

MAKING CLASS ACTIONS WORK: THE UNTAPPED POTENTIAL OF THE INTERNET

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INTRODUCTION

Over twenty years ago, the Supreme Court recognized that in class action litigation, absent class members “must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.”¹ Although the absent class members’ rights to receive notice and an opportunity to opt out are of vital importance, the ability to be heard and participate in the litigation are also important.²

Despite the benefits of participation by absent class members, class action case law and commentary have focused more on maximizing efficiency than on protecting an individual class member’s ability to participate in the litigation.³ Indeed, the Supreme Court itself has recognized that, within existing class action practice, absent class members normally do nothing.⁴

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1. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

2. See, e.g., Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 *TEX. L. REV.* 571, 630 (1997).

3. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing JACK WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995)) (discussing “the efficient use of court resources and the conservation of funds” in aggregate litigation); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 *CORNELL L. REV.* 837 (1995).

4. *Shutts*, 472 U.S. at 810 (“[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided

Instead of fostering true participation by absent class members, courts have accepted alternatives, finding that the rights of absent class members to receive notice and to opt out and the promise of adequate class counsel are sufficient surrogates for actual participation.⁵ In the past, these substitute mechanisms for true involvement, although inadequate, may have been understandable because of the logistical difficulties in permitting absent class members to participate in the same manner as litigants in traditional bilateral litigation.⁶

Class action litigation inherently focuses on the claims of large numbers of people. That concept is captured explicitly in Federal Rule of Civil Procedure 23(a), which requires, as a prerequisite to class certification, that “the class is so numerous that joinder of all members is impracticable.”⁷ And, although “impracticable” does not necessarily require large numbers,⁸ the requirement is usually fulfilled *because* of the large number of individuals involved.⁹

Adjudicating the claims of large numbers of absent class members presents difficulties that do not exist in traditional bilateral litigation. In bilateral litigation, the parties have direct contact with their counsel and can obtain from them necessary information about the case and the litigation process in general. By contrast, class counsel have historically been unable to keep absent class members abreast of the progress of a specific class action case or to involve absent class members in litigation in any meaningful manner.¹⁰ Until recently, these difficulties have precluded meaningful involvement by most absent class members, to the detriment of the entire class action process.

for his protection.”).

5. See Geoffrey P. Miller, *Rethinking Certification and Notice in Opt-Out Class Actions*, 74 UMKC L. REV. 637, 641 (2006) (“[A]n interest in participation, taken alone, is not a significant due process concern when absent class members receive adequate representation.”).

6. *But see* Woolley, *supra* note 2, at 630 (“Adequate representation simply does not adequately protect the rights of class members who wish to actively participate in the litigation of their claims. We need not ignore this reality for ‘practical’ reasons.”).

7. FED. R. CIV. P. 23(a).

8. See ROBERT H. KLONOFF, *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION IN A NUTSHELL* 33-38 (3d ed. 2007); ROBERT H. KLONOFF ET AL., *CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS* 69-83 (2d ed. 2006).

9. See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (noting the use of class action lawsuits to resolve claims too numerous to be resolved one-by-one); *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1222, 1224 (9th Cir. 2007) (affirming the certification of a class estimated to include more than 1.5 million women).

10. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 (Preliminary Draft No. 5, 2008).

The internet has become entrenched in the American way of life and provides a mechanism through which absent class members' right to participate meaningfully in class action litigation can be realized. Since September 2001, over half of the households in the United States have maintained internet access.¹¹ Even this enormous number, however, represents only part of the picture, because it fails to account for individuals who have access to the internet at work or through other channels, such as public libraries. Taking into account all means of accessing the internet, as of March 31, 2007, the percentage of Americans over the age of twelve with internet access is between 70% and 78% of the population.¹²

People not only have access to the internet; they use it. The average American internet user accesses the web ten times and visits approximately 24 to 26 different domains per week.¹³ Over the course of a week, the average American internet user spends more than ten hours on the internet,¹⁴ and this usage is on the rise. For instance, a 2007 study by the Newspaper Association of America indicates that 62.8 million people per month visited online newspaper websites in the fourth quarter of 2007.¹⁵ Comparing 2006 to 2005, the average unique audience for newspaper websites increased 22%.¹⁶ Increasingly, people are regularly visiting portal websites and websites with extensive search capabilities, such as MSN.com, Yahoo, and Google, to guide

11. U.S. DEP'T OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 4 (2004), available at <https://www.esa.doc.gov/Reports/NationOnlineBroadband04.htm>.

12. America Internet Usage and Population Statistics, www.internetworldstats.com/stats2.htm (last visited Sept. 12, 2008) (citing Nielsen//NetRatings and International Telecommunication Union). In its 2007 Digital Future Report, the USC-Annenberg Center for the Digital Future reports that 77.6% of Americans over the age of twelve go online. Center for the Digital Future, USC-Annenberg School for Communication, Highlights: 2007 USC-Annenberg Digital Future Project 4 (2007), <http://www.digitalcenter.org/pdf/2007-Digital-Future-Report-Press-Release-112906.pdf> (last visited Sept. 12, 2008) [hereinafter USC-Annenberg Digital Future Report].

13. Nielsen//NetRatings, United States: Average Web Usage, http://www.nielsen-netratings.com/resources.jsp?section=pr_netv&nav=1 (last visited Sept. 12, 2008) (reporting twenty-six website domain visits per week for the week ending March 10, 2008); see also THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, NEWS CONSUMPTION AND BELIEVABILITY STUDY 8 (2006), available at <http://people-press.org/reports/pdf/282.pdf> (reporting that the average internet user in the United States logs on to the internet ten times and visits twenty-six websites per week).

14. *Id.* (reporting ten hours, four minutes per week for the week ending Mar. 10, 2008).

15. Press Release, Newspaper Association of America, Online Newspaper Viewership Reaches Record in 2007 (Jan. 24, 2008), available at <http://www.naa.org/PressCenter/SearchPressReleases/2008/Online-Newspaper-Viewership.aspx>.

16. *Id.*

their internet browsing.¹⁷ The internet has clearly become a vital “communication, information, entertainment, and transaction tool.”¹⁸

This Article focuses on the capacity of the internet to foster true participation by absent class members. Part I of this Article examines how the internet is currently used in class action litigation. As the Article explains, although the internet has been used in some aspects of class action practice, that use has been limited and sporadic. Part II examines the full potential of the internet to increase absent class members’ participation. It offers concrete proposals for integrating the internet into virtually every aspect of the class action process.

I. THE INTERNET TODAY

The internet’s ability to streamline and enhance class action litigation has not gone unnoticed. Courts and practitioners have begun to rely on the internet in the class action process. This section provides an overview of the current uses of the internet in class action litigation.¹⁹

A. *Providing Individual Notice to Class Members*

Providing notice to absent class members of the pendency of litigation and their membership in the class is the first step in involving these individuals.²⁰ Indeed, “[n]otice is a critical part of class action practice.”²¹ Courts and commentators have long struggled with the difficulties associated with providing “the best notice that is practicable under the circumstances,

17. THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *supra* note 13, at 15.

18. U.S. DEP’T OF COMMERCE, *supra* note 11, at 3. *Time Magazine* named “You” its 2006 Person of the Year based on Americans’ increased and dramatic use of the internet. Lev Grossman, *TIME’s Person of the Year: You*, TIME, Dec. 25, 2006, at 38, available at 2006 WLNR 21920577 (highlighting that the internet is “a tool for bringing together the small contributions of millions of people and making them matter”).

19. Classifying websites by content or purpose poses difficulties. Among other things, it is not always clear whom the website targets or who sponsors the website. What appear to be public domain websites are often the product of interested legal, consulting, or marketing firms. *See, e.g.*, Class Action Litigation Information, <http://www.classactionlitigation.com> (last visited Sept. 12, 2008) (a website “to provide a useful legal research source for attorneys” and “to assist the public in understanding class action litigation, government, and the legal system,” operated by Timothy E. Eble, a class action lawyer). Although many of the websites discussed in this section may perform multiple functions, each is discussed under the heading that it best represents.

20. *See* FED. R. CIV. P. 23(c), (d)(2), (e)(1)(B), and (h)(1).

21. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.31 (2004).

including individual notice to all members who can be identified through reasonable effort.”²²

A major source of difficulty is that people move—across town, across the country, and to a lesser extent, throughout the world. According to the most recent report by the U.S. Census Bureau, roughly 14% of the entire United States population moved during 2004.²³ And they often move long distances. Although 57% of all movers remained in the same county as their previous residence,²⁴ nearly 20% of movers left their previous state of residence,²⁵ and 4.6% of movers went abroad.²⁶ In terms of distance, 24% of intercounty movers relocated 50 to 199 miles, 19.7% relocated 200 to 499 miles, and 25.3% of intercounty movers relocated to a distance 500 or more miles from their previous residence.²⁷

Because the Census Bureau appears capable of tracking geographic mobility, it may create a false sense of “ease” in tracking individuals as they move. The truth is that it is very difficult to track the locations of individuals as they move. As one commentator recognizes, the traditional means for updating an individual’s address after a move, such as accessing the National Change of Address database and relying on credit bureau records, are limited.²⁸ In some class action lawsuits, current correct addresses may be found for only 50% of identifiable class members.²⁹

Recognizing the difficulties in providing individual notice through direct mail, publication notice has become an entrenched component of class action notification programs.³⁰ But people do not read the newspaper as often or as

22. FED. R. CIV. P. 23(c)(2); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); see also Todd B. Hilsee et al., *The “Desire-to-Inform” Requirement for Effective Class Action Notice is Highlighted by Katrina*, 80 TUL. L. REV. 1771 (2006); Jordan S. Ginsberg, Comment, *Class Action Notice: The Internet’s Time Has Come*, 2003 U. CHI. LEGAL F. 739, 762 (2003).

23. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2005 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, tbl. 30 (2005), available at <http://www.census.gov/population/www/socdemo/migrate/cps2005.html>. Because of the manner in which this statistic is reported, the number may actually be much higher.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See Hilsee et al., *supra* note 22, at 1774.

29. *Id.* at 1791.

30. See, e.g., *DeJulius v. New Eng. Health Care Employees Pension Fund*, 429 F.3d 935, 947 (10th Cir. 2005) (holding that a notice program that included newspaper publication satisfied the notice requirement); *Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 57 (1st Cir. 2004) (holding that publication notice in thirty-three newspapers satisfied the notice requirement as to a class member who did not receive direct mail notice).

diligently as they once did.³¹ The total circulation of all newspapers in the United States amounts to fifty-one million copies daily.³² According to Journalism.org's Annual Report on American Journalism, daily newspaper circulation fell roughly 2.8% during 2006, with Sunday circulation down 3.4%.³³ These losses are more significant than they appear because daily circulation had already fallen 12% (7.7 million copies) and Sunday circulation had fallen 8% (4.9 million copies) between 1990 and 2004.³⁴ Industry experts project that in a best-case-scenario, the declines will stabilize at approximately 1% annually within the next couple of years.³⁵ "Readership" for all newspapers in the United States, which takes into account adults in the same household who share a single copy of the paper, "pass along" copies, and copies in public places read by several people, currently stands at 124 million.³⁶ Although the figure itself is quite large, it too is shrinking.³⁷

Television's ability to notify absent class members is also suffering. Television notice campaigns usually come with an exorbitant price tag.³⁸ These costs have historically posed the largest barrier to television-based notice programs.³⁹ Advances in technology are also reducing television viewership. For instance, over 35% of internet users say they watch less

31. The decline of newspaper readership exacerbates the long-recognized problem that absent class members are not likely to encounter a legal notice published in a newspaper, even if they read the paper. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) ("Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.").

32. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2007: NEWSPAPERS, INTRO (2007), http://www.stateofthenewsmedia.org/2007/narrative_newspapers_intro.asp?cat=1&media=3 (last visited Sept. 12, 2008) [hereinafter THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2007].

33. *Id.*

34. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2006, Overview, Audience (2006), http://www.stateofthenewsmedia.org/2006/narrative_overview_audience.asp?cat=4&media=1 (last visited Sept. 12, 2008).

35. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2006, Overview, http://www.stateofthenewsmedia.org/2006/narrative_newspapers_audience.asp.

36. THE PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2007, *supra* note 32.

37. In the first half of 2006, *USA Today's* readership fell 3% and the *New York Times's* readership fell 5.8%. *Newspaper Website Readership Up 31%*, USA TODAY, Oct. 4, 2006, available at http://www.usatoday.com/tech/news/2006-10-04-news-web-up_x.htm. Although the *Wall Street Journal* has maintained its readership, it includes in that number individuals who access the *Wall Street Journal* online. *Id.*

38. *See Ginsberg, supra* note 22, at 759 (highlighting that a thirty-second prime-time commercial cost \$150,000 to air and another \$343,000 to produce in 1999).

39. *Id.* at 760-61.

television since they began to use the internet.⁴⁰ Also, with the advent of digital video recorders (DVRs), television may face a new difficulty: people may not watch commercials. The arrival of DVRs has provoked Nielsen Media Research, the main provider of national television-ratings data in the United States, to try to measure the number of people who actually view commercials.⁴¹ Nielsen's new commercial ratings, once released, are expected to reveal a drop in commercial viewership.⁴² In any event, courts have to consider the possibility that television-based notice programs, although still expensive, do not have unlimited ability to reach absent class members.

As the traditional methods of providing notice have become increasingly ineffective and disfavored, internet notice programs are on the rise. Commentators and practitioners have recognized the internet's ability to play a prominent role in class action notice programs.⁴³ The *Manual for Complex Litigation* best summarizes the power of the internet in class action notice programs:

Posting notices on dedicated internet sites, likely to be visited by class members and linked to more detailed certification information, is a useful supplement to individual notice, might be provided at a relatively low cost, and will become increasingly useful as the percentage of the population that regularly relies on the internet for information increases.⁴⁴

Over time, courts have come to accept both email and internet notice campaigns as acceptable means of giving notice in class actions.⁴⁵ Indeed,

40. See USC-Annenberg Digital Future Report, *supra* note 12, at 2.

41. See Brian Steinberg, *Nielsen Delays Plan to Release Viewership Ratings for TV Ads*, WALL ST. J., Nov. 4, 2006, at A2 ("While Nielsen now measures how many people watch TV programs—a rating used to set TV ad prices—it hasn't previously released formal ratings showing how audience levels change during a commercial break.").

42. *Id.*

43. See, e.g., Brian Walters, "Best Notice Practicable" in the *Twenty-First Century*, 2003 UCLA J.L. & TECH. 4; Ginsberg, *supra* note 22, at 760; Jeanne Finnegan, *The Web Offers Near, Real-Time Cost-Efficient Notice*, 22 AM. BANKR. INST. L.J. 30 (2003); Katherine Kinsella et al., *How Viable is the Internet for Class Action Notice?*, <http://www.kinsella-novak.com/PDFs/KNCInternetArticle.pdf> (last visited Sept. 12, 2008).

44. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.311 (2004).

45. See, e.g., *Nichols v. SmithKline Beecham Corp.*, No. 00-6222, 2005 U.S. Dist. LEXIS 7061, at *29-35 (E.D. Pa. Apr. 22, 2005) (holding that internet notice will be deemed adequate so long as it is combined with other forms of notice such as mailers); *House v. GlaxoSmithKline PLC*, No. 2:02CV442, 2005 U.S. Dist. LEXIS 33711, at *8 (E.D. Va. Jan. 10, 2005) (holding that hosting a website dedicated to the pending litigation and providing other forms of traditional notice to class members fulfilled the notice requirement found in Rule 23); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 448-49 (S.D.N.Y. 2004) (holding that internet notice combined with other forms of notice, including mailed

courts are beginning to embrace the belief that internet notice may be preferable to traditional methods of publication notice.⁴⁶

Internet notice may be implemented in various ways. Banners may be placed on targeted websites.⁴⁷ Notices themselves may be published on websites class members are likely to visit.⁴⁸ Notices may also be emailed to class members directly.⁴⁹ As with traditional notice programs, a combination of methods may be used. Many companies specialize in tailoring notice programs, including internet notification, to specific class actions.⁵⁰ Regardless of the individual delivery mechanisms, the internet has quickly become a mainstay in class action notice programs. As a result, more class members may become aware of the class actions to which they are parties and, ultimately, can participate more directly in those actions.

B. Publicizing Pending Class Action Lawsuits

In addition to internet notice programs, a growing number of websites provide information and links about specific class action lawsuits. On one level, these websites serve the same purpose as the notice programs described

individual notice packets, satisfied Rule 23).

46. *See, e.g., Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (“[I]n this age of electronic communications, newspaper notice alone is not always an adequate alternative to individual notice. . . . The World Wide Web is an increasingly important method of communication, and . . . an increasingly important substitute for newspapers.” (citing Walters, *supra* note 43)).

47. *See, e.g., In re Briscoe*, 448 F.3d 201, 207 (3d Cir. 2006) (affirming the trial court’s decision that the notice, including “banner advertisements on the [i]nternet directing class members to the official settlement website” proved to be “highly successful”).

48. *See, e.g., In re Stock Exchs. Options Trading Antitrust Litig.*, No. M-21-79(RCC), 2006 U.S. Dist. LEXIS 87825, at *23-24 (S.D.N.Y. Dec. 4, 2006) (holding that a notice program that included posting the “Summary Notice of Proposed Settlements and Hearing Thereon” on an Internet Business Wire website proved reasonable and adequate).

49. *See, e.g., Lucas v. Kmart Corp.*, No. 99-CV-01923-JLK, 2006 U.S. Dist. LEXIS 51439, at *19 (D. Colo. July 27, 2006) (holding that including email notice in a notice program went “above and beyond that required by law”).

50. *See, e.g., Hilsoft Notifications*, <http://www.hilsoft.com/the-media-experts.html> (last visited Sept. 12, 2008); Epiq, <http://www.epiqsystems.com/solutions.php?ServiceID=19> (last visited Sept. 12, 2008) (“We are industry leaders in full-service class action notice and bankruptcy notice plan design, implementation and analysis. Epiq has developed more than 200 notification programs and placed more than \$225 million in media notices.”); Garden City Group, <http://www.gardencitygroup.com/about/informationtechnologies.html> (last visited Sept. 12, 2008) (“The cornerstone of our success lies in our proprietary software. Not only do our claims processing systems virtually eliminate paper handling, but they also allow for immediate access to case details at any level.”); The Notice Company, <http://www.notice.com> (last visited Sept. 12, 2008) (“We also provide internet consulting, web design and hosting services.”); Class Action Administration, Inc., <http://www.classactionadmin.com/services/claim.htm> (last visited Sept. 12, 2008).

above: to alert class members about class actions that will determine their rights and to involve those class members in either litigation or a settlement. On another level, these websites are educational portals that provide information on everything from the most basic rules to the most complex issues in class action litigation. Viewed on a continuum, these websites span from “non-soliciting/content-neutral” to “non-soliciting/content-motivated” to “soliciting/content-motivated.”

1. *The “Non-Soliciting/Content-Neutral” Websites*

“Non-soliciting/content-neutral” websites are independent. They lack any specific ties to plaintiffs’ firms, defense firms, referral services, or any other “content-motivated” entity. They provide information about class action lawsuits as an end in and of itself.⁵¹ They serve as informational hubs through which absent class members and other individuals can gather information without concern for bias or distortion. Examples of these websites are described below.

FindLaw.com is operated by the West Group, and it purports to be “the highest-trafficked legal Web site, providing the most comprehensive set of legal resources on the internet for lawyers, businesses, students and individuals.”⁵² Its “Class Action and Mass Tort Center”⁵³ provides overviews, news, “Frequently Asked Questions” sections, and additional links for products and services relating to class actions.⁵⁴ The information is organized by product and covers everything from Accutane to Zyprexa.⁵⁵ The website also provides recall announcements from the Consumer Product Safety Commission and the Food and Drug Administration.⁵⁶ Given the amount of time internet users spend searching for product information⁵⁷ and FindLaw’s dominant web presence, the website has a fair likelihood of informing consumers—potential class members—of pending litigation.

51. This is not to suggest that the companies that sponsor these websites are not motivated by the financial gains derived from providing this information. These companies profit, however, by providing information itself—not from whether website visitors pursue their claims after obtaining the information supplied.

52. FindLaw, About FindLaw, http://company.findlaw.com/company_info.html (last visited Sept. 12, 2008).

53. FindLaw Class Action Center, <http://classaction.findlaw.com> (last visited Sept. 12, 2008).

54. See, e.g., FindLaw For the Public, <http://injury.findlaw.com/lexapro> (last visited Sept. 12, 2008).

55. FindLaw Class Action Center, *supra* note 53.

56. *Id.*

57. See *supra* notes 11-18 and accompanying text.

Stanford Law School's Securities Class Action Clearinghouse (the Clearinghouse) is a website dedicated to providing detailed information on "the prosecution, defense, and settlement of federal class action securities fraud litigation."⁵⁸ The Clearinghouse serves as the "Designated Internet Site" for securities class actions brought within the Northern District of California.⁵⁹ The Clearinghouse maintains the most comprehensive information on securities fraud class actions on the internet. It indexes the 2,735 issuers that have been named in federal class action securities fraud lawsuits since passage of the Private Securities Litigation Reform Act of 1995⁶⁰ and maintains copies of more than 26,000 complaints, briefs, and other litigation-related materials filed in these cases.⁶¹

The "Class Action Lawsuits" website is designed to give the average non-lawyer an idea of what a class action lawsuit entails and how it operates.⁶² The website has links to information on lawsuits and filings in various insurance, technology, tobacco, and securities class actions.⁶³ Additionally, the website provides a "contacts" section designed to put class members in touch with individuals who may have information about their lawsuit or with attorneys who may be able to handle a lawsuit.⁶⁴ Along these same lines, FreeAdvice.com⁶⁵ offers information and "as is" advice on many legal topics and issues, including a section dedicated to litigation, and specifically to class actions.⁶⁶ It provides general information, information about product liability class actions, and California-specific information.⁶⁷

"Class Action Litigation Information," unlike the previously described websites, is geared to more legally sophisticated internet users.⁶⁸ It purports to provide a useful legal research source and contains links to, among other

58. Stanford Securities Class Action Clearinghouse, <http://securities.stanford.edu> (last visited Sept. 12, 2008).

59. *See id.*

60. *Id.*

61. *Id.*

62. *See* Class Action Lawsuits, <http://www.web-access.net/~aclark/frames45.htm> (last visited Sept. 12, 2008).

63. *Id.*

64. Class Action Lawsuits, Legal Contacts for Class Actions, <http://www.web-access.net/~aclark/contacts.htm> (last visited Sept. 12, 2008).

65. FreeAdvice, <http://www.freeadvice.com> (last visited Sept. 12, 2008).

66. *See* FreeAdvice, Litigation—Class Actions Center, http://law.freeadvice.com/litigation/class_actions (last visited Sept. 12, 2008).

67. *See id.*

68. *See* Class Action Litigation Information, <http://www.classactionlitigation.com> (last visited Sept. 12, 2008).

things, the Class Action Fairness Act of 2005, Rule 23 of the Federal Rules of Civil Procedure, the *Manual for Complex Litigation*, and other legal reference tools.⁶⁹ The site also contains brief summaries of various class actions.⁷⁰

2. The “Non-Soliciting/Content-Motivated” Websites

Like the websites discussed above, “non-soliciting/content-motivated” websites provide information as an end in and of itself. However, unlike the websites discussed above, the information provided is not neutral. These websites, like those discussed below, are clearly agenda driven. But instead of selling legal services, these websites “sell” ideas.

As we discuss “non-soliciting/content-motivated” websites, we are primarily discussing legal blogs, or “blawgs.” Blogs are rapidly growing in popularity, and no discussion of the internet is now complete without acknowledging them.⁷¹ Both legal scholars and practitioners host legal blogs. Sites hosted by scholars include the Mass Tort Litigation Blog,⁷² Point of Law,⁷³ and Products Liability Prof Blog.⁷⁴ Sites hosted by practitioners include the Drug and Device Law Blog,⁷⁵ OverReg’d,⁷⁶ Class Action Fairness Act Blog,⁷⁷ and Class Action Defense Blog.⁷⁸ These websites serve as regularly updated internet journals and provide commentary on a wide variety of topics.

69. *Id.*

70. *See id.*

71. The number of internet users that maintain blogs has doubled in the last three years. USC-Annenberg Digital Future Report, *supra* note 12, at 2. A leader in blog tracking, Technorati was tracking over 82 million blogs as of May 2007. Technorati: About Us, <http://www.technorati.com/about> (last visited Sept. 12, 2008). There are also a number of websites dedicated to tracking legal blogs. *See, e.g.*, http://uslaw.com/law_blogs (tracking over 1,000 legal blogs); <http://abajournal.com/blawgs> (another website tracking legal blogs).

72. Mass Tort Litigation Blog, http://lawprofessors.typepad.com/mass_tort_litigation (last visited Sept. 12, 2008).

73. PointofLaw.com, <http://www.pointoflaw.com> (last visited Sept. 12, 2008).

74. Products Liability Prof Blog, http://lawprofessors.typepad.com/products_liability (last visited Sept. 12, 2008). Both the Products Liability Prof Blog and the Mass Tort Litigation Blog fall within the Law Professors Blog Network. *See* Welcome to Law Professor Blogs, <http://www.lawprofessorblogs.com> (last visited Sept. 12, 2008).

75. Drug and Device Law, <http://druganddevicelaw.blogspot.com> (last visited Sept. 12, 2008).

76. Over Reg’d Blog, <http://overregd.lindquist.com> (last visited Sept. 12, 2008).

77. CAFA Law Blog, <http://www.cafalawblog.com> (last visited Sept. 12, 2008).

78. Class Action Defense Blog, <http://classactiondefense.jmbm.com> (last visited Sept. 12, 2008).

The blogs we are most concerned with are those that provide analysis of the issues involved in class action and other complex litigation. For example, the CAFA Law Blog, by its own account, “is the leading online resource for information, case analyses, and insights regarding the Class Action Fairness Act of 2005.”⁷⁹ Its interactive website provides information on the development of class action litigation in the post-CAFA era.⁸⁰ The Class Action Defense Blog is intended to be a resource for class action defense lawyers and posts summaries of pending class actions with defense-oriented analysis as well as other information on the development of class action litigation.⁸¹

3. *The “Soliciting/Content-Motivated” Websites*

“Soliciting/content-motivated” websites give potential plaintiffs the opportunity to become involved in class action lawsuits. These websites do not provide information about class actions as an end in and of itself. Instead, these websites solicit clients by providing information on pending or possible class action lawsuits. These sites are often managed by plaintiffs’ firms, interest groups, third-party referral service companies, or other economically motivated parties.⁸² Because these groups are attempting to attract clients, their websites are driven by the motive to notify and involve potential class members.⁸³ Representative examples of these motivated websites are described below.

The website of Milberg LLP, a prominent plaintiffs’ firm, has a “Case Information” section that allows internet users to “Report a Fraud,” or “join [Milberg’s] E-Mail List.”⁸⁴ The firm also dedicates webpages to many of its

79. Class Action Fairness Act Blog: About Us, <http://www.cafalawblog.com/cat-about-us.html> (last visited Sept. 12, 2008).

80. *See id.*

81. *See id.*

82. Defense firms also devote webpages to their class action practices. *See, e.g.*, Jones Day, Services, Class Action Litigation, Overview, http://www.jonesday.com/class_action_litigation (last visited Sept. 12, 2008); Latham & Watkins, LLP., Class Actions and Multi-District Litigation, <http://www.lw.com/Practices.aspx?page=practicedetail&practice=212> (last visited Sept. 12, 2008); Sidley Austin LLP, Class Action and Multidistrict Litigation, http://www.sidley.com/classaction_mdli (last visited Sept. 12, 2008); Winston & Strawn LLP, Class Actions, <http://www.winston.com/index.cfm?contentID=19&itemID=274> (last visited Sept. 12, 2008). Presumably, these websites are designed to attract defendants threatened with or involved in class action litigation.

83. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) (“As is often the case, plaintiffs’ lawyers solicited potential class members over the internet and through newspaper advertisements.”).

84. Milberg, <http://www.milberg.com> (last visited Sept. 12, 2008).

pending or potential class action investigations, including, for example, its investigation into a products liability action involving Medtronic's Sprint Fidelis® leads.⁸⁵ Milberg's website makes clear that its driving purpose is to get potential class members involved in the litigation: "If you or a loved one is impacted by these leads, we advise you to speak to your physician about the risks associated with them. We also ask that you contact us immediately You may be legally entitled to recover medical expenses, lost earnings, as well as compensation for physical pain and suffering, mental anguish and physical impairment."⁸⁶

Motley Rice, another prominent plaintiffs' firm, also explains its practice on its firm homepage. Many practice areas are identified, including "Occupational," "Environmental," "Medical," "Complex Cases," and "Catastrophic."⁸⁷ By clicking on any of these practice areas, the internet user links to an informational page about Motley Rice's experience and the scope of its practice in the area.⁸⁸ The website contains input fields and contact information if individuals wish to "explore [their] legal rights."⁸⁹

Motley Rice operates a website in addition to the firm's general website that is dedicated to a specific type of class action.⁹⁰ For example, Motley Rice operates a website dedicated exclusively to mesothelioma litigation.⁹¹ This website provides a brief history of the firm's involvement with mesothelioma litigation.⁹² The website also explains that "[l]awyers from the Law Firm of Motley Rice LLC serve as national asbestos counsel with a network of associated local lawyers throughout the country."⁹³ As with its general website, Motley Rice's mesothelioma webpage features an input form for

85. See Medtronic Sprint Fidelis, <http://www.milberg.biz/sprint-fidelis.html> (last visited Sept. 12, 2008).

86. *Id.*

87. See Law Firm of Motley Rice LLC, <http://www.motleyrice.com> (last visited Sept. 12, 2008).

88. See, e.g., The Law Firm of Motley Rice LLC—Catastrophic Injury, <http://www.motleyrice.com/catastrophicinjury/default.asp> (last visited Sept. 12, 2008) ("The attorneys of Motley Rice's catastrophic injury practice group represent individual victims and families affected by tragic events caused by dangerous consumer products, occupational and industrial accidents, fires, premises injuries and other calamities or negligent acts.")

89. See *id.*

90. See Mesothelioma Lawyer, <http://www.aboutmeso.com> (last visited Sept. 12, 2008).

91. This website makes clear that it is operated by Motley Rice. Indeed, the firm's name appears conspicuously throughout the website and is explicitly featured in the "contact us" section. *Id.*

92. *Id.*

93. http://www.aboutmeso.com/mesothelioma_litigation.asp (last visited Sept. 12, 2008).

internet users to supply their contact information and inquire about their legal rights.⁹⁴

In addition to private law firms that undertake class action representations, non-profit organizations constantly battle in the courts on behalf of the interests of their members. Those organizations operate websites to rally support for particular causes and to inform the general public about activities taking place in the courtrooms across the country.⁹⁵

The Electronic Frontier Foundation (EFF) manages a website dedicated to “Defending Freedom in the Digital World.”⁹⁶ That website contains information on every lawsuit—many of which are class actions—in which the EFF is involved.⁹⁷ As one example, EFF highlights its “class-action lawsuit against AT&T . . . accusing the telecom giant of violating the law and the privacy of its customers by collaborating with the National Security Agency (NSA) in its massive, illegal program to wiretap and data-mine Americans’ communications.”⁹⁸ Unlike most law firm websites, EFF’s website does not permit internet users to submit contact information or to seek legal advice. Rather, the website encourages donations and extra-judicial activities, such as writing to legislators about particular issues.⁹⁹ Nonetheless, the website informs interested individuals and absent class members of EFF’s efforts and associated class action litigation.

Public Citizen, “a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts,” operates a similar website.¹⁰⁰ Like EFF, Public Citizen has a webpage dedicated to its litigation group that provides briefs from cases in which the group is involved.¹⁰¹ On this webpage, an internet user can find

94. <http://www.aboutmeso.com/contact.asp?from=Mesothelioma%20Litigation> (last visited Sept. 12, 2008) (“Call us toll free . . . or fill out the form below . . .”).

95. *See, e.g.*, Electronic Frontier Foundation, <http://www.eff.org/work> (last visited Sept. 12, 2008) (highlighting recent activities); Public Citizen, Cases and Documents, <http://www.citizen.org/litigation/briefs> (last visited Sept. 12, 2008) (calling for support for Public Citizen’s continuing litigation and other advocacy endeavors).

96. Electronic Frontier Foundation, <http://www.eff.org> (last visited Sept. 12, 2008).

97. *Id.* EFF posts press releases, news reports, legal documents, rulings, and links for further information on its website.

98. <http://www.eff.org/cases/hepting> (last visited Sept. 12, 2008).

99. *See, e.g.*, EFF’s Action Center, at http://action.eff.org/site/PageServer?pagename=ADV_homepage (last visited Sept. 12, 2008) (allowing visitors to contact their representatives online about pending legislation).

100. Public Citizen, About Public Citizen, <http://www.citizen.org/about/> (last visited Sept. 12, 2008).

101. Public Citizen, Cases and Documents, <http://www.citizen.org/litigation/briefs> (last visited Sept. 12, 2008).

class action notices, settlement objections, and other pleadings.¹⁰² This website increases awareness of Public Citizen's class action practice and the class actions themselves. As a result, an interested individual gains a greater opportunity to learn about the progress of litigation in which he or she may be a class member.

ClassAction.com is not operated by either a law firm or an interest group.¹⁰³ By its own description, "ClassAction.com is not a law firm but rather a venue that works with law firms to facilitate your ability to interact with an attorney."¹⁰⁴ Although there is no ostensible link between the website and any particular firm or group, the website looks and operates like the websites described above. The website lists products, services, companies, and medical conditions that lie at the heart of many of the nation's largest class actions and would-be class actions.¹⁰⁵ As the internet user clicks on each product or service, the site displays general information about the nature of the product and explains the allegations being made in pending or anticipated litigation.¹⁰⁶ The "defining" aspect of the website, like the plaintiffs' firm websites described above, is the case evaluation form. The user inputs his or her contact information and submits a question relating to any of the products, services, etc., listed on the website.¹⁰⁷ A licensed attorney will then contact the user with an answer. As with the other websites described in this section, ClassAction.com provides a portal through which absent class members may become aware of, and actively involved in, litigation.

LawyersandSettlements.com provides a service similar to that offered by ClassAction.com.¹⁰⁸ This website, like its counterpart, is equipped with search engines, topical lists, drop-down menus, and other mechanisms to guide

102. Public Citizen, Class Action, http://www.citizen.org/litigation/briefs/class_action (last visited Sept. 12, 2008).

103. <http://www.classaction.com> (last visited Sept. 12, 2008).

104. *Id.*

105. *Id.*

106. For example, the website's Vioxx page explains that "Vioxx, a widely prescribed arthritis drug, has been taken off the market following the results of a three-year study linking use of the drug to higher incidence of heart attack and stroke." Classaction.com, Drugs, Vioxx, <http://www.classaction.com/drugs-vioxx.cfm> (last visited Sept. 12, 2008). Following the presentation of additional information, the webpage announces "If you or someone you know has suffered serious side effects or injury that you believe may be related to your usage of Vioxx, you may be eligible to file a claim." *Id.*; see also <http://www.classaction.com/drugs-ppa.cfm> (last visited Sept. 12, 2008) ("If you or someone you know has experienced a stroke and had previously taken any of the medicines containing PPA, you may have a valid legal claim.").

107. *Id.*

108. Legal News and Legal Help, <http://www.lawyersandsettlements.com> (last visited Sept. 12, 2008).

internet users to information regarding individual products, and ultimately to put the user into contact with an attorney by submitting a complaint form.¹⁰⁹

Despite the differences between the content-neutral websites and the content-motivated websites described in this section, the purpose and effect of the websites remain constant. The websites inform class members about pending or potential class action lawsuits and funnel prospective class members into law firms and claims-handling companies. They are access points—only possible because of the internet—for the as-yet uninvolved class member.

C. Claims Administration

Aside from internet notification programs, web-based claims-administration programs constitute the most widely used internet tool in the class action process. In many recent class action settlements, websites exist for administering claims. These websites supplement traditional methods of distributing and processing claim forms.¹¹⁰ Because these websites are often removed from the internet after all claims have been processed,¹¹¹ tracking their development or maintaining an accurate record of their existence is difficult. Enough of these websites remain, however, to explain what they entail.

Claims administration websites provide notice of class action settlements and foster class members' participation in those settlements. The websites typically provide the official notice or some other description of the settlement, provide a mechanism for class members to ask questions (through internet submission or a telephone number), and allow the internet user either to print or submit directly a claim form.

The Masonite Class Action Settlement website is dedicated to providing settlement information for three settled Masonite class actions.¹¹² The

109. See, e.g., Zyprexa, Diabetes, and Weight Gain, <http://www.lawyersandsettlements.com/case/zyprexa.html> (last visited Sept. 12, 2008) (“If you have or a loved on[e] has taken Zyprexa and suffered from diabetes or hyperglycemia, you may qualify for damages or remedies that may be awarded in a Zyprexa class action or lawsuit. Click the link below to send your Zyprexa complaint to a lawyer . . .”).

110. See, e.g., Worldcom Securities Litigation, <http://www.worldcomlitigation.com> (last visited Sept. 12, 2008) (providing electronic access to the notices and claim forms previously sent to class members through traditional mail and information about submitting claim forms).

111. See, e.g., *In re* PayPal Litigation website, at <http://www.settlement4onlinepayments.com> (last visited Sept. 12, 2008).

112. Masonite Class Action Settlement Website, <http://www.masoniteclaims.com> (last visited Sept. 12, 2008).

websites for the individual class actions briefly explain that settlements have been reached.¹¹³ They also provide the formal notices-of-settlement and claims form as well as a “FAQ” section that explains the settlement and claims processes.¹¹⁴ Class members can print a duplicate claim form to submit in hard-copy.¹¹⁵ If the class member has additional questions, the website provides a toll-free number.¹¹⁶

Similarly, the *In Re Literary Works in Electronic Databases Copyright Litigation* website, dedicated to accepting claims submissions for that lawsuit, provides details of the claims administration process.¹¹⁷ In addition to providing a claim form, the website also provides an opt-out form during the opt-out period.¹¹⁸ Moreover, this website allows class members to submit comments, although it is unclear to what end.¹¹⁹

Because specialized companies typically handle claims administration for class actions, these companies often list on their websites all class actions for which they serve as claims administrator. These companies are thus able to bring together information on multiple class actions. The HR&S Claims Administration website,¹²⁰ operated by Heffler, Radetich & Saitta LLP, contains links to every case in which HR&S serves as claims administrator.¹²¹ Like the other sites mentioned here, it provides information to class members regarding submitting and processing claims.¹²²

113. *See, e.g.*, Masonite Omniwood, <http://www.masoniteclaims.com/omniwood2index.htm> (last visited Sept. 12, 2008).

114. *Id.*

115. *Id.*

116. *Id.*

117. *In Re Literary Works in Electronic Databases Copyright Litigation*, Copyright Settlement <http://www.copyrightclassaction.com> (last visited Sept. 12, 2008). The *In Re Literary Works in Electronic Databases Copyright Litigation* was brought by a group of “three writers organizations and 21 freelance authors . . . against a group of commercial electronic databases and print publishers, alleging that they had infringed the copyrights of thousands of freelance contributors to newspapers, magazines, and other print publications.” Copyright Settlement, Frequently Asked Questions, <http://www.copyrightclassaction.com/faq.php3#1> (last visited Sept. 12, 2008).

118. *Id.* (noting that details about claims administration process were sent to class members both by electronic notice and letter).

119. Copyright Settlement, Comments, <https://cert.tgcing.com/edb/comments.php3> (last visited Sept. 12, 2008).

120. HR&S Claims Administration, <http://www.hrsclaimsadministration.com> (last visited Sept. 12, 2008).

121. HR&S Claims Administration, Cases, <http://www.hrsclaimsadministration.com/cases/?type=all> (last visited Sept. 12, 2008); *see also* Complete Claim Solutions, LLC, Listing of Settlements, <http://www.completeclaimssolutions.com/settlements.html> (last visited Sept. 12, 2008) (providing a partial listing of settlements CCS is handling).

122. *Id.*

If the notice and informational websites discussed above are the entrance points for absent class members to participate in litigation, then the claims administration websites are the exit points. By supplying absent class members notice of proposed class action settlements and the forms necessary either to participate in or opt-out of the settlement, these websites enhance absent class members' ability to participate.

D. Court-Administered Websites

Although lawyers, litigants, and claims administrators are increasingly using the internet in class action litigation, courts are doing so to a much lesser degree. Although most courts have websites, few courts devote any domain space to their pending class action lawsuits. A survey of the United States district court websites reveals the scarcity of judicially operated class action websites.¹²³ Of the ninety-four federal district court websites,¹²⁴ only seven websites contain readily accessible information about pending class actions.¹²⁵

When courts decide to provide information regarding pending class actions, they offer very detailed information.¹²⁶ For example, the Middle District of Louisiana dedicates part of its website to the Brusly Barge Class Action.¹²⁷ Clicking on the link to this section immediately opens the

123. The search was conducted on September 12, 2008.

124. There are eighty-nine district courts in the fifty states and another five in Puerto Rico, the Virgin Islands, the District of Columbia, Guam, and the Northern Mariana Islands. Each has a dedicated website. See U.S. Courts, <http://www.uscourts.gov/courtlinks> (last visited Sept. 12, 2008).

125. See Southern District of Indiana, <http://www.insd.uscourts.gov> (follow "Case Information" hyperlink; then follow "Information on Class Actions" hyperlink) (last visited Sept. 12, 2008); Eastern District of Louisiana, <http://www.laed.uscourts.gov> (last visited Sept. 12, 2008); Middle District of Louisiana, <http://www.lamd.uscourts.gov> (follow "Court Links" hyperlink; then follow "Brusly Barge Claims" hyperlink) (last Sept. 12, 2008); District of Maine, <http://www.med.uscourts.gov> (follow "General Information" hyperlink; then follow "Class Action Litigation" hyperlink) (last visited Sept. 12, 2008); Eastern District of Michigan, <http://www.mied.uscourts.gov> (follow "Dow Corning Litigants" hyperlink) (last visited Sept. 12, 2008); Southern District of Mississippi, <http://www.mssd.uscourts.gov> (last visited Sept. 12, 2008); Eastern District of New York, <http://www.nyed.uscourts.gov> (last visited Sept. 12, 2008); Southern District of Texas, <http://www.txsd.uscourts.gov> (follow "Notable cases" hyperlink) (last visited Sept. 12, 2008). The websites contain "readily available information" when the website's homepage identifies a class action lawsuit by name or through a clearly-marked portal, such as "class action information" or "notable cases."

126. All federal district courts offer the Public Access to Court Electronic Records (PACER) service, so presumably case information is available on all federal court websites. The focus of this Article, however, is not the labyrinth of available legal research tools, but sharing information with non-lawyers. Thus, PACER's availability is not discussed further here.

127. See Barge Release Class Action Information Packet and Legal Notice, available at http://www.lamd.uscourts.gov/cmecf/pdf_court_documents/3_04cv00611_178-4.pdf. The Barge Release Class Action

short-form notice for the litigation.¹²⁸ The section also contains, in a single location, all legal filings associated with the litigation.¹²⁹ Additionally, some courts have begun experimenting with email listservs to notify registered individuals of the release of judicial opinions and orders.¹³⁰ These court websites bring together and deliver information in a way that an interested non-lawyer can reasonably locate and use.

In addition to the few courts that post information about pending class actions, the District Court for the Northern District of California requires parties to any suit containing a claim brought under the Private Securities Litigation Reform Act of 1995 to post various pleadings, briefs, and other filings on a "Designated Internet Site."¹³¹ Stanford's Clearinghouse website usually serves as the Designated Internet Site.¹³² This local rule puts the onus of webposting on the parties themselves and relieves the court of the administrative duties associated with maintaining the website.

Although the federal judicial system on the whole does little to post information about class actions on the internet, it employs the internet extensively for multidistrict litigation. The Judicial Panel on Multidistrict Litigation operates its own website, dedicated to all multidistrict litigation (MDL) proceedings.¹³³ The Panel determines whether cases pending in different federal courts should be centralized in one court for pretrial proceedings.¹³⁴ The Panel then assigns a judge or judges to conduct those

arose from "the release of air contaminants from a barge known as the FT-22 on the Mississippi River in Baton Rouge, Port Allen and Brusly, Louisiana occurring on or about April 27-28, 2004." *Id.* at 6.

128. Barge Release Class Action Notice, <http://www.rivercityclaims.com> (last visited Sept. 12, 2008).

129. *Id.* The Southern District of Mississippi gives similar treatment to the many Katrina-related cases pending in that court. Hurricane Katrina Insurance Orders and Opinions, <http://www.mssd.uscourts.gov/insurance.htm> (last visited Sept. 12, 2008).

130. *See, e.g.*, District of Maine Electronic Notification, <http://www.med.uscourts.gov/rules/electionotification.htm> (last visited Sept. 12, 2008).

131. N.D. CAL. R. 23-2. The list of documents to be posted include pleadings, briefs, documents pertaining to class certification, expert witness reports, pretrial conference statements, settlement approval filings, and more. *Id.*

132. Stanford's Clearinghouse, discussed *supra* notes 58-61 and accompanying text, clearly benefits from the Northern District of California's local rule. The website serves as a substitute for the court's and provides the wealth of information discussed above with negligible cost to the parties and little, if any, court involvement. *See* Walters, *supra* note 43; Joan Lambert, *Stanford Law School's Securities Class Action Clearinghouse: Securities Litigation Meets the Web*, INSIGHTS, July 1997, at 14.

133. *See* U.S. Judicial Panel on Multidistrict Litigation Home, <http://www.jpml.uscourts.gov> (last visited Sept. 12, 2008). The Judicial Panel on Multidistrict Litigation was created by an Act of Congress in 1968. *See* 28 U.S.C. § 1407 (2000).

134. *See* U.S. Judicial Panel on Multidistrict Litigation, Overview, http://www.jpml.uscourts.gov/General_Info/overview/overview.html (last visited Sept. 12, 2008).

proceedings.¹³⁵ The Panel's website provides general information about the Panel, statistics on the Panel's activities, the rules employed by the Panel, the Panel's hearing orders, and links to other judiciary websites.¹³⁶ The website also provides a bimonthly list of all currently pending coordinated proceedings and cases transferred to the Panel.¹³⁷ From this list, visitors can access transferee district court web links and master docket information.¹³⁸

Many of the transferee district courts in turn have dedicated websites for the coordinated cases they are handling. Those local websites contain a wealth of information about the particular MDL proceeding. For example, the United States District Court for the Eastern District of Louisiana has a website dedicated to the now-settled MDL-1657, Vioxx Product Liability Litigation.¹³⁹ The website has a regularly updated "Current Developments" section that details every event in the litigation,¹⁴⁰ including information about participating in the settlement program.¹⁴¹ Additionally, the website contains a "Frequently Asked Questions" section that covers everything from "What is multidistrict litigation?" to "What information is available on the Court's website?" and "How can I be kept advised of the developments of this case?"¹⁴² The website also provides various forms relevant to the litigation.¹⁴³ Finally, the website maintains a public calendar of upcoming proceedings in the litigation.¹⁴⁴ Many similar websites exist for other multidistrict proceedings.¹⁴⁵

135. *Id.*

136. *Id.*

137. *Id.* The website offers the list in case-name alphabetical order by district and is grouped by type of MDL proceeding—e.g., antitrust, contracts, products liability, and securities.

138. *Id.*

139. *See* Vioxx Product Liability Current Developments, <http://vioxx.laed.uscourts.gov> (last visited Sept. 12, 2008). As the website explains the litigation:

[T]he plaintiffs have filed suit alleging certain actual and potential risks associated with the medication known generically as Vioxx. Defendants Merck & Co., Inc. produced Vioxx to treat arthritis and acute pain. The plaintiffs contend that Vioxx caused death and other injuries to themselves or their family members who took Vioxx.

Introduction, <http://vioxx.laed.uscourts.gov/Intro.htm> (last visited Sept. 12, 2008).

140. *Id.*

141. Vioxx Product Liability, <http://vioxx.laed.uscourts.gov/> (last visited Sept. 12, 2008).

142. Frequently Asked Questions, <http://vioxx.laed.uscourts.gov/FAQ/faq.htm> (last visited Sept. 12, 2008).

143. Forms, <http://vioxx.laed.uscourts.gov/Forms/Forms.htm> (last visited Sept. 12, 2008). The forms offered on the website include: Counsel Contact Information Form, Check Request Form, Time and Expense Guidelines, Member Firm Time, Common Held Costs and Expenses, Final Plaintiff Profile Form, Final Merck Profile Form, and Final Authorization Forms. *Id.*

144. Calendar, <http://vioxx.laed.uscourts.gov/Calendar/Calendar.htm> (last visited Sept. 12, 2008).

145. *See, e.g.*, MDL-1203, *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products

State courts too have developed coordinating bodies and websites to manage coordinated proceedings. New Jersey, for example, has a particularly well-developed process for coordinating multiple cases pending in its state court system.¹⁴⁶ The New Jersey judiciary, responsible for managing this process, maintains its own website: the Mass Tort and Centralized Management Information Center.¹⁴⁷ As a result of this sophistication, the judiciary maintains a webpage dedicated to the Vioxx litigation pending in state court there.¹⁴⁸ This webpage is an example of the New Jersey judiciary's practice of providing online information as an "aid to the bench, bar and public for the dissemination of information concerning mass tort cases throughout the State of New Jersey."¹⁴⁹ Like its federal court counterpart, the New Jersey website provides voluminous information about the Vioxx litigation.¹⁵⁰

Liability Litigation, <http://www.fenphen1203.com> (last visited Sept. 12, 2008); MDL-1348, *In re Rezulin Products Liability Litigation*, <http://www.nysd.uscourts.gov/courtweb> (last visited Sept. 12, 2008); MDL-1355, *Propulsid Product Liability Litigation*, <http://propulsid.laed.uscourts.gov> (last visited Sept. 12, 2008); MDL-1373, *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, <http://www.insd.uscourts.gov/Firestone/default.htm> (last visited Sept. 12, 2008); MDL-1396, *In re St. Jude Medical, Inc., Silzone Heart Valves Products Liability Litigation*, http://www.mnd.uscourts.gov/Tunheim_Mdl/index.htm (last visited Sept. 12, 2008); MDL-1507, *In re Prempro Products Liability Litigation*, <http://www.are.uscourts.gov/mdl/index.cfm> (last visited Sept. 12, 2008); MDL-1401, *In re Sulzer Orthopedics, Inc., Hip Prosthesis and Knee Prosthesis Products Liability Litigation*, http://www.ohnd.uscourts.gov/Clerk_s_Office/Notable_Cases/notable_cases (last visited Sept. 12, 2008); MDL-1407, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, <http://www.wawd.uscourts.gov/wawd/mdl.nsf/main/page> (last visited Sept. 12, 2008); MDL-1431, *In re Baycol Products Liability Litigation*, http://www.mnd.uscourts.gov/Baycol_Mdl/index.htm (last visited Sept. 12, 2008); MDL-1699, *In re Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation*, <https://ecf.cand.uscourts.gov/cand/bextra> (last visited Sept. 12, 2008).

Although this list of MDL websites appears to be comprehensive, it includes only some of the MDL proceedings mentioned on the Judicial Panel on Multidistrict Litigation's "Products Liability" list. *See Products Liability Litigation*, http://www.jpml.uscourts.gov/Docket_Info/Products_Liability/products_liability.html (last visited Sept. 12, 2008). This list includes no cases from the Panel's other nine case-category lists.

146. *See* MARK HERRMANN ET AL., *STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS* 375-412 (2d ed. 2004).

147. <http://www.judiciary.state.nj.us/mass-tort/index.htm> (last visited Sept. 12, 2008).

148. *See* Vioxx Information Center, <http://www.judiciary.state.nj.us/mass-tort/vioxx/index.htm> (last visited Sept. 12, 2008).

149. Mass Tort and Centralized Management Information Center, *supra* note 147 (last visited Sept. 12, 2008).

150. *See* Vioxx Information Center, *supra* note 148 (last visited Sept. 12, 2008) (providing Case Management Orders, Case Management Recommendations, Counsel Lists, Department Staff, Events Calendar, Judges Assigned, and a link to Other Orders & Decisions).

II. THE FUTURE OF THE INTERNET IN CLASS ACTION LITIGATION

The current use of the internet in the class-action realm falls well short of the internet's ultimate capabilities. To date, the internet has been primarily used as a substitute mechanism for undertaking tasks formerly accomplished through old-world methods. These developments have increased the availability of information about class actions.

The federal courts' methods of disseminating information to the public electronically has achieved some success, at least according to the federal courts themselves.¹⁵¹ As access to judicial information increases, the general public becomes more aware of, and interested in, what transpires in courtrooms across the country.¹⁵² This increased access, in turn, empowers class members to exercise the ability to participate in litigation to which they are, or may be, parties.

The internet should be used in the future to ensure that absent class members easily obtain reliable information about, and an opportunity to participate in, class action litigation. To accomplish these twin goals, the internet must be viewed not as a substitute for traditional communications, but as a vehicle to accomplish things never before possible in the class action realm. This section identifies both current uses of the internet that should be enhanced and new uses of the internet that should be implemented to provide absent class members with a meaningful opportunity to participate in litigation in which their rights are being adjudicated.

A. *Expanding and Enhancing the Current Uses*

1. *Notices*

As explained above, identifying and notifying potential class members of the pendency and settlement of class actions is a difficult and expensive undertaking.¹⁵³ It is no surprise that the internet is being increasingly relied

151. See External Participants, The Judiciary's IT Objectives, <http://www.uscourts.gov/itplan/external.html> (last visited Sept. 12, 2008) (highlighting the success and popularity of the courts' Electronic Public Access Program).

152. M.R. Kropko, *Ohio Lower Court Hopping Into Video Online Trend*, USA TODAY, Jan. 18, 2005, available at http://www.usatoday.com/tech/news/2005-01-18-sentenced-online_x.htm (quoting Lloyd Snyder, professor at Cleveland State University Cleveland-Marshall College of Law as saying, "This is coming. With 'Court TV' available, people are getting used to having things like this out there . . .").

153. See *supra* Part I.A.

upon as a supplemental mechanism for providing class notices.¹⁵⁴ As courts are becoming more comfortable with internet notification, this type of notice should become more common. Moreover, as courts accept the idea that internet notification is often more likely than hard-copy notice to reach the targeted populations, internet notifications may begin to replace, in addition to simply supplementing, traditional notice programs.¹⁵⁵ These developments are already occurring to a limited extent.¹⁵⁶

The possibility of internet notice, however, should inspire courts to adapt and experiment further. Many events may occur over the course of a class action lawsuit that merit or require giving notice to the class.¹⁵⁷ In addition to the notices required under Rule 23, courts have discretion to require notice of the certification of Rule 23(b)(1) and 23(b)(2) classes,¹⁵⁸ as well as to give any other notice “for the protection of the members of the class or otherwise for the fair conduct of the action.”¹⁵⁹

First, the internet should be increasingly used to notify class members of the progress of the litigation. For example, when a previously certified class is decertified or redefined to exclude class members who were previously included in the class, notice should (or must) be given to the affected class members.¹⁶⁰ Courts may also order notice to correct misinformation or misrepresentations by one of the parties or their counsel,¹⁶¹ when substituting a new lead plaintiff,¹⁶² when ordering a change of counsel, when dismissing certain causes of action, or when otherwise ruling in ways that affect absent class members. Moreover, a court may simply desire to inform absent class

154. *See supra* Part I.A.; *see also* U.S. DEP’T OF COMMERCE, *supra* note 11, at 4 (emphasizing the increasing reliance on the internet as a means of communication).

155. *See supra* note 43 and accompanying text.

156. *See supra* Part I.A.

157. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.313 (2004).

158. *Id.*

159. FED. R. CIV. P. 23(d)(2).

160. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.313 (2004) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 354 (1983); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 561 (1974); *Culver v. City of Milwaukee*, 277 F.3d 908, 915 (7th Cir. 2002)).

161. *Id.*

162. *See, e.g., Z-Seven Fund, Inc. v. Motorcar Parts & Accessories*, 231 F.3d 1215, 1218-19 (9th Cir. 2000) (“It is not inconceivable that a lead plaintiff appointed originally might turn out to be an inadequate class representative and that a change might have to be made.”).

members of their right to intervene or otherwise participate in the litigation.¹⁶³ These examples are by no means exhaustive.

The cost associated with providing notice to class members and the unlikelihood of absent class members actually receiving the notices has likely deterred courts from ordering more expansive notices in the past.¹⁶⁴ The internet decreases the cost of giving these notices and increases the likelihood that absent class members will receive them. Courts should therefore increasingly rely on the internet to deliver these, and other, notices. This is particularly true for the discretionary notices allowed by Rule 23(d). Rule 23(d)(2) notices are not required; thus, they are a prime candidate for experimenting with less-costly internet notice programs.¹⁶⁵ Just as courts are coming to embrace the internet as a mechanism through which to give required notices, courts should expand the use of the internet to include discretionary notices. By giving more discretionary notices, made increasingly efficient and effective by the internet, courts will better fulfill their duty to serve as fiduciaries for absent class members.¹⁶⁶ And the more information absent class members receive, the more likely they are to be able to make meaningful decisions about their involvement.

Second, the internet should replace, in the appropriate situations, direct mail notice just as the internet has begun to replace other traditional notice methods. Under existing Supreme Court precedent, courts are required to order “‘the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.’”¹⁶⁷ The American Law Institute (ALI) proposes dispensing with the requirement of direct-mail notice to all identifiable class members where such notice does not make economic sense.¹⁶⁸ In accord with this Article, the ALI

163. See FED. R. CIV. P. 23(d)(2); see, e.g., *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (holding that intervention was appropriate where an absent class member moved to intervene and substitute himself as the class representative once he received notice that his individual rights may have been impaired had he not been allowed to intervene).

164. See *supra* Part I.A.

165. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.313 (2004) (“The court may consider using means less costly than personal notice.”).

166. See *In re Cendant Corp. Litig.*, 264 F.3d 286, 296 (3d Cir. 2001) (“The fiduciary duty to the class exists because the very nature of the class action device prevents many who have claims from directly participating in the litigation process.” (citation omitted)); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (“The ultimate responsibility to ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court.” (citation omitted)).

167. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 n.11 (1974) (quoting FED. R. CIV. P. 23(c)(2)).

168. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.04 (Preliminary Draft No. 5, 2008)

cites the internet as a preferable substitute notice mechanism, particularly in small-claim class actions.¹⁶⁹ As the ALI notes, moving to internet notice programs decreases the cost of providing notice and increases the settlement funds available for class members.¹⁷⁰ Additionally, with technological advances in email delivery and tracking and webpage monitoring, it is easier to verify delivery of internet notices than traditional mail notice delivery.¹⁷¹

Accordingly, courts ought to rely more on the internet as a cost-effective and capable tool for delivering notices. Indeed, the internet should lead courts to expand and rethink their notice guidelines. When the rules and decisions governing notice were implemented, the internet did not exist. This new technology should alter and replace the old rules of class action notices.

2. *Claims Administration*

Just as the internet should evolve as a tool for providing notice, claims administration websites should also evolve. Improved claims administration will increase the prospects of class members participating in settlements to which they are entitled. The claims administration websites are also the most likely to experience rapid development, since they are motivated by competition between firms.

Claims should be increasingly processed through the internet directly; so too should class members' elections to opt out and, where appropriate, opt into litigation.¹⁷² As described above, direct claim submissions are just beginning to take hold.¹⁷³ People have grown unhappy with mail-in forms and prefer online submissions.¹⁷⁴ People already submit their income taxes and

("The value of the claim may be so small that litigation outside of the class context would not be viable, and the likelihood of opting out or objecting may be so low that individual notice would simply consume resources from the settlement without generating any real benefit for the class.")

169. *Id.*

170. *Id.*

171. For example, email messages can include "read receipts," i.e., email messages returned to the sender when the recipient opens the email confirming that the message was received.

172. As discussed above, class members in Rule 23(b)(3) class actions are given an explicit right to "opt out" of the litigation. *See supra* notes 1-2 and accompanying text. In "collective actions" brought under the Fair Labor Standards Act (FLSA) or the Age Discrimination in Employment Act (ADEA), class members must affirmatively "opt in" to the litigation. *See* 29 U.S.C. § 216(b) (2000) ("No employee shall be a party plaintiff to any [FLSA] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); *see also* KLONOFF ET AL., *supra* note 8, at 968-95.

173. *See supra* Part I.C.

174. *See, e.g.*, Lois M. Collins, *Filing for Rebates Isn't for the Fainthearted*, DESERET MORNING NEWS, Jan. 18, 2007, at A9; Humberto Cruz, *Hassle of Getting a Mail-In Rebate Will Try Your Patience*,

pay their bills online. Given the ease in setting up direct-claim submissions and the willingness of claims administration companies to do it, the growth of online claims submissions should continue. Along with this growth, we should expect similar growth in the direct processing of opt-in and opt-out forms online. In turn, more absent class members will choose to participate in the settlements to which they are entitled (or affirmatively to opt out of those class actions, if they so choose).¹⁷⁵

In an effort to direct absent class members to claims websites, courts should provide links to the claims administration websites of the cases over which they preside. This would both make it easier for class members to locate the appropriate website and legitimize the claims administration process. The United States District Court for the Middle District of Louisiana, for example, maintains a link on its website for the Brusly Barge Claims website.¹⁷⁶ Clicking on the link sends the user to a webpage containing the settlement notice and .pdf versions of the claims forms.¹⁷⁷ Although maintained as part of the court's website, the settlement webpage is nothing more than a re-post of the settlement page independently established to handle claims administration for the lawsuit.¹⁷⁸ In effect, absent class members have two avenues to the identical information, thereby increasing the likelihood that they locate it.

In the end, the easier and more cost efficient claims procedures become, the more likely class members can participate in settlements.¹⁷⁹

SUN-SENTINEL, Jan. 24, 2007, at 3D.

175. Cf. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (“[O]n average, less than 1 percent of class members opt-out and about 1 percent of class members object to class-wide settlements.”).

176. See Louisiana Middle District, <http://www.lamd.uscourts.gov> (follow “court links”) (last visited Sept. 12, 2008).

177. *Id.*

178. See Barge Release Class Action Settlements, <http://www.rivercityclaims.com> (last visited Sept. 12, 2008).

179. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.04 (Preliminary Draft No. 5, 2008); cf. Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 24 (1993) (“Costly procedures may also operate to make settlements less inclusive, rather than more inclusive. For example, complex procedures for proving class membership can serve to discourage a response from class members, while at the same time being more expensive to administer.”).

B. Developing New Uses of the Internet

In addition to expanding the use of the internet for purposes already proving beneficial in class action litigation, practitioners and courts should look to use the internet for much more. By unlocking the full potential of the internet, class action litigation can involve absent class members in ways that were previously impossible.

As recognized by the Judicial Conference of the United States, “[t]echnology has increased accessibility to the courts and the appetite for electronic information and interaction between external participants and the judiciary is growing.”¹⁸⁰ The Judicial Conference also acknowledges that “the public should share in the benefits of the judiciary’s investment in information technology including access to case-related information.”¹⁸¹ Although the judicial system has made strides in providing greater access to the general public, much more can be done to bring the outsiders into the courts, particularly when those outsiders are participants in a class action lawsuit.¹⁸²

1. Case Information and Administration

Courts should increase access to the events that take place in class action proceedings. “Communication by the court and counsel with the class is a major concern in the managing class actions.”¹⁸³ As discussed above, very few courts post user-friendly information on pending class actions.¹⁸⁴ The lack of comprehensive coverage of class action litigation leaves absent or would-be class members scouring the internet for information about class actions to which they may be parties.

On a general level, information about class action litigation should increasingly come from objective sources. Although current websites provide truthful and valuable information on the nuts and bolts of class action

180. External Participants, The Judiciary’s IT Objectives, <http://www.uscourts.gov/itplan/external.html> (last visited Sept. 12, 2008).

181. *Id.*

182. *See supra* Part I; *see also* External Participants, The Judiciary’s IT Objectives, <http://www.uscourts.gov/itplan/external.html> (last visited Sept. 12, 2008) (“[C]ourts maintain internet web sites with court-specific information and rules, and the electronic public access program provides access to case-related information.”).

183. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.3 (2004). The Manual goes on to stress how “[i]t is important to develop appropriate means for providing information to . . . class members.” *Id.* at 284-85.

184. *See supra* Part I.D.

litigation, it would be naïve to say that this will always be the case. People turn to the internet for information because they have questions. When knowledgeable individuals are not there to answer those questions, people will turn to anyone pretending to have the answers, if only because the public does not know the difference.¹⁸⁵

Instead of relying on Wikipedia¹⁸⁶ and the private sector to supply general information on class action litigation, courts should take an active role in providing that information. Courts currently provide information on their websites about local court rules, filing information, and even links to additional resources.¹⁸⁷ Adding content on class action litigation is no more difficult. When instituted in conjunction with other recommendations made in this Article, courts can provide information on class action litigation and ensure that knowledgeable individuals are available to answer questions.

The model for court-administered class action coverage exists already. The MDL transferee court websites discussed above provide comprehensive information about their respective MDL proceedings.¹⁸⁸ And the courts' use of them, although not universal, far exceeds that of similarly dedicated class action websites. By simply adopting what they do in the MDL context, courts handling non-MDL class actions can begin to use the power of the internet to provide class members with information about the cases that will determine their rights.

Nothing like the Judicial Panel on Multidistrict Litigation's (JPML) website yet exists for class action litigation. The JPML website is the place

185. See USC-Annenberg Digital Future Report, *supra* note 12 (reporting that over 55% of internet users believe most or all of the information reported on the internet is reliable and accurate). The authors of this Article can attest to the difficulty in distinguishing reliable, unbiased information about class actions from information that is biased or incomplete. The authors conducted many web searches on each topic discussed in this Article. These searches provided no shortage of results; sorting through these results to find reputable or credible information, however, proved to be a task one would not expect the typical internet user to undertake. In many cases, the sheer volume of seemingly indistinguishable results would deter the internet user from performing a detailed or selective investigation.

186. See Wikipedia:About, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Sept. 12, 2008) ("Since its creation in 2001, Wikipedia has grown rapidly into one of the largest reference Web sites, attracting at least 684 million visitors yearly by 2008." (citation omitted)). The website's greatest attribute may also be its biggest flaw: "Wikipedia is written collaboratively by volunteers from all around the world. . . . Most of the articles can be edited by anyone with access to the [i]nternet, simply by clicking the *edit this page* link." *Id.*; see also *Microsoft Offers Pay for Wikipedia Fix*, L.A. TIMES, Jan. 24, 2007, at C3 (explaining how Microsoft offered to pay a blogger to "correct" information on Wikipedia).

187. See, e.g., United States District Court for the District of Maryland, www.mdd.uscourts.gov (last visited Sept. 12, 2008); United States District Court, District of Nevada, <http://www.nvd.uscourts.gov> (last visited Sept. 12, 2008); U.S. District Court - Oregon, <http://ord.uscourts.gov> (last visited Sept. 12, 2008).

188. See *supra* Part I.D.

to go if one is interested either in multidistrict litigation generally or any particular multidistrict litigation proceeding. The same sort of centralized resource could exist for class action litigation. Although individual courts can provide information about pending class actions, absent class members would still need to know which court website to visit. By directing traffic through a consolidated website, the judiciary can guide interested parties to the appropriate information.

Such a centralized website would also have the benefit of increasing internet visibility of the information regarding class actions. Websites that receive large numbers of “hits” and establish hyperlinks to and from other “credible” webpages appear higher on the list of returned results on the various internet search engines.¹⁸⁹ The JPML website currently appears as the first hit of a Google or MSN search and the fourth hit of a Yahoo search of the term “multidistrict litigation.”¹⁹⁰ As users increasingly rely on these websites as their portals to the internet, the importance of appearing high on the returned results list increases.¹⁹¹ Maintaining an oft-visited and credible website, therefore, is critical in disseminating class action information to as many people as possible.

Critics of this proposition may assert that the logistics of maintaining a centralized class action website, like the JPML website, are prohibitive. All multidistrict litigation must pass through the JPML, allowing the Panel to track all such litigation. No centralized coordinating body exists for class action litigation. Class actions may be filed in any of the hundreds of federal courts or thousands of state courts.

With the passage of the Class Action Fairness Act of 2005 (CAFA),¹⁹² class action litigation will increasingly be resolved in federal, as opposed to state, courts.¹⁹³ The Federal Judicial Center “found a 72 percent increase in

189. See, e.g., Yahoo, How are Web Documents Ranked?, <http://help.yahoo.com/help/us/ysearch/ranking/ranking-01.html> (last visited Sept. 12, 2008).

190. The searches were conducted on September 12, 2008.

191. See iPROSPECT, SEARCH ENGINE USER BEHAVIOR STUDY 3 (2006), available at http://www.iprospect.com/about/whitepaper_seuserbehavior_apr06.htm (“[Sixty-two percent] of search engine users click on a search result within the first page of results, and a full 90% of search engine users click on a result within the first three pages of search results.”). The study goes on to note that “more users are abandoning their query after reviewing the first page now (41%) than in 2002 (28%).” *Id.*

192. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

193. See Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1696-97 (2006) (“It is well known that under CAFA, most major class actions, including virtually all multistate class actions, will now be heard in federal court.”); John Beisner & Jessica Davidson Miller, *Fulfilling Framers’ Promise*, NAT’L L.J. 22 (Feb. 13, 2006).

class action activity in the eighty-eight district courts . . . studied.”¹⁹⁴ That shift makes coordinating information about many (although by no means all) class actions more feasible than in the past and more like what occurs through the JPML website. Individual courts can adopt local rules similar to the Northern District of California’s Local Rule 23(b), ordering parties to post class action filings to Designated Internet Sites.¹⁹⁵ One need only visit the Stanford Clearinghouse website—which serves as the “Designated Internet Site” for securities class actions brought in the Northern District of California—to see how effective local rules can be in creating information repositories for class action lawsuits.¹⁹⁶

On at least the federal court level, all courts should agree on a single website as the designated internet site for class action information. The Federal Judicial Center website could serve as the class action repository.¹⁹⁷ Alternatively, a non-judicial entity could host a website dedicated to receiving and posting information about federal class actions, along the lines of the Stanford Clearinghouse.¹⁹⁸ It makes little difference who operates the website as long as the site adheres to its purpose and establishes itself, as the Stanford Clearinghouse website has, as *the* authoritative and reliable website for all things related to class action litigation. The Federal Judiciary and each court should post a link to the agreed-upon designated internet site on their individual homepages.¹⁹⁹ Internet users can thus be funneled to the designated internet site.

194. EMERY G. LEE III & THOMAS E. WILLGING, THE FEDERAL JUDICIAL CENTER, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 1 (2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafe0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafe0408.pdf) (noting, however, that not all of this increase is attributable to CAFA, as the number of federal question cases accounts for a large percentage of the increase).

195. See generally Walters, *supra* note 43.

196. See *id.*

197. See Federal Judicial Center, <http://www.fjc.gov> (last visited Sept. 12, 2008).

198. Given the large number of law schools in the United States and the prestige that would be associated with operating such a website, there should be no shortage of volunteers to host the website. Allowing an individual law school or a cooperative of law schools to operate such a website would relieve the courts of the administrative responsibilities and costs of doing so themselves. See, e.g., Tony Wright, *Lawyers Say MA Supreme Judicial Court’s Webcasts Will Be Vital Practice Tool*, MASS. LAW. WKLY., Apr. 25, 2005, available at 2005 WLNR 24530520 (“With the ongoing costs being borne by Suffolk University Law School, . . . managing the webcasts and accompanying website won’t cost the commonwealth—including the court system—a dime.”).

199. The Federal Judiciary’s website contains a link to the JPML website. See U.S. Courts, <http://www.uscourts.gov/courtlinks/#other> (last visited Sept. 12, 2008). The Northern District of California’s website already posts a link to the Clearinghouse. See California Northern Links, <http://www.cand.uscourts.gov/cand/links.nsf/1a65c343a2f833c28825643c00270ad2?OpenView> (last visited Sept. 12, 2008).

Similarly, state courts should agree on a single website to which information in their respective courts should be posted. The National Center for State Courts (NCSC) already operates a website that could serve as a repository.²⁰⁰ The NCSC already hosts the Mass Tort Clearinghouse “to provide access to news and educational resources about developments in mass tort management.”²⁰¹ The NCSC could operate a similar webpage dedicated to class action litigation. Short of agreeing on a single designated internet site, each state should at least establish its own designated internet site.²⁰²

By maintaining, or ordering the maintenance of, these informational websites, courts would ensure that absent class members have at least the opportunity to inform themselves about class action litigation in general and about specific classes to which they belong.

2. *Webcast Proceedings*

The judiciary can take an aggressive step in increasing the involvement of class members by webcasting class action proceedings. To accomplish this, the judiciary would have to revisit its past decisions on allowing (or disallowing) cameras in courtrooms. At the federal level, “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto” became prohibited in 1972.²⁰³ In 1996, the Judicial Conference relaxed its prohibition on broadcasting judicial proceedings by allowing appellate judges to decide for themselves whether to permit electronic media coverage of their proceedings.²⁰⁴ The ban on cameras at the trial-court level remained.²⁰⁵

Over the years, the Judicial Conference has revisited its decision to ban cameras in the courtroom. In 1990, for example, the Judicial Conference engaged in a pilot program that authorized six district courts and two courts

200. See National Center for State Courts, <http://www.ncsconline.org> (last visited Sept. 12, 2008).

201. See NCSC: Knowledge and Information Services, <http://www.ncsconline.org/WC/Publications/MassTorts/MassTortIndex.htm> (last visited Sept. 12, 2008).

202. See, e.g., New Jersey Judiciary, Mass Tort and Centralized Management Information Center, <http://www.judiciary.state.nj.us/mass-tort/index.htm> (last visited Sept. 12, 2008). As discussed above, New Jersey’s Mass Tort and Centralized Management Information Center provides a wealth of information on all mass tort litigation in New Jersey, including consolidated cases and class actions, on a single webpage. See *supra* notes 146-50 and accompanying text.

203. Background on Cameras in Federal Courts, http://www.courtsandmedia.org/research/court_media_rules/admin_office_u_s_cts_cameras.htm (last visited Sept. 12, 2008). Cameras in criminal trials have been expressly prohibited since 1946. See also FED. R. CRIM. P. 53.

204. Background on Cameras in Federal Courts, *supra* note 203.

205. *Id.*

of appeals to allow electronic media coverage.²⁰⁶ Despite a recommendation from the research project staff to lift the ban on cameras in the courtroom nationwide and to authorize the broadcasting of judicial proceedings,²⁰⁷ the Judicial Conference continued the ban.²⁰⁸

Congress has also repeatedly addressed the question of cameras in the courtroom. Senate Bill 352, the Sunshine in the Courtroom Act of 2007, was introduced in January 2007.²⁰⁹ The bill would grant federal judges at both the district and appellate levels authority to “permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.”²¹⁰ Both the Senate and House have considered similar legislation in the past but failed to pass it.²¹¹ The push for cameras in the courtrooms in federal court continues and may soon have enough momentum to overturn the ban.

While the fight continues to allow cameras in federal courts, a number of state courts have allowed broadcast coverage of their proceedings since the mid-1970s.²¹² As reported by NCSC, twenty-five states currently permit televised coverage of the judicial proceedings when the presiding judge agrees to let the cameras into the courtroom.²¹³ Only eight states, however, permit the broadcasting of *trial-court level* proceedings.²¹⁴

In addition to television broadcasts, state courts have begun experimenting with online webcasting. Fifteen states currently webcast their supreme court proceedings.²¹⁵ Although only three state-level trial

206. MOLLY TREADWAY JOHNSON & CAROL KRAFLEA, FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 4 (1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf).

207. *Id.* at 43 (“The research project staff recommends that the Judicial Conference authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms, subject to Conference guidelines . . .”).

208. Background on Cameras in Federal Courts, *supra* note 203.

209. See S. 352, 110th Cong. (2008).

210. *Id.* § 2(b)(1)(A).

211. See, e.g., Sunshine in the Courtroom Act of 2005, S. 829, 109th Cong. (2005); H.R. 2519, 107th Cong. (2001) (proposing to allow “the photographing, electronic recording, broadcasting, or televising to the public of court proceedings”); H.R. 1281, 106th Cong. (1999); Sunshine in the Courtroom Act, H.R. 1280, 105th Cong. (1997).

212. Background on Cameras in Federal Courts, *supra* note 203.

213. Media Information FAQs, <http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=Media&Mode=pf#FAQ765> (last visited Sept. 12, 2008).

214. *Id.* These states universally restrict television coverage when witnesses object to the cameras. *Id.*

215. Court Webcasting, A Project Weblog of the WV Supreme Court Clerk, <http://radio.weblogs.com/0103705/categories/courtWebcasting> (last visited Sept. 12, 2008). The supreme courts that

courts—the Delaware County Ohio Municipal Court, the Ninth Judicial Circuit of Florida, and Wise County Virginia—currently webcast their proceedings,²¹⁶ courts have expressed a growing interest in online video.²¹⁷ As technology spreads, forecasters predict increased participation.²¹⁸

Thus far, the debate on cameras in the courtroom and on webcasting proceedings has been approached broadly. The debate usually focuses on the benefits of increased public access versus the prejudice or embarrassment potentially suffered by defendants, criminal and civil.²¹⁹ The most frequently marshaled, and most readily identifiable, reason for banning cameras in the courtroom is the risk that the media will turn trials, particularly criminal trials, into spectacles.²²⁰

Maintaining the debate over cameras in the courtroom on such a broad level overlooks the benefits a limited exception can provide. When one focuses on class action litigation, as opposed to criminal trials or even general civil litigation, and focuses on webcasting, as opposed to television broadcasts, the need for cameras in the courtroom becomes readily apparent. The lingering issues of criminal defendants' rights immediately disappear.

currently webcast their proceedings are: Alaska, Florida, Indiana, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, Ohio, South Dakota, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

216. *Id.*

217. *See, e.g.*, Kropko, *supra* note 152.

218. *See, e.g., id.* (quoting Charles Ash, owner of Visual Resources Corp., the company that helped the Delaware Municipal Court set up its webcasts, as saying, "It's just starting to pick up. . . . Courts are behind in the technology in a lot of ways. They are coming along.")

219. *See, e.g.*, Henry Schleiff, *The Case for TV*, N.Y. TIMES, Sept. 3, 2003, at A19, available at 2003 WLNR 566617; S.L. Alexander, *A Reality Check on Court/Media Relations*, 84 JUDICATURE 146 (2000); Philip S. Anderson, *Time to Open the Electronic Eye*, A.B.A. J., June 1999, at 8; Millie Aulbur & Jack Wax, *Making Sense of Trials in the News*, CITIZENSHIP EDUCATOR, Jan. 1998, at 1; Christo Lassiter, *Cameras and the Infusion of Political Bias into the Courtroom*, 5 INT'L J.L. & INFO. TECH. 28 (1997); Francis Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in our Justice System*, 79 JUDICATURE 173 (1996); Floyd Abrams & Wendy Kaminer, *Cameras in the Courtroom: Should Judges Permit High-Profile Trials To Be Televised?—Yes: Cameras Reflect the Process, for Better or Worse*, A.B.A. J., Sept. 1995, at 36; Christo Lassiter, *Put the Lens Cap Back on Cameras in the Courtroom: A Fair Trial is at Stake*, 67 N.Y. ST. B.J. 6 (1995).

220. *See Cameras in the Courtroom: Hearing on S. 829 Before the S. Comm. on the Judiciary*, 109th Cong. 40-65 (2005) (statement of Judge Diarmuid O'Scannlain on behalf of the Judicial Conference of the United States), available at <http://www.uscourts.gov/testimony/exhibit4CameraTest05.pdf> (pointing out the "obvious examples" of the 1935 Lindbergh kidnapping trial, the 1954 Dr. Sam Sheppard murder trial, the Menendez brothers' trial and, most notably, the O.J. Simpson murder trial); Gina Holland, *Supreme Court Justices Conflicted on Benefits of Courtroom Cameras*, ASSOCIATED PRESS, Nov. 11, 2005, available at <http://www.law.com/jsp/article.jsp?id=1131640496602> (quoting Justice O'Connor's statement regarding the broadcast of the O.J. Simpson trial: "I thought it was pretty sad. I was very uncomfortable with it.").

Moreover, the arguments against cameras in the courtroom as a general matter do not apply with the same force in this more limited realm.

Whereas critics have argued that televising trials risks encouraging the involvement of disinterested parties, courts should webcast class action lawsuits precisely *to encourage* the involvement of typically disinterested parties. Absent class members have a genuine and direct interest in being aware of, and participating in, the litigation. The Judicial Conference has stressed that

there is a common-sense distinction between a public trial in a public courtroom—typically filled with individuals with a real interest in the case—and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.²²¹

The very “flaw” of increased involvement in most cases becomes the greatest benefit in the context of class action litigation. Through webcasts, courts can grant access to people who would otherwise have no opportunity to witness proceedings that are adjudicating their rights.²²² Absent class members can finally witness firsthand the events of the litigation in which they are involved. Moreover, webcasting can allow absent class members to obtain court documents while watching the proceedings²²³ and to participate in the litigation by posting comments in real time.²²⁴ The distances between the class members and the court, and the size of the courtroom, would no longer matter.

To the extent that courts fear too wide a distribution of trial footage, webcasting provides safeguards that television cannot. Because television broadcasts are public, there is no way to prevent viewing by what the courts consider to be “disinterested parties.” The internet, on the other hand, can

221. Statement of Judge Diarmuid O’Scainnlain, *supra* note 220, at 55.

222. Hope Viner Samborn, *Plenty of Seats in Virtual Courtrooms: “Webcasts of Judicial Proceedings Gaining—and Educating—a Wide Audience*, A.B.A. J., Feb. 2000, at 68 (“[O]nline access makes it convenient for some people who might have difficulty getting to the courthouse in person.”).

223. *See, e.g.*, Wright, *supra* note 198 (outlining an expansion of the Massachusetts’s Supreme Court webcasting program “to make briefs submitted to the court available in an electronic format on the website so that viewers tuning in will be able to access the corresponding briefs while listening in on the argument”).

224. *See, e.g.*, ConnectLive Webcast Services, <http://www.connectlive.com/index-1.html> (last visited Sept. 12, 2008) (“We . . . offer innovative and useful real-time audience interaction capabilities with the broadcasts.”); *see also* Orna Rabinovich-Einy, *Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape*, 6 YALE J.L. & TECH. 1 (2003-2004) (arguing for the creation of “virtual courtrooms”).

minimize this concern and permit courts to grant greater access without granting unlimited access to proceedings.

Courts already have experience in limiting the use of technology to interested parties and preventing involving strangers to the proceedings. The Second, Third, Eighth, Ninth, and Tenth Circuit Courts of Appeals use videoconferencing extensively for oral arguments.²²⁵ Allowing the parties and judges to participate in hearings through video feeds yields a “gain in efficiency—saving time and money—and sacrifice[s] little, mainly nostalgia for the old days.”²²⁶ More important, judges involved in videoconferencing have recognized that the practice has “increased access to the courts for litigants.”²²⁷ Although courts use videoconferencing, they have prevented complete public dissemination of these video feeds.²²⁸ Moving these videoconferences to the web allows greater access than closed-circuit television can provide, thereby fostering increased participation. At the same time, courts can continue to restrict access to “interested parties.”²²⁹

The availability of secure websites, password protections, and internet service provider registration allows the internet to limit access to class action proceedings to “interested parties,” i.e., absent class members. Courts have previously embraced these protections to prevent overly broad distribution of class action information. For example, the United States District Court for the Southern District of Texas ordered the plaintiffs in the Enron Corporation Securities Litigation to “prepare and maintain a website to be used by the parties to [the] case to post all filings with the [c]ourt and notices and orders issued by the [c]ourt.”²³⁰ The court also ordered that “[o]nly authorized

225. MEGHAN DUNN & REBECCA NORWICK, FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY OF VIDEOCONFERENCING IN THE COURTS OF APPEALS, at 1 (2006), available at [http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/\\$file/vidconca.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf); see also Henry Weinstein, *Court's Use of Video is Facing Review*, L.A. TIMES, Jan. 16, 2007, at B-1, available at 2007 WLNR 847099 (“Videoconferencing for oral arguments was introduced in several of the nation’s federal circuits between 1998 and 2001.”).

226. Weinstein, *supra* note 225 (quoting New York University law professor Stephen Gillers).

227. DUNN & NORWICK, *supra* note 225, at 1.

228. See, e.g., Weinstein, *supra* note 225 (discussing the decision of a Ninth Circuit panel to deny a television station the opportunity to film a proceeding that occurred via video conferencing, “apparently deciding that it would be unwise for the general public to watch the proceedings on television”).

229. Companies that provide webcasting services find great strength in their ability to disseminate webcasts to as broad or narrow an audience as desired. See, e.g., ConnectLive Webcast Services, *supra* note 224 (“Our video/audio transmission services can be designed for wide delivery to the general public, or specifically limited to intranet environments and private corporate or government networks.”). ConnectLive Communications provides live webcasting services as well as audio and video archival services to both corporate and government clients, including the U.S. Department of Defense, the U.S. Department of Education, the U.S. Department of Treasury, and the U.S. Census Bureau. See *id.*

230. *In re Enron Corp. Sec. Litig.*, No. 4:01-CV-03624 (S.D. Tex. June 6, 2002) (order regarding

persons shall have access to the website.”²³¹ To effectuate its order, the court required each person to submit contact information, including an email address to liaison counsel for the plaintiffs, who would, in turn, email the person a user-ID and password to access the website.²³² The Missouri Supreme Court provides another example of the way courts can limit access to webcast proceedings. The court streams live audio of its oral arguments on the internet but requires visitors to have a password to access the feed.²³³ Courts could use similar password protection to permit only absent class members to watch video feeds of hearings in class action proceedings.²³⁴

3. *Two-Way Communication*

This Article has thus far treated the “information superhighway” as primarily a one-way street. But the internet is not so confined. In addition to disseminating information to absent class members, the internet should be used more extensively to gather information from absent class members and exchange information between them. Email communications travel in both directions, and websites can accept as much information as they can distribute. The internet can permit absent class members to provide information to other class members, class counsel, or the court.

Only recently have commentators begun to realize that the internet provides a “cost-effective way for class members to communicate with each other or the court.”²³⁵ Despite its readily apparent power as a communication tool, however, “class members have generally not been able to use the [i]nternet to initiate communication to each other, to counsel, or to the court.”²³⁶ No good reason exists for this inability and non-use to continue. Two-way communication through the internet can (and will) provide benefits to the litigation of class actions, from the inception of the litigation through its conclusion.²³⁷

service of papers and notice of hearings via independent website).

231. *Id.*

232. *Id.*

233. See Missouri Supreme Court Website, <http://supremecourt.missourinet.com> (last visited Sept. 12, 2008).

234. Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 126 (2007).

235. *Id.*

236. *Id.* at 127.

237. Professor Leslie focuses primarily on the disincentives of class members to object to inadequate proposed settlements. *Id.* at 77-84. He thus encourages courts to “require counsel to create a website for

Class members must have the ability to communicate with each other and with class counsel for any meaningful participation to occur. The internet facilitates this communication.²³⁸ The benefits to opening these lines of communication can be seen at all stages of class action litigation.

First, two-way communication via the internet has the potential to reduce transaction costs in ways that permit smaller claims to be pursued as class actions. The inability to obtain economically feasible relief has long been a primary concern in class action litigation.²³⁹ This has been particularly true when class members seek small amounts in damages.²⁴⁰ The internet's ability to streamline the exchange of information and to open new lines of communication places individuals in a better situation to pool their efforts and achieve collective relief.²⁴¹ This cost-effective ability to work as a collective and to communicate with other class members and class counsel reduces the overall cost of litigating a class action. As a result, small-claim class actions that were previously not economically feasible may become feasible.

Second, class counsel can obtain a better understanding of the class's composition and claims as well as the class's desires in the particular litigation. As discussed above, many plaintiffs' firms and referral services host websites that allow potential class members to enter basic information about their cases.²⁴² Class counsel can also host bulletin boards dedicated to the class.²⁴³ From these sources, class counsel can efficiently gather information from absent and potential class members. Having a better understanding of the class and its composition, class counsel can provide more informed and responsive representation.²⁴⁴

each class action . . . [that] should have a bulletin board where class members can communicate with each other and air their concerns." *Id.* at 128. He also suggests that "judges themselves should accept comments and objections to proposed class settlement through [i]nternet-based communications, such as a web page dedicated to a particular class action." *Id.*

238. *Id.* at 128.

239. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.04 (Preliminary Draft No. 5, 2008).

240. See *Esler v. Northrop Corp.*, 86 F.R.D. 20, 34 (W.D. Mo. 1979); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.04 (Preliminary Draft No. 5, 2008).

241. *Cf.* *Leslie*, *supra* note 234, at 128-29 (highlighting the positive effects of cost-effective coordination in collective action situations).

242. See *supra* Part I.B.2.

243. See *Leslie*, *supra* note 234.

244. For example, if many absent class members (whose voices are heard only through the internet) are opposed to a particular settlement proposal or to dismissing claims against a particular defendant, class

Third, as absent class members' participation increases and they voice their opinions, the reliance and burden on class representatives diminishes. As it stands, class representatives are *the* voice of the class. As absent class members increasingly communicate with each other and counsel, the voice of the class becomes a collective voice. In this regard, the class representative assumes a less prominent and controlling role in the litigation. At the same time, the class representative that desires to truly speak "on behalf of the class" will have more information by which to determine the class' desires. Like class counsel, a class representative can provide more informed and responsive representation of the class as a whole.

Fourth, absent class members can obtain a better understanding of what is going on in their case, why counsel is pursuing or not pursuing certain claims, and most importantly, whether class counsel is truly representing their interests. Absent class members can make more informed decisions about whether to remain members of the class, to oppose appointment of particular class counsel, to object to the adequacy of the named class representatives, and to accept a proposed settlement. Absent class members could communicate with each other and with counsel to discuss the progression of the litigation. Ultimately, this two-way communication provides the key to unlocking the ability of absent class members to participate in and influence the litigation to which they are parties.

(a) Communication between class members and the court

In addition to the internet's ability to benefit absent class members and their counsel, it can benefit the courts. The evidence obtainable through enhanced two-way communication gives the court a better understanding of the class.²⁴⁵ The court can gain a better sense of the composition of the class and of the individual class members. With increased information about the class, the court receives greater guidance about whether to certify the class and how to proceed with the litigation.

Courts face many decisions at the class certification stage that become easier with increased information from and about the proposed class. For example, the court must make a threshold determination whether the proposed

counsel can factor these opinions into the decisions whether to reject the proposed settlement or to dismiss a particular defendant. This marks a stark contrast to the historical practice of leaving absent class members on the sidelines until the fairness hearing or other late stage in the litigation.

245. *Cf. Leslie, supra* note 234, at 129 (discussing the court's ability to discern the attitude of the class regarding a proposed settlement).

class is sufficiently cohesive to maintain a class action lawsuit. Increased communication from class members, particularly absent class members that have been historically uninvolved, can provide tremendous insight regarding this question. Class members can provide information, for example, on the nature and extent of their injuries or damages, the events giving rise to these injuries or damages, and their desire to pursue their individual claims. On the one hand, information obtained from absent class members can show that the proposed class lacks the cohesiveness necessary for certification.²⁴⁶ On the other hand, information from absent class members can show that a class indeed possesses the cohesiveness required for certification (even if it does not appear so at first blush).²⁴⁷ Along these same lines, courts can obtain information regarding the size of the class and its geographic dispersion (numerosity concerns), the individual aspects of respective class members' claims (predominance concerns), and whether to divide the proposed class into subclasses or whether to certify individual issues for class treatment.

Also, courts can obtain information regarding class members' feelings about the progress of the litigation and the performance of class counsel. The importance of adequate representation in class action litigation is obvious; it supplies the very foundation upon which class actions are built.²⁴⁸ Absent class members know, for example, whether class counsel are communicating with them, how the class representatives' cases compare to their own, and whether the class collectively approves of how the litigation is being pursued. Nonetheless, a 2004 study noted "the need for both defendants and the courts to be more vigilant in monitoring the adequacy of class representatives and

246. See, e.g., *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1150-54 (D. Minn. 2005) (decertifying a conditional class in a collective action after discovery revealed that the members of the class were not similarly situated nor uniform).

247. See, e.g., *Cokely v. N.Y. Convention Ctr. Operating Corp.*, No. 00-Civ-437, 2004 U.S. Dist. LEXIS 9264 (S.D.N.Y. May 20, 2004) (granting plaintiffs' renewed motion for certification after plaintiffs acquired sufficient evidence to demonstrate the commonality and typicality requirements of Rule 23(a)).

248. See *Massengill v. Bd. of Educ., Antioch Cmty. High Sch.*, 88 F.R.D. 181, 185 (N.D. Ill. 1980) (quoting *Folding Cartons, Inc. v. Am. Can Co.*, 79 F.R.D. 698, 701 (N.D. Ill. 1978)); accord *Levitan v. McCoy*, No. 00 C 5096, 2003 U.S. Dist. LEXIS 5078, at *14 (N.D. Ill. Mar. 28, 2003) (discussing need for "stringent" enforcement of adequacy requirement); *Hall v. Nat'l Recovery Sys., Inc.*, 96-132-CIV-T-17(c), 1996 U.S. Dist. LEXIS 11992, at *11 (M.D. Fla. Aug. 9, 1996) (class representative is a "fiduciary" and "serves as a guardian of the interests of the class"); *In re Lloyd's Am. Trust Fund Litig.*, No. 96-Civ-1262, 1998 U.S. Dist. LEXIS 1199, at *32 (S.D.N.Y. Feb. 4, 1998) (noting that class representative must be capable of making "reasonable decisions at critical stages of the litigation").

counsel.”²⁴⁹ “[C]ourts need to request any and all materials they deem necessary or helpful in adjudicating adequacy issues.”²⁵⁰

Two-way communication creates a record of additional materials, not previously available to the courts, upon which to base adequacy decisions. On the one hand, the evidentiary record may be replete with instances of class members contesting the decisions of class counsel. Such a record could provide grounds to find counsel’s representation inadequate. On the other hand, the record may contain acquiescence or support for counsel’s decisions. This reaction might support a court’s assessment that counsel was adequate. These evidentiary records would be particularly telling if webcasting also occurred and class members had the opportunity to watch counsel in action.

Although recognizing that courts would benefit from obtaining information from absent class members, one must also recognize that the court is not primarily responsible for gathering that information. Rather, the primary responsibility for gathering and presenting evidence on class certification issues falls on the parties.²⁵¹ Thus, two-way communication through the internet should develop in ways that facilitate the parties’ ability to gather information from absent class members.

Class counsel can easily obtain information from absent class members to present to the court. Through website bulletin boards and email communications, class counsel will receive information directly from absent class members. Class counsel can then summarize these communications or submit them to the court to support its arguments for class certification, its actions in the litigation, or a proposed settlement.

Opposing counsel faces greater difficulty in gathering information from absent class members to present to the court. First, opposing counsel does not have the same level of connection as class counsel to absent class members. Opposing counsel, for example, will neither host bulletin boards for the class nor receive emails from the class regarding the progression of the litigation. Second, courts have generally been reluctant to grant discovery as to unnamed class members.²⁵² Discovery obtained from unnamed class members,

249. Robert H. Klonoff, *The Judiciary’s Flawed Application of Rule 23’s “Adequacy of Representation” Requirement*, 2004 MICH. ST. L. REV. 671, 695.

250. *Id.* at 697.

251. In situations where absent class members are expected to present their individual objections or to present individualized proof, such as during a fairness hearing on a proposed settlement, courts should accept such submissions directly through the internet. Like direct submission of settlement claim forms, opt-outs, and opt-ins, the ease and cost-efficiency of such direct internet submissions increases the likelihood of absent class member participation. See Leslie, *supra* note 234, at 128-29; *supra* Part II.A.2.

252. See *Kline v. First W. Gov’t Sec.*, No. 83-1076, 1996 U.S. Dist. LEXIS 3329, at *4 (E.D. Pa.

however, provides the court with more detailed information about the class, by which to render its certification determination.²⁵³ Courts should become more willing to allow discovery from absent class members when determining whether to certify a class.²⁵⁴

The internet can facilitate discovery from absent class members non-intrusively and inexpensively. Courts have continuously sought to limit discovery from absent class members to avoid unduly burdening them.²⁵⁵ Courts have also wrestled with assigning the costs of obtaining discovery from absent class members between plaintiffs and defendants.²⁵⁶ For example, in *Schwartz v. Celestial Seasonings, Inc.*,²⁵⁷ the court allowed defendants to send a questionnaire to absent class members that sought information regarding alleged damages and purported reliance.²⁵⁸ Because the questionnaire was to be sent with the “Notice of Pendency of Class Action,” the court ordered that the parties share in the costs of simultaneously providing both.²⁵⁹ These questionnaires, and other forms of discovery, are prime candidates for internet delivery. The costs associated with internet delivery are substantially lower than through direct mail.²⁶⁰ And the court can easily monitor both propounded discovery and the responses from the absent class members.

By relying on the internet as a way to gather information from absent class members, courts can obtain more information than previously available regarding class certification and case management issues. Given the ease of obtaining this information and courts’ ability to regulate counsel’s efforts to obtain it, courts should come to expect greater information about unnamed class members and should issue appropriate orders if that information is not presented. Moreover, courts should facilitate opposing counsel’s ability to

Mar. 11, 1996) (“Upon a survey of cases, it is safe to state that discovery of absent class members is disfavored.”); *see also* KLONOFF ET AL., *supra* note 8, at 383-90; MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.41 (2004).

253. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.141 (2004).

254. *See Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (“Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.”); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.142 (“Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the claims, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof.”).

255. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.41.

256. *See id.*

257. 185 F.R.D. 313 (D. Colo. 1999).

258. *Id.* at 315.

259. *Id.* at 319-20 (noting that the cost to the plaintiff from providing notice and the questionnaire would be “burdensome”).

260. *See supra* Part I.A.

gather and present information from unnamed class members to ensure a balanced and meaningful presentation.

CONCLUSION

The power of the internet to allow class members to participate in class action litigation cannot be ignored. No longer can efficiency or logistical concerns prevent courts and practitioners from engaging those unnamed class members who have been historically cast aside.

The current uses of the internet in class action litigation alleviate some of the plight of the absent class member. At the very least, the internet has begun to take steps aimed at empowering these individuals by enhancing their ability to gather information about pending or potential litigation. But the transition to actual and meaningful participation has just begun.

The future development of the internet can complete the transformation. As the judiciary takes responsibility for supplying and coordinating the dissemination of class action information on the internet, class members can be assured of accurate and complete information. Allowing webcasting of class action proceedings permits courts to take the next step and allows class members to witness the events of litigation that impact their rights. And the internet provides an opportunity for absent class members to contribute to those proceedings.

The development of two-way communication brings class action litigation closer to traditional bilateral litigation than ever before possible. It empowers class counsel to communicate with the entire class, gives a voice to the historically silent absent class members, and gives a reviewing court the evidence it needs to render informed decisions on class certification, case management issues, and proposed settlements. Through these open lines of communication, absent class members—for the first time—can truly participate in litigation that will ultimately determine their rights.