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CRAFTING A SUCCESSFUL E-MAIL NOTICE PROGRAM

E-mail notice to settlement classes has significant advantages in terms of cost and effectiveness, making it in some cases -- but not always -- the "best notice that is practicable under the circumstances." The authors discuss the benefits of such programs, the competing standards under the Federal Rules, and the elements of a successful program in light of case law and the Federal Judicial Center's checklist for judges.

By Christopher Chorba and Lauren A. Eber *

E-mail notice can be an effective, efficient, and economical means of providing notice to settlement classes. The ever-increasing use of electronic forms of communication by the public suggests that e-mail notice in many circumstances may be the most reliable means of reaching class members to notify them of class settlement. And the lower cost of e-mail notice, versus postal mail notice, means that under an e-mail notice program, defendants should be able to allocate more settlement dollars to class members and fewer to the U.S. Postal Service. But despite the many benefits of e-mail notice, many courts remain skeptical of such programs and defendants risk having to re-notice the entire class if their notice program is disapproved by the court after it is carried out. Consequently, defendants' best interests are served by ensuring that any class notice program involving e-mail notice is as robust as possible from the outset and is designed to withstand scrutiny under the applicable legal standards.

Defense counsel should consider several factors when crafting an e-mail notice program that is likely to be approved by the court: (1) the benefits of e-mail notice for the parties; (2) which of the competing notice provisions of the Federal Rules of Civil Procedure applies in the circumstances, Rule 23(e)(1) (requiring notice to be directed "in a reasonable manner to all class members who would be bound by the proposal") or 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances" to be directed to class members); (3) whether e-mail notice is appropriate given the facts of the particular case at issue; and (4) what elements to incorporate into a proposed notice program, in light of the case law and the guidance published in the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist. We consider below each of these aspects of e-mail notice.

THE BENEFITS OF E-MAIL NOTICE

E-mail notice has several obvious advantages over postal mail notice that make it a preferable form of notice for class action defendants in many circumstances. First, e-mail notice is far more cost-effective than postal mail notice. The cost savings in postage alone can amount to millions of dollars for a large class. The least expensive form of postal mail notice, a postcard, costs a minimum of 50 cents in

* *CHRISTOPHER CHORBA and LAUREN EBER practice in the Los Angeles office of Gibson, Dunn & Crutcher LLP as members of the firm's Class Actions Practice Group. Their e-mail addresses are cchorba@gibsondunn.com and leber@gibsondunn.com.*

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postage and postcard printing costs, compared to a cost of as little as $.01-$.02 per e-mail – including the cost for maintaining a website and a call center. For a class of two million people, this translates to a cost savings of $980,000 ($1 million for mail notice and $20,000 for e-mail notice).

While the cost benefits of e-mail notice make it a very attractive option for defendants, courts have held that the cost advantage of e-mail notice on its own is not a sufficient reason for favoring e-mail notice over postal mail notice. For example, one district court explained that "the law is quite clear that concerns about the financial burdens of [mail] notice cannot excuse noncompliance with that requirement."[1] Other courts are more sympathetic to the difference in cost of notice programs and understand that it could mean the difference between reaching settlement or not. As discussed further below, when proposing an e-mail notice program to the court, it is important to focus on the effectiveness of the program, rather than the cost savings to defendants.

In addition to the cost savings of e-mail notice, it has benefits of efficiency and effectiveness. For many businesses, the primary means of communicating with their customers is electronic. For these businesses, e-mail notice would more effectively reach their customers than postal mail. In many cases, these businesses may not even have physical addresses for customers. E-mail has the added benefit of providing "read receipts" and similar electronic feedback that allows the sender to determine instantly whether the e-mail address was operable and/or whether the message was received. The methods for determining whether physical mail was sent to the correct addresses can be far slower and less reliable.[2] Barring the short-term situation where mail forwarding is active immediately following a change of address, or the conscientious new resident returning the mail to sender, there is little means of knowing if a piece of mail has been sent to an outdated physical address.[3] E-mail has the added benefit of being sent nearly instantaneously, versus the longer printing, delivery, and return times for traditional mail (dubbed "snail mail" for this reason).

Reliable data as to the relative effectiveness of e-mail versus mail in reaching customers is difficult to ascertain. Moreover, courts do not appear to require empirical support for their conclusions as to what form of notice will be more effective, so it is up to the parties to make the most compelling case possible that, based on the particular circumstances of the case, e-mail notice is the more appropriate method of notice to effectively reach class members.

COMPETING PROVISIONS OF FEDERAL RULE OF CIVIL PROCEDURE 23

How rigorous a notice program must be turns largely on what standard is applied under the Federal Rules of Civil Procedure. The Rules set forth two competing standards for notice of settlement: Rule 23(e)(1) generally applies to notice of settlement and requires only that "[t]he court must direct notice in a *reasonable manner* to all class members who would be bound by the proposal."[4] Rule 23(c)(2)(B), on the other hand, applies to notice of class certification and sets forth the far more stringent requirement that "the court must direct to class members *the best notice that is practicable under the*

[1] *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 93 (E.D.N.Y. 2007); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (U.S. 1974) ("There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.).

[2] Courts are not necessarily inclined to see it this way. Some courts remain skeptical of e-mail and believe that mail is a more reliable means of reaching consumers. *See, e.g.*, *Karvaly*, 245 F.R.D. at 93 (e-mail "does not produce the same degree of

footnote continued from previous column…

reassurance that every member of the proposed class will receive individual notice of the settlement that a plan of notification by first class mail would"). Which view controls will likely be decided based on the facts of the particular situation at issue.

[3] Some resources exist, such as the National Change of Address Database, that can assist with locating address information, but while these resources may help with updating outdated address information, they do not provide receipt confirmation of any kind, let alone real-time read receipts, the way that e-mail can.

[4] Fed. R. Civ. P. 23(e)(1) (emphasis added).

circumstances, including *individual notice* to all members who can be identified through reasonable effort."[5] While on its face, Rule 23 seems to require only the lower "reasonable manner" standard for notice of class settlement, in practice, that is often not the case. The reality in practice is that notice of both class certification and settlement are frequently combined. And courts have generally found that combined notice of class certification and settlement must satisfy the heightened "best notice that is practicable" standard. So while several district court cases hold that in actions in which the court has not yet certified a class, the heightened standard of Rule 23(c)(2)(B) applies to notice of class certification, and the lower standard of Rule 23(e)(1) applies to notice of the settlement, in practice, notice of both certification *and settlement* are frequently subject to the heightened "best notice that is practicable under the circumstances" standard.

For example, in *Browning v. Yahoo! Inc.*, the court pointed out that "[i]n class-action settlements, it is common practice to provide a single notice program that satisfies both of these notice standards," referring to Rule 23(c)(2)(B) and Rule 23(e)(1).[6] Similarly, in *Larson v. Sprint Nextel Corp.*, the court held that "where a settlement class has been provisionally certified and a proposed settlement preliminarily approved, notice of both certification and settlement can be combined but must satisfy the heightened standard of Rule 23(c)(2)(B)."[7] Other district court decisions have adopted this reasoning.[8]

Given the frequency with which notice of both class certification and settlement are combined, when crafting a notice plan, class action defendants should be prepared to propose a program that can survive the scrutiny of the heightened "best notice that is practicable under the circumstances" standard.

E-MAIL NOTICE CAN SATISFY THE HEIGHTENED STANDARD OF RULE 23(C)(2)(B), BUT NOT ALWAYS

In an environment where "the best notice that is practicable under the circumstances" is frequently required, proponents of an e-mail notice program must show not simply that e-mail notice is a possible alternative to mail notice, but that e-mail notice is the *best* form of notice. This determination will rely heavily on the facts of the particular case. The nature of the typical communication between the defendant and the class members will be a leading factor to consider. In *Browning v. Yahoo! Inc.*, for example, the court held that e-mail notice is "particularly suitable . . . where settlement class members' claims arise from their visits to Defendants' Internet websites."[9]

The risk of moving forward with an e-mail notice program is that following preliminary approval, after the notice is carried out, the court could reject the program following objections from class members. In *Larson v. Sprint Nextel Corp*., for example, the district court rejected the notice that the parties provided at significant expense (and after the court's preliminary approval), because the content of the notice was insufficient, and because the notice did not make use of an existing partial list of potential class members that the defendants had compiled in separate litigation years earlier.[10] The defendants cited the "exorbitant cost and effort required in order to ascertain the identities of each and every member of the proposed class," but the court nevertheless ordered a new notice because the initial efforts "complied with Rule 23(e) but neglected to surmount the more onerous burden imposed by Rule 23(c)."[11] The court suggested but did not expressly endorse possible e-mail notice, stating, "Sprint and Class Counsel are free to devise a notice plan that meets Rule 23(c)(2) standards while at the same time utilizing the cost and efficiency savings that come from features such as electronic mail or text messaging."[12]

ELEMENTS OF A SUCCESSFUL NOTICE PROGRAM

Given the stringent "best notice that is practicable under the circumstances" standard and the skepticism of many judges toward e-mail as a reliable method of notice, parties should incorporate several additional

[5] Fed. R. Civ. P. 23(c)(2)(B) (emphases added).

[6] *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at *4 n.7 (N.D. Cal. Nov. 16, 2007) (citing Manual For Complex Litigation § 21.31 (4th ed. 2004).

[7] *Larson v. Sprint Nextel Corp*., No. 07-05325, 2009 U.S. Dist. LEXIS 39298, at *7-8 (D.N.J. Apr. 29, 2009).

[8] *See, e.g.*, *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 612-13 (S.D. Cal. 2008) ("Notice must be provided to a class in the best way practicable under the circumstances."); *In re LG/Zenith Rear Proj. Telev. Class Action Litig*., No. 06-5609, 2009 U.S. Dist. LEXIS 13568, at *6-10 (D.N.J. Feb. 18, 2009) (notice must satisfy both Rule 23(c) and 23(e)).

[9] *Browning v. Yahoo! Inc.*, *supra* note 6 at *4 (N.D. Cal. Nov. 16, 2007).

[10] *Larson v. Sprint Nextel Corp*., *supra* note 7 at *34.

[11] *Id.*

[12] *Id*. at *47.

elements into an e-mail notice program to make it more robust and better able to withstand judicial scrutiny. Additional elements that counsel should consider incorporating into the notice program include: mail notice for e-mail "bounce-backs," advertisement in online and print sources (*e.g.*, search engines like Google, social networking websites such as Facebook, and newspapers of broad national circulation like USA Today), a toll free call number for inquiries from notice recipients, an informational website about the class certification and settlement, and a detailed declaration from an expert in the field of providing notice. The facts of the particular case may dictate other elements that should be a part of the program. For example, in class actions involving Facebook, an internal Facebook message to class members was an important component of the notice program, in addition to e-mail, because Facebook messages were a regular means of communication between Facebook and the class members.[13]

A combined notice program incorporating some or all of the elements described above is likely the safest course of action when it comes to relying on a notice program with e-mail notice as its centerpiece. For example, in *Lundell v. Dell,* the court approved a program of notice by e-mail, and posting of the notice on the company website, with notice by first class mail for customers that the defendant determined did not receive the e-mail notice.[14]

In *Parker v. Time Warner Entertainment Co*., on the other hand, the court disapproved the class notice, citing fairness concerns, because defendant proposed to notify only 1/15 of class members.[15] The defendant's database contained the names of 16 million customers, but current addresses were available for only 1.3 million of them. Defendant proposed that while these 1.3 million individuals would receive individual notice, the remainder of the class would receive notice only through a website and other publications. An objector submitted evidence, in the form of a statement from a notice expert, that all 16 million names and address database records could be updated for $22,400 (at 90% accuracy). In light of that possibility, the court held that the defendant had not met its burden of showing that the requirements of Rule 23 had been met.[16] As seen in *Parker*, notice experts can play a significant role in the court's decision and defendants are better situated when they have a credible expert endorsing their proposed notice plan.

A successful notice program will also take into account the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist, although this checklist is not binding and the parties may develop evidence to show that one or more of these factors do not apply.[17] Factors on the Checklist include:

1. Can a high percentage of the proposed class be reached (*i.e.*, exposed to a notice)?
2. Is it economically viable to adequately notify the class?
3. Does the plan include individual notice?
4. Was reliable information received on whether and how much individual notice can be given, including expert review of the information?
5. Will outdated addresses be updated before mailing?
6. Are there plans to re-mail notices that are returned as undeliverable?
7. Will e-mailed notice be used instead of postal mailings?
8. Will publication efforts combined with mailings reach a high percentage of the class? The Checklist considers this to be the lynchpin of an objective determination of the adequacy of a proposed notice effort.

The more elements of the Checklist a defendant can incorporate into a notice program, the higher the likelihood that the program will be approved by the court.

CONCLUSION

The cost and efficiency benefits of e-mail notice make it a very attractive option for class action defendants. The heightened "best notice that is

[13] *Lane v. Facebook, Inc.*, 2009 U.S. Dist. LEXIS 24762 (N.D. Cal. Mar. 17, 2010) (approving a notice program incorporating e-mail plus internal Facebook messages).

[14] *Lundell v. Dell, Inc.*, 2006 U.S. Dist. LEXIS 90990, at *2-3 (N.D. Cal. Dec. 5, 2006); *see also Parker v. Time Warner Entertainment Co*., 239 F.R.D. 318 (E.D.N.Y. 2007).

[15] *Parker v. Time Warner Entertainment Co*., *supra* note 14 at 335.

[16] *Id.*

[17] Federal Judicial Center 2010 Judges' Class Action Notice and Claims Process Checklist (http://www.fjc.gov/public/pdf.nsf/lookup/notcheck.pdf/$file/notcheck.pdf).

practicable in the circumstances" standard for notice of class certification and settlement means that defendants should craft a robust, multifaceted notice program to maximize the likelihood of surviving judicial review. A reliable program is required to avoid the worst case scenario of having to re-notice the class after implementing an unsuccessful e-mail notice program. The prevailing case law and the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist indicate that a combined notice program, along with an affidavit from a notice expert is the safest course of action. A combined notice program can take advantage of the cost savings of e-mail notice by making e-mail notice the centerpiece of the program and relying on postal mail, website and print advertisement, and a toll free information phone line and informational website to fill in the gaps and maximize the reach of the program. The facts of the case should also be taken into account, and the nature of the ordinary communication between the defendant and the class members can weigh in favor of an e-mail notice program, if electronic communication is the norm. The case law to date shows that courts are willing to consider e-mail notice programs. As more defendants use these best practices to craft effective e-mail notice programs, e-mail notice will become more widely accepted and less subject to unwarranted skepticism, benefitting class action defendants and class members alike. ■