MAKING CLASS ACTIONS WORK: THE UNTAPPED POTENTIAL OF THE INTERNET

Robert H. Klonoff, Mark Herrmann, and Bradley W. Harrison

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

---

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

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.” And, although “impracticable” does not necessarily require large numbers, the requirement is usually fulfilled because of the large number of individuals involved.

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. Until recently, these difficulties have precluded meaningful involvement by most absent class members, to the detriment of the entire class action process.
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. 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.

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. Over the course of a week, the average American internet user spends more than ten hours on the internet, 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. Comparing 2006 to 2005, the average unique audience for newspaper websites increased 22%. Increasingly, people are regularly visiting portal websites and websites with extensive search capabilities, such as MSN.com, Yahoo, and Google, to guide
their internet browsing.\textsuperscript{17} The internet has clearly become a vital “communication, information, entertainment, and transaction tool.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} Indeed, “[n]otice is a critical part of class action practice.”\textsuperscript{21} Courts and commentators have long struggled with the difficulties associated with providing “the best notice that is practicable under the circumstances,

\textsuperscript{17} THE PÆW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, supra note 13, at 15.
\textsuperscript{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.
\textsuperscript{20} See Fed. R. Civ. P. 23(c), (d)(2), (e)(1)(B), and (h)(1).
\textsuperscript{21} MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.31 (2004).
including individual notice to all members who can be identified through reasonable effort.  

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. And they often move long distances. Although 57% of all movers remained in the same county as their previous residence, nearly 20% of movers left their previous state of residence, and 4.6% of movers went abroad. 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.

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. In some class action lawsuits, current correct addresses may be found for only 50% of identifiable class members.

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

---


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).
The total circulation of all newspapers in the United States amounts to fifty-one million copies daily. 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%. 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. Industry experts project that in a best-case-scenario, the declines will stabilize at approximately 1% annually within the next couple of years. “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. Although the figure itself is quite large, it too is shrinking.

Television’s ability to notify absent class members is also suffering. Television notice campaigns usually come with an exorbitant price tag. These costs have historically posed the largest barrier to television-based notice programs. Advances in technology are also reducing television viewership. For instance, over 35% of internet users say they watch less
television since they began to use the internet.\textsuperscript{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.\textsuperscript{41} Nielsen’s new commercial ratings, once released, are expected to reveal a drop in commercial viewership.\textsuperscript{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.\textsuperscript{43} The \textit{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."\textsuperscript{44}

Over time, courts have come to accept both email and internet notice campaigns as acceptable means of giving notice in class actions.\textsuperscript{45} Indeed,
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
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. 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.” Its “Class Action and Mass Tort Center” provides overviews, news, “Frequently Asked Questions” sections, and additional links for products and services relating to class actions. The information is organized by product and covers everything from Accutane to Zyprexa. The website also provides recall announcements from the Consumer Product Safety Commission and the Food and Drug Administration. Given the amount of time internet users spend searching for product information 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.
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.” The Clearinghouse serves as the “Designated Internet Site” for securities class actions brought within the Northern District of California. 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 1995 and maintains copies of more than 26,000 complaints, briefs, and other litigation-related materials filed in these cases.

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. The website has links to information on lawsuits and filings in various insurance, technology, tobacco, and securities class actions. 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. Along these same lines, FreeAdvice.com offers information and “as is” advice on many legal topics and issues, including a section dedicated to litigation, and specifically to class actions. It provides general information, information about product liability class actions, and California-specific information.

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

---

59. See id.
60. Id.
61. Id.
63. Id.
67. See id.
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. The site also contains brief summaries of various class actions.

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. Both legal scholars and practitioners host legal blogs. Sites hosted by scholars include the Mass Tort Litigation Blog, Point of Law, and Products Liability Prof Blog. Sites hosted by practitioners include the Drug and Device Law Blog, OverReg’d, Class Action Fairness Act Blog, and Class Action Defense Blog. These websites serve as regularly updated internet journals and provide commentary on a wide variety of topics.

69. Id.
70. See id.
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.” Its interactive website provides information on the development of class action litigation in the post-CAFA era. 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.

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. Because these groups are attempting to attract clients, their websites are driven by the motive to notify and involve potential class members. 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.” The firm also dedicates webpages to many of its
pending or potential class action investigations, including, for example, its investigation into a products liability action involving Medtronic’s Sprint Fidelis® leads.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{88} The website contains input fields and contact information if individuals wish to “explore [their] legal rights.”\textsuperscript{89}

Motley Rice operates a website in addition to the firm’s general website that is dedicated to a specific type of class action.\textsuperscript{90} For example, Motley Rice operates a website dedicated exclusively to mesothelioma litigation.\textsuperscript{91} This website provides a brief history of the firm’s involvement with mesothelioma litigation.\textsuperscript{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.”\textsuperscript{93} As with its general website, Motley Rice’s mesothelioma webpage features an input form for
internet users to supply their contact information and inquire about their legal rights.\textsuperscript{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.\textsuperscript{95}

The Electronic Frontier Foundation (EFF) manages a website dedicated to “Defending Freedom in the Digital World.”\textsuperscript{96} That website contains information on every lawsuit—many of which are class actions—in which the EFF is involved.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{100} Like EFF, Public Citizen has a webpage dedicated to its litigation group that provides briefs from cases in which the group is involved.\textsuperscript{101} On this webpage, an internet user can find

\begin{itemize}
\item \textsuperscript{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 . . . ”).
\item \textsuperscript{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).
\item \textsuperscript{96} Electronic Frontier Foundation, http://www.eff.org (last visited Sept. 12, 2008).
\item \textsuperscript{97} \textit{Id.} EFF posts press releases, news reports, legal documents, rulings, and links for further information on its website.
\item \textsuperscript{98} http://www.eff.org/cases/hepting (last visited Sept. 12, 2008).
\item \textsuperscript{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).
\item \textsuperscript{100} Public Citizen, About Public Citizen, http://www.citizen.org/about/ (last visited Sept. 12, 2008).
\item \textsuperscript{101} Public Citizen, Cases and Documents, http://www.citizen.org/litigation/briefs (last visited Sept. 12, 2008).
\end{itemize}
class action notices, settlement objections, and other pleadings. 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. 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.” 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. 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. 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. 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. This website, like its counterpart, is equipped with search engines, topical lists, drop-down menus, and other mechanisms to guide

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

\subsection*{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.\textsuperscript{110} Because these websites are often removed from the internet after all claims have been processed,\textsuperscript{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.\textsuperscript{112} The

\begin{flushleft}
\textsuperscript{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 one 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 . . . .”).

\textsuperscript{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).


\end{flushleft}
websites for the individual class actions briefly explain that settlements have been reached.\textsuperscript{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.\textsuperscript{114} Class members can print a duplicate claim form to submit in hard-copy.\textsuperscript{115} If the class member has additional questions, the website provides a toll-free number.\textsuperscript{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.\textsuperscript{117} In addition to providing a claim form, the website also provides an opt-out form during the opt-out period.\textsuperscript{118} Moreover, this website allows class members to submit comments, although it is unclear to what end.\textsuperscript{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,\textsuperscript{120} operated by Heffler, Radetich & Saitta LLP, contains links to every case in which HR&S serves as claims administrator.\textsuperscript{121} Like the other sites mentioned here, it provides information to class members regarding submitting and processing claims.\textsuperscript{122}

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{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).
\textsuperscript{118} Id. (noting that details about claims administration process were sent to class members both by electronic notice and letter).
\textsuperscript{120} HR&S Claims Administration, http://www.hr CLAIMS administrators .com (last visited Sept. 12, 2008).
\textsuperscript{121} HR&S Claims Administration, Cases, http://www.hrclaimsadministration.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).
\textsuperscript{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. Of the ninety-four federal district court websites, only seven websites contain readily accessible information about pending class actions.

When courts decide to provide information regarding pending class actions, they offer very detailed information. For example, the Middle District of Louisiana dedicates part of its website to the Brusly Barge Class Action. 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).
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.
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.”

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.” Stanford’s Clearinghouse website usually serves as the Designated Internet Site. 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. The Panel determines whether cases pending in different federal courts should be centralized in one court for pretrial proceedings. The Panel then assigns a judge or judges to conduct those

---

129 Id. at 6.
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.
proceedings. 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. The website also provides a bimonthly list of all currently pending coordinated proceedings and cases transferred to the Panel. From this list, visitors can access transferee district court web links and master docket information.

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. The website has a regularly updated “Current Developments” section that details every event in the litigation, including information about participating in the settlement program. 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?” The website also provides various forms relevant to the litigation. Finally, the website maintains a public calendar of upcoming proceedings in the litigation. Many similar websites exist for other multidistrict proceedings.

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.
140. Id.
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.
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. The New Jersey judiciary, responsible for managing this process, maintains its own website: the Mass Tort and Centralized Management Information Center. As a result of this sophistication, the judiciary maintains a webpage dedicated to the Vioxx litigation pending in state court there. 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.” Like its federal court counterpart, the New Jersey website provides voluminous information about the Vioxx litigation.
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. As access to judicial information increases, the general public becomes more aware of, and interested in, what transpires in courtrooms across the country. 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. It is no surprise that the internet is being increasingly relied

---


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.\textsuperscript{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.\textsuperscript{155} These developments are already occurring to a limited extent.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.”\textsuperscript{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.\textsuperscript{160} Courts may also order notice to correct misinformation or misrepresentations by one of the parties or their counsel,\textsuperscript{161} when substituting a new lead plaintiff,\textsuperscript{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 members of important developments in the litigation.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{154}] See \textit{supra} Part I.A.; see also U.S. \textsc{Dep’t of Commerce}, \textit{supra} note 11, at 4 (emphasizing the increasing reliance on the internet as a means of communication).
\item[\textsuperscript{155}] See \textit{supra} note 43 and accompanying text.
\item[\textsuperscript{156}] \textit{See supra} Part I.A.
\item[\textsuperscript{157}] \textsc{Manual for Complex Litigation (Fourth)} § 21.313 (2004).
\item[\textsuperscript{158}] \textit{Id.}
\item[\textsuperscript{159}] \textsc{Fed. R. Civ. P.} 23(d)(2).
\item[\textsuperscript{161}] \textit{Id.}
\item[\textsuperscript{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.”).
\end{itemize}
\end{footnotesize}
members of their right to intervene or otherwise participate in the litigation. 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. 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. 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. 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.” 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. 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.
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)).
cites the internet as a preferable substitute notice mechanism, particularly in small-claim class actions. As the ALI notes, moving to internet notice programs decreases the cost of providing notice and increases the settlement funds available for class members. 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.

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; too should class members’ elections to opt out and, where appropriate, opt into litigation. As described above, direct claim submissions are just beginning to take hold. People have grown unhappy with mail-in forms and prefer online submissions. 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). 

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. Clicking on the link sends the user to a webpage containing the settlement notice and .pdf versions of the claims forms. 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. 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.
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

181. Id.
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 Wikipedia 186 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).


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. 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.” As users increasingly rely on these websites as their portals to the internet, the importance of appearing high on the returned results list increases. 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), class action litigation will increasingly be resolved in federal, as opposed to state, courts. The Federal Judicial Center “found a 72 percent increase in

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.
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 J. 22 (Feb. 13, 2006).
class action activity in the eighty-eight district courts . . . studied.”

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. 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.

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. 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. 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. Internet users can thus be funneled to the designated internet site.


195. See generally Walters, supra note 43.

196. See id.


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.”).

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.\textsuperscript{200} The NCSC already hosts the Mass Tort Clearinghouse “to provide access to news and educational resources about developments in mass tort management.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{204} The ban on cameras at the trial-court level remained.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{200} See National Center for State Courts, http://www.ncsconline.org (last visited Sept. 12, 2008).
\item \textsuperscript{201} See NCSC: Knowledge and Information Services, http://www.ncsconline.org/WC/Publications/MassTorts/MassTortIndex.htm (last visited Sept. 12, 2008).
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{204} Background on Cameras in Federal Courts, supra note 203.
\item \textsuperscript{205} Id.
\end{itemize}
of appeals to allow electronic media coverage.\footnote{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,\footnote{207} the Judicial Conference continued the ban.\footnote{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.\footnote{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.”\footnote{210} Both the Senate and House have considered similar legislation in the past but failed to pass it.\footnote{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.\footnote{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.\footnote{213} Only eight states, however, permit the broadcasting of trial-court level proceedings.\footnote{214}

In addition to television broadcasts, state courts have begun experimenting with online webcasting. Fifteen states currently webcast their supreme court proceedings.\footnote{215} Although only three state-level trial
courts—the Delaware County Ohio Municipal Court, the Ninth Judicial Circuit of Florida, and Wise County Virginia—currently webcast their proceedings, courts have expressed a growing interest in online video. As technology spreads, forecasters predict increased participation.

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. 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.

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.”).


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’Scaannlairin 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’Scaannlain, supra note 220, at 55.
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”).
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.\textsuperscript{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.”\textsuperscript{226} More important, judges involved in videoconferencing have recognized that the practice has “increased access to the courts for litigants.”\textsuperscript{227} Although courts use videoconferencing, they have prevented complete public dissemination of these video feeds.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{230} The court also ordered that “[o]nly authorized...
persons shall have access to the website.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{233} Courts could use similar password protection to permit only absent class members to watch video feeds of hearings in class action proceedings.\textsuperscript{234}

3. \textit{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{237}

\begin{footnotesize}
\begin{enumerate}
\item[231.] \textit{Id.}
\item[232.] \textit{Id.}
\item[233.] \textit{See Missouri Supreme Court Website, http://supremecourt.missourinet.com (last visited Sept. 12, 2008).}
\item[235.] \textit{Id.}
\item[236.] \textit{Id. at 127.}
\item[237.] Professor Leslie focuses primarily on the disincentives of class members to object to inadequate proposed settlements. \textit{Id. at 77-84}. He thus encourages courts to “require counsel to create a website for
\end{enumerate}
\end{footnotesize}
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. 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. This has been particularly true when class members seek small amounts in damages. 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. 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. Class counsel can also host bulletin boards dedicated to the class. 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.
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. 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. 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). 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. 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..."
“Courts need to request any and all materials they deem necessary or helpful in adjudicating adequacy issues.”

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. 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. Discovery obtained from unnamed class members,


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.

however, provides the court with more detailed information about the class, by which to render its certification determination.\textsuperscript{253} Courts should become more willing to allow discovery from absent class members when determining whether to certify a class.\textsuperscript{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.\textsuperscript{255} Courts have also wrestled with assigning the costs of obtaining discovery from absent class members between plaintiffs and defendants.\textsuperscript{256} For example, in \textit{Schwartz v. Celestial Seasonings, Inc.},\textsuperscript{257} the court allowed defendants to send a questionnaire to absent class members that sought information regarding alleged damages and purported reliance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{254} See \textit{id.}

\textsuperscript{255} See \textit{Manual for Complex Litigation} (Fourth) § 21.41.

\textsuperscript{256} See \textit{id.}

\textsuperscript{257} 185 F.R.D. 313 (D. Colo. 1999).

\textsuperscript{258} \textit{Id.} at 315.

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

\textsuperscript{260} See \textit{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.