change to the Federal Rules may not be a desirable course of action.

⁶³ *See Eisen, supra*, n.12. *See also In re Nissan Motor Corp. Antitrust Litigation, supra*, n.10 ("Rule 23(c)(2) prescribes the type of notice to be 23(b)(3) [and] . . . expresses an 'unambiguous requirement' that 'individual notice must be provided to those class members who are identifiable through reasonable effort'") (quoting *Eisen, supra*).

⁶⁴ *See Zimmer Paper Products, Inc. v. Berger & Montague P.C.*, 758 F.2d 86, 90 (3d Cir. 1985).

class actions against credit card companies or utilities, is to place a copy of the notice in the regular monthly bill or statement. A more novel potential alternative for individual notice is via electronic mail to class members whose mailing addresses are not ascertainable, but whose e-mail addresses are.⁶⁵ For instance, online shopping websites regularly obtain individuals' e-mails to notify them of sales or other special events. Although the defendant company may not know the mailing address of individuals on their distribution lists, the company does have a quick and efficient way to deliver notice of the class action to those individuals via e-mail.

If direct individual notice is not available for all the members of the class, then constructive notice must be used. This paper proposes that the court should then determine whether the proposed notice publication scheme is sufficiently tailored to the specific class action. The Internet portion of any notice scheme should receive greater scrutiny, because it is in this area that the greatest need for improvement rests. The question the court must ask is whether the Internet notice could reasonably be better tailored to the class action before the court. To make this determination, the court should consider the nature of the class action, as well as the probable characteristics and interests of the class members.⁶⁶ This analysis may often point to certain types of websites that are far more likely to receive traffic from class members and therefore more likely for the class members to see the notice. In business-to-business class action litigation, trade association websites may be very effective. In geographically limited class actions such

⁶⁵ For a more detailed discussion of notice through electronic mail ("e-mail"), see note, Jennifer Mingus, "E-mail: A Constitutional (And Economical) Method of Transmitting Class Action Notice," 47 Clev. St. L. Rev. 87 (1999).

⁶⁶ See Manual for Complex Litigation, *supra* n.23 (citing similar criteria to consider in newspaper and journal publication of notice).

as some environmental class actions, geographic-based websites may offer the best choice.

As mentioned earlier, websites touting the events of particular municipalities may be very useful in class actions related to those cities.⁶⁷ For instance, Citysearch informs visitors to its site of events and activities in the city of the visitor's choice. A geographically based class action notice could appear on the webpage of the related city in similar fashion to the sponsored links on search engines. Local newspapers' online websites may also be a positive supplement to the notice scheme, particularly where the websites are cost-free to users. Furthermore, all federal courts should institute the practice that some courts have already implemented of posting the class notice to the defendant's website, where one exists. The notice or a related link should be placed conspicuously on the site, most likely on the defendant's home page.⁶⁸

For securities class actions, Internet notice might best be posted on financial news and analysis websites like MSNBC,⁶⁹ Fool,⁷⁰ and Datek Online.⁷¹ Even more generalized websites that have money or financial related sections on their site may provide the best notice. Some examples of such sites include AOL,⁷² MSN,⁷³ Excite,⁷⁴ Yahoo!,⁷⁵ and

⁶⁷ Understandably, a municipality or its Chamber of Commerce, eager to promote tourism and public relations through a website, would be reticent to post notices of class actions to the site. It is not contemplated that such website operators would or should be forced to include the notices, unless they are a party to the action.

⁶⁸ While this particular form of notice is clearly unpopular with defendants, it is routinely done when Internet notice is used. *See, e.g.,* Rinaldi v. Iomega Corp., Civ. Action No. 98C-09-064-RRC (posting a link to the class action settlement on the bottom of defendant's homepage), *available at* <http://www.iomega.com/na/landing.jsp>.

⁶⁹ <http://www.msnbc.com>.

⁷⁰ <http://www.fool.com>.

⁷¹ <http://www.datek.com>.

⁷² <http://www.aol.com>.

⁷³ <http://www.msn.com>.

⁷⁴ <http://www.excite.com>.

⁷⁵ <http://www.yahoo.com>.

Iwon.⁷⁶ These generalized sites might be more attractive for the same reason that newspapers with the largest circulations were the media of choice for many class action plaintiffs as the means of publishing notice: they often attract the highest number of visitors, thereby increasing the likelihood that class members will see the notice.

However, courts should be aware that some plaintiffs' counsel might attempt to misuse class action notice as a tool of extortion.⁷⁷ For instance, plaintiffs could pay websites for the notice or a link to it to appear whenever the defendant's or a competitor's stock quote is requested. The danger is that the individual, whether a class member or not, may be overly sensitive to the information when received in this context. The heightened sensitivity may have a particularly harsh deleterious effect on potential investors and/or customers of the company. This additional impact may be so undesirable to the defendant company in question that it feels forced to settle the class action, whether the lawsuit has merit or not. While a defendant company may be eager to settle a class action, anyway, because of the pressures that already exist in the class action context, the court should nevertheless be aware of plaintiff's counsel's potential misuse of the notice.

Where a court is faced with a class action with very little cohesion, but where the class is still maintainable under subdivision 23(b)(3), posting the notice on Internet sites with a large number of visitors may be the best notice practicable under the circumstances. Here, the websites would be used in much the same way that newspapers

⁷⁶ <http://www.iwon.com>.

⁷⁷ *See Abdallah v. Coca-Cola Co.*, 186 F.R.D. 672, 678 (N.D. Ga. 1999) (purging complaint, exhibits, and references to counsel from a website, given the danger that employees in a class discrimination action would use widespread publication of their claims on the website to coerce defendants into settlement, and that the website would cause serious and irreparable harm to employer's reputation and its relationship with its employees).

have been traditionally employed to provide notice, but with the additional advantages of a greater potential audience, greater longevity of the notice, and the potential for greater interactivity in the notice itself.

Courts should also consider the use of search engines like Google,⁷⁸ Dogpile,⁷⁹ Alta Vista,⁸⁰ and Lycos.⁸¹ Sponsoring a link to the notice on one or more of these search engines can allow the courts to harness the Internet's remarkable ability to "market" to specific individuals. When potential class members input key words related to the class action, a link to the notice would appear next to the search results. Take, for example, a large consumer class action based on a defective DVD player made by ABC Co. ABC advertises the product as the most macho, inexpensive unit on the market to entice young men to purchase it. With this information, a sponsored link to the class action notice could appear on the search engine results of anyone performing a search about DVD players, ABC Co., or action movie DVDs. As a result, notice of the pending class action can be tailored directly to the interests of the class members and the question of law or fact common to the class members.

The use of online services to which individuals voluntarily submit personal information to receive information catering to their interests could also be of great advantage for the posting of the class action notice depending on the circumstances. The Gator program discussed herein is but one example of such a service. Another service that is particularly useful in the class action context is Class Action America.⁸²

⁷⁸ <http://www.google.com>.

⁷⁹ <http://www.dogpile.com>.

⁸⁰ <http://www.altavista.com>.

⁸¹ <http://www.lycos.com>.

⁸² <http://www.classactionamerica.com>.

Subscribers to this free service⁸³ submit their e-mails to the website, and in exchange, receive a listing via e-mail of current and pending class action lawsuits, divided by case categories.⁸⁴ The listing includes the name of the case, the case's current procedural disposition, the amount at issue, and a brief summary of the nature of the case. The title of each of the cases contains a link to obtain additional information about the class action.

On its face, the site appears to suffer from the aforementioned problem that it will only attract those individuals already inclined to check for class actions. However, Class Action America offers two distinct advantages to other websites where class action notice is posted. First, updates on the status of class actions are sent via e-mail to individuals who subscribe to the free service, so that individuals do not have to take additional affirmative steps to learn of the class action. Furthermore, the service provides information about product recalls in the regular e-mail it sends, along with the status of current class actions. Therefore, individuals who are interested in product recall information, but may not otherwise be inclined to seek out class action information will nonetheless receive class action notices in their e-mail on a regular basis. As a result, this or a similar service could be potentially helpful in making possible the "best notice practicable."

All of the above considerations are relevant to the judge's determination as to whether the proposed notice scheme is the best notice practicable under the circumstances. Plaintiffs should be expected to provide the court with the rationale for the choice of particular websites and the exclusion and inclusion of other uses of the Internet. The information presented should include a rough estimate of the class

⁸³ Users of the service may also "upgrade" their membership by paying a fee to obtain additional benefits, such as greater access to information regarding the class action suits.

members who are likely to visit each site. It is not anticipated that plaintiffs' attorneys will now need to hire an expert to make these determinations, although they may disagree. Much of the information the court will require is freely available on the Internet or obtainable from the defendant. Even if the situation calls for an expert, the relative economy the Internet affords should significantly offset the additional costs incurred by the retention of an expert. Moreover, in light of *Eisen*, it appears that cost is of relatively little value to the best notice practicable analysis, unless such a cost is outrageous.⁸⁵

After undergoing the above analysis, if the court believes the proposed Internet notice publication scheme could be better tailored to the specific class action, the court has two options: (1) reject the notice proposal and require the plaintiffs to improve the scheme, or (2) use the court's discretion to improve the notice scheme itself. As courts take these strides to assure that each class action maintained under subdivision 23(b)(3) is implementing the best notice practicable under the circumstances, plaintiffs' counsel are likely to quickly improve their original notice proposals to comport with the expectations of the court.

VI. Conclusion

The historical purpose of class actions is "to alleviate the burden on the court and its facilities in cases where a claim [is] common to a large number of people,"⁸⁶ but not at the complete expense of due process. The security of due process is an ongoing concern, especially those maintained under subdivision 23(b)(3) of the Federal Rules of Civil

⁸⁴ The service also provides notice of product recalls.

⁸⁵ See *Eisen*, *supra*, n.12.

⁸⁶ *Greenfield v. Villager Indus.*, 483 F.2d 824, 831 (3d Cir. 1973).

Procedure, where class members are often absent, but may nonetheless be bound by the court's judgment. While technology and the ability to send notice in better ways moves forward, many courts continue to look backward and adhere to conceptions of notice that are technologically outdated. Some courts have taken notice,⁸⁷ but are nonetheless in need of a standard to ensure that the stringent requirement of subdivision 23(c)(2) that the best notice practicable under the circumstances be given is met, and therefore the underlying principles of due process are satisfied. The framework proposed herein will help to assure that individual class member's rights are better protected and that the notice requirements of FRCP 23(c)(2) are followed both in spirit and in form.

It is also critical to recognize in our rapidly advancing society that there may soon be other technology that can facilitate the provision of notice to absent class members. When the time comes that a future technology is sufficiently ripe to allow the courts "under the circumstances" to harness its superior advancements for the improvement of the best notice practicable, the judiciary must stand ready to respond. Such is the challenge faced by our courts in the twenty-first century.

⁸⁷ "The Internet is the newest medium in which notices can be published, and it certainly provides an outlet that many people can access." *Greenberg v. Bear Stearns & Co.*, 80 F.Supp. 2d 65, 68 (E.D.N.Y. 2000); *In re Network Associates, Inc. Securities Litigation*, 76 F.Supp. 2d 1017, 1052 (N.D. Cal. 1999); *In re Synthroid Marketing Litigation*, No. 97 C 6017.