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E-mail: A Constitutional (and Economical) Method of Transmitting Class Action Notice

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E-MAIL: A CONSTITUTIONAL (AND ECONOMICAL) METHOD OF TRANSMITTING CLASS ACTION NOTICE

I. INTRODUCTION

In a modern society heavily dependent on computers,[1] the Internet is quickly becoming a part of everyday life in the United States and around the world.[2] It is

[1] *See, e.g.*, John Pike, *FAS Cyberstrategy Project: CyberStats* (last modified Oct. 16, 1997) <http://www.fas.org/cp/netstats.htm> ("By the end of this decade, the number of households with home computers may surpass the number with cable television.").

[2] Statistics on Internet use vary greatly, but it is undeniable that the number of Internet users is growing at a tremendous rate. *See, e.g.*, American Civil Liberties Union v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (200 million users worldwide by

attracting the masses for a number of reasons, but largely because its services are convenient, fast, and relatively cheap.[3] Many activities that were once carried out in person, by telephone, or by traditional mail are now taking place on this vast computer network.

While new technologies may bring convenience and cost savings to the public, they also bring challenges to established legal principles. Courts are just beginning to struggle with some of the unique legal questions that the Internet has created.[4] In recent years, the legal system has wrestled with such issues as how Internet contacts establish personal jurisdiction[5] and how much Fourth Amendment protection is afforded an e-mail message.[6] And as the Internet becomes further established as a staple of American society, many more legal questions are certain to arise.

One such question will likely involve the due process implications of sending notice in a class action lawsuit by e-mail. Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, requires notice of "opt out" rights in a Rule 23(b)(3) class, including individual notice to identifiable members of the class.[7] Traditionally, individual notice in (b)(3) class actions has been given by first-class mail,[8] up until now the most convenient and inexpensive form of individual notice in most class actions. But notice by traditional mail may soon be a thing of the past, replaced by e-mail notice over the Internet. As more attorneys recognize the benefits

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1999); *Computer Industry Almanac Inc.: Over 300 Million Internet Users in Year 2000* (visited Mar. 29, 1999) <http://www.c-i-a.com/199809iu.htm> (over 327 million users world wide by year-end 2000, up from 100 million by year-end 1997); *Emerge Inc.: What's New* (visited Mar. 29, 1999) <http://www.emergeinc.com.statistics.html> (estimating 1 billion internet users worldwide by 2001); *Nua Internet: How Many Online* (visited Mar. 29, 1999) <http://www.nua.ie/surveys/how_many_online/index.html> (151 million users worldwide as of December 1998). *See also* Kelly M. Slavitt, *Gabby in Wonderland - Through the Internet Looking Glass*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 611, 612 (1998) (citing various statistics on the growth of Internet use); Scott A. Sundstrom, *You've Got Mail! (And the Government Knows It): Applying the Fourth Amendment to Workplace E-Mail Monitoring*, 73 N.Y.U.L. REV. 2064, 2064 (1998) (compiling statistics on internet use).

[3]*See* Leonard I. Frieling, *Making E-Mail Mean Effective Mail*, 26 COLO. LAW 121, 121 (1997) ("E-mail is rapidly becoming an integral part of professional and personal lives. It is almost free, quite reliable, very fast, and works, unlike telephones, on the individual schedules of the writer and reader."); Jeff Goodell, *E-Mail*, ROLLING STONE, Nov. 27, 1997, at 66 ("[E-mail is] [t]he best form of communication ever invented—fast, cheap, silent, and personal.").

[4]*See, e.g.,* Compuserve Inc., v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997) (whether unsolicited e-mail advertisements are a form of trespass); Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436 (E.D. Pa. 1996) (whether the right to send unsolicited e-mail advertisements is protected by the First Amendment).

[5]*See* Christopher E. Friel, *Downloading a Defendant: Is Categorizing Internet Contacts a Departure from the Minimum Contacts Test?*, 4 ROGER WILLIAMS U.L. REV. 293 (1998) (how internet contacts establish personal jurisdiction).

[6]*See* United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) (evaluating the scope of privacy afforded an e-mail message under the Fourth Amendment).

[7]FED. R. CIV. P. 23(c) (2).

[8]431 PRACTICING LAW INSTITUTE, LITIGATION, CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE, 7 CLASS ACTION CONTROVERSIES 277 (1992).

of conducting business on-line,[9] attorneys practicing in class action litigation will be particularly attracted to the convenience and cost savings that notice by e-mail affords over "snail" mail.[10] While it will take a few years before e-mail notice becomes a popular option, at least one class action, *Fine v. America Online Inc.*, has already utilized e-mail to serve notice.[11]

But like the other Internet activities that courts have struggled to reconcile with established legal principles, e-mail notice must be reconciled with the principles of due process. Although e-mail is still a developing technology that has its drawbacks, this Note argues that courts should find that notice by e-mail satisfies the standards of due process that the United States Supreme Court has developed for class action notice. First, this Note establishes that e-mail is a form of individual notice, as required by *Eisen v. Carlisle & Jacquelin*.[12] Second, this Note shows that e-mail notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and "reasonably certain to inform those affected" as required by *Mullane v. Central Hanover Bank & Trust Co*.[13] Third, this Note contends that due process is a flexible concept that allows for considerable judicial discretion, which allows room for new methods of transmitting notice.[14] Fourth, this Note argues that e-mail is comparable to first-class mail, which is widely accepted as satisfying due process requirements.[15] Although e-mail and traditional

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[9]Attorneys are recognizing not only that the Internet is efficient and convenient, but also that in the near future their clients will demand that they use the Internet because of the cost and time savings. *See, e.g.*, Richard M. Georges, *The Impact of Technology on the Practice of Law- 2010*, FLA. B.J., May 1997, at 36, 38 ("E-mail is the most popular Internet application, and the most used by lawyers, because it enables rapid, efficient communication and file sharing with anyone in the world from the lawyer's desk . . . . Some lawyers already are conducting much of their business over the Internet using e-mail."); Al Harrison, *Delivery of Electronic Documents*, 60 TEX. B.J. 476, 476 (1998) ("Electronic communications and electronic document transfer are rapidly becoming a focal point of modern law practice."); Laura W. Morgan, *Attorney-Client Privilege in E-Mail Communications*, 10 NO. 5 DIVORCE LITIG. 98, 98 (1998) ("Today . . . most lawyers are online and many communicate with other attorneys and their clients by e-mail."); Ron Smith, *Lawyers Must Overcome Technophobia, Learn to Take Advantage of E-Mail, Net*, J.KAN. B.A., Oct. 1996, at 3 ("The main reason that sooner or later 'the 'Net' is gonna getcha' is your sophisticated clients will demand that you be an 'intranaut.' Time is money, for you and your clients."); Ron Smith, *Postage Up, Email Costs Down*, J. KAN. B.A., Mar. 1995, at 7 ("Your future legal clients may demand that you institute such cost savings as part of representing them.").

[10]Internet users refer to traditional postal mail as "snail mail" because it is slower than e-mail.

[11]Order Approving Class Notice and Directing Distribution Thereof, Fine v. America Online, Inc., No. 97CV118102 (Lorain Co. Ct. of Common Pleas Ohio, Feb. 10, 1997) ("Plaintiffs' counsel are hereby authorized to transmit the Notice to class members by E-mail forthwith."); Journal Entry, Fine v. America Online, Inc., No. 97CV118102 (Lorain Co. Court of Common Pleas Ohio, Feb. 10, 1997) (granting order of class notice).

[12]417 U.S. 156 (1974).

[13]339 U.S. 306 (1950).

[14]*See* FED. R. CIV. P. 23(c) (2); *see generally Mullane*, 339 U.S. at 306.

[15]*See* MANUAL FOR COMPLEX LITIGATION 3d § 30.211 (1995)

mail are different in some respects, this note demonstrates that the differences: (1) are irrelevant for purposes of due process, (2) are small enough that the broad due process standards set forth by the Supreme Court are not violated, or (3) will diminish as e-mail technology improves.

Finally, this Note maintains that, from a policy standpoint, e-mail notice may actually be better than notice by traditional mail. Because e-mail notice would be much cheaper than notice by first-class mail, cost will no longer be an obstacle for class action plaintiffs, who must bear the cost of notice under *Eisen*. The cost savings will not only benefit plaintiffs; defendants, who often bear the cost of notice of settlement under Rule 23(e), can benefit by using e-mail as well.

Presently, e-mail notice is most viable in class actions where only an e-mail address is available for the class member, such as in class actions that involve Internet activities.[16] But as the Internet grows and subscriber rates continue to rise, e-mail addresses will become as common as telephone numbers and street addresses. When that time comes, attorneys will have the choice between sending notice by e-mail or sending it by first-class mail. Because of the convenience and cost savings, those attorneys will likely choose to send notice by e-mail. And traditional concepts such as due process not only should, but must be adaptable to an online society.

II. THE ESTABLISHED RULES GOVERNING CLASS ACTIONS

A. The Requirements of Rule 23

Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for maintaining a class action.[17] Subsection (a) sets out the four prerequisites for a class action: numerosity, commonality, typicality, and adequacy of representation.[18] A class action must then fit into at least one of the three types of classes, described in subsections (b)(1), (b)(2), and (b)(3) of the rule.[19] This Note focuses only on the "(b)(3)" class, which may be maintained when "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[20] As the rule's Advisory Committee's notes point out, a fraud perpetuated on many people through similar misrepresentations is a good candidate for this type of class action.[21]

Rule 23 contains three notice provisions that are applicable to (b)(3) classes. The primary focus of this Note is subsection (c)(2), which unambiguously requires notice of membership in a (b)(3) class.[22] Subsection (c)(2) provides that "[i]n any class

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[16]For example, in class actions involving the provision of online access, or one of the many businesses that sell their products online, e-mail addresses would likely be available since Internet businesses generally communicate with their customers only by e-mail.

[17]FED. R. CIV. P. 23.

[18]FED. R. CIV. P. 23(a).

[19]FED. R. CIV. P. 23(b).

[20]FED. R. CIV. P. 23(b) (3).

[21]FED. R. CIV. P. 23(b) (3) advisory committee's note.

[22]FED. R. CIV. P. 23(c) (2).

action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[23] The reason for mandatory notice in (b)(3) classes, but not in (b)(1) or (b)(2) classes, is that the (b)(3) class is the only type of class from which a member can exclude himself or herself ("opt-out").[24] Therefore, the rule requires that the notice inform members of a (b)(3) class of their rights and options:

> The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member so desires, enter an appearance through counsel.[25]

The other two notice provisions in Rule 23 are applicable to all class actions, not just (b)(3) classes. Subsection (e) provides that notice is mandatory when any class action is dismissed or compromised and must be given "to all members of the class in such manner as the court directs."[26] The final notice provision in Rule 23 is discretionary.[27] Subsection (d)(2) allows the court to order notice as it sees fit throughout the litigation "for the protection of the members of the class or otherwise for the fair conduct of the action."[28]

The Federal Rules of Civil Procedure make notice an important element of class action litigation. The Rules establish notice as a fundamental element in (b)(3) classes, as the mandatory notice provision set out in subsection (c)(2) demonstrates, because of the unique opt out rights of (b)(3) class members.

B. Due Process Requirements for Rule 23 Notice

The concept of due process is embodied in both the Fifth and Fourteenth Amendments of the United States Constitution: "nor [shall any person] be deprived of life, liberty, or property without due process of the law."[29] The fundamental right to due process is a primary consideration in all litigation.[30] Due process is a critical

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[23] *Id.*

[24] *Id.* According to the Advisory Committee's note, it appears that the reason for opt out rights in (b) (3) classes but not in (b) (1) or (b) (2) classes is that the individual's interest in pursuing his or her own litigation is particularly compelling in claims that fall under (b) (3). FED. R. CIV. P. 23(c) (2) advisory committee's note; *See also* FED. R. CIV. P. 23(b) (3).

[25] FED. R. CIV. P. 23(c) (2).

[26] FED. R. CIV. P. 23(e).

[27] FED. R. CIV. P. 23(d) (2).

[28] FED. R. CIV. P. 23(d) (2).

[29] U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV.

[30] *See* Roller v. Holly, 176 U.S. 398, 409 (1900) ("That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

concept in class actions because the judgement will affect the legal rights of the members of the action who are not parties.[31] Due process concerns are all the more compelling in Rule 23(b)(3) classes because of the members' opt out rights. Without notice of their membership in the action and of their opt out rights, the rights of absent class members in (b)(3) classes could be compromised without their control or knowledge. Therefore, notice of the action is critical if members are to receive the process they are due.

The drafters of the Federal Rules paid particular attention to the due process implications of class action notice. The Advisory Committee's notes for Rule 23 establish that the Rule's notification requirements are "designed to fulfill the requirements of due process."[32] The drafters relied on two United States Supreme Court cases, *Hansberry v. Lee* and *Mullane v. Central Hanover Bank & Trust Co.*, in formulating the notice requirements to comply with due process requirements.[33]

In the first case relied on by the drafters, *Hansberry*, the United States Supreme Court examined the potential res judicata effect of a class action on absent class members.[34] Although the opinion concerned adequacy of representation as a due process requirement in a class action rather than notice, *Hansberry* was the Court's first decision that set forth the proposition that class actions must meet the due process requirements of the 14th Amendment.[35] The Court held that the judgment in a class action can only be binding on absent class members if due process standards are met.[36]

The second case relied on by the drafters, *Mullane*, sets forth the basic due process standards that are now applied to class action notice.[37] The Court held that notice by newspaper publication was constitutionally sufficient for beneficiaries of a common trust whose addresses could not be ascertained with due diligence, but was insufficient protection for the due process rights of beneficiaries whose addresses where ascertainable.[38] The Court noted that "[a]n elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present the objections."[39] The Court went

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[31] *See* HERBERT B. NEWBERG AND ALBA CONTE, 1 NEWBERG ON CLASS ACTIONS § 4.46 (3d. ed. 1992); PRACTICING LAW INSTITUTE, *supra* note 8, at 34. The due process rights of plaintiff class members are also important to the defendants in the class action so that they may have a binding and final judgement that will not be continually subject to attack. *See* NEWBERG at § 8.01.

[32] FED. R. CIV. P. 23(d) (2) advisory committee's note.

[33] *Id.*

[34] 311 U.S. 32 (1940).

[35] *Id.* at 40-43.

[36] *Id.*

[37] 339 U.S. 306 (1950).

[38] *Id.* at 318-20.

[39] *Id.* at 314. In formulating this test, the Court relied on and cited to the case of *Milliken v. Meyer*, 311 U.S. 457 (1940). In addressing the adequacy of substituted service in acquiring personal jurisdiction over an absent defendant, the Court stated that

on to develop the following test for constitutionally adequate class action notice: "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."[40]

Since the present Rule 23 was drafted in 1966, the United States Supreme Court has had the opportunity to elaborate on the due process requirements of notice in several cases. The first case the Court decided after the rule was enacted was *Eisen v. Carlisle & Jacquelin*.[41] *Eisen* has become the primary precedent for the due process standards for class action notice in (b)(3) classes.[42] The Supreme Court's decision in *Eisen* was the culmination of almost a decade of litigation over whether the notice requirements of Rule 23(c)(2) were also the due process standards, with several trips back and forth from the district to the circuit court.[43] When the case finally reached the Supreme Court, in a decision often referred to as "Eisen IV," the Court held that the notice requirements of Rule 23 satisfied due process standards.[44] The Court reaffirmed Rule 23's mandate that individual notice is the best notice practicable for class members whose addresses are identifiable through reasonable effort.[45] The Court also settled a critical dispute in (b)(3) class actions: who should bear the cost of notice. The Court disapproved of the district court's attempt to allocate costs between the plaintiff class and the defendant, holding that "[w]here, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing the suit."[46] *Eisen* firmly established that due process requires individual notice of membership in a (b)(3) class to class members who are identifiable through reasonable effort.

Two years after *Eisen*, the Supreme Court addressed (b)(3) notice issues again in *Oppenheimer Fund, Inc. v. Sanders*.[47] In *Oppenheimer Fund*, the Court seemed to back away from the hard line approach to notice issues that it took in *Eisen*, restoring the notion that due process in class actions is a flexible concept. While the Court reiterated that the representative plaintiffs must generally bear the cost of notice, the Court clarified that *Eisen* does not always require that plaintiffs pay all costs incident

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> [I]t's adequacy so far as due process is concerned is dependent on whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice . . . implicit in due process are satisfied.

Id. at 463 (citation omitted).

[40] *Mullane*, 339 U.S. at 315.

[41] 417 U.S. 156 (1974).

[42] NEWBERG, *supra* note 31, at § 8.03.

[43] *Id.*

[44] 417 U.S. at 173-75.

[45] *Id.* at 175.

[46] *Id.* at 178-79.

[47] 437 U.S. 340 (1978).

to sending notice.[48] The Court held that a district court has discretion under Rule 23(d) to order a defendant to perform a task necessary to sending notice, such as the identification of class members, if the defendant can do it with less difficulty or expense than the representative plaintiff.[49] By pointing out that "[a] district court necessarily has some discretion in deciding . . . how notice should be sent,"[50] the Court impliedly endorsed the notion that due process in class actions is not a fixed and rigid concept, but a flexible one that allows room for a court's discretion.

The Supreme Court's most recent examination of the due process requirements for (b)(3) class action notice took place in *Phillips Petroleum Co. v. Shutts*.[51] In holding that due process does not require that out-of-state plaintiff class members must affirmatively consent to jurisdiction,[52] the Court nicely summarized the due process requirements for a binding judgment in a class action. The Court's summary of due process requirements included five points: 1) "[t]he plaintiff must receive notice plus an opportunity to be heard and participate in the litigation;" 2) the notice must conform to the "reasonably calculated" standard set forth in *Mullane*; 3) "[t]he notice should describe the action and the plaintiffs' rights in it;" 4) "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court;" and 5) the named plaintiffs must adequately represent the absent class members.[53]

The due process standards for class action notice provide a generous amount of flexibility.[54] With the exception of the *Eisen* requirement for individual notice to class members whose addresses are reasonably ascertainable, the United States Supreme Court has refused to set rigid rules for constitutionally adequate class action notice. Instead, the Court has allowed for considerable judicial discretion in class actions, subject only to the broad standards of reasonableness set forth in *Mullane*.

C. Traditional Methods of Transmitting Individual Notice

Absent from both Rule 23 and from the Supreme Court's due process standards is the mandate that individual notice to class members be transmitted by any particular means.[55] In keeping with the flexibility and discretion that due process standards afford, trial courts have approved a number of methods for transmission of notice in (b)(3) class actions. Representative litigation presents such a variety of circumstances and fact patterns that courts refuse to adhere to any rigid rules for sending notice to class members.

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[48] *Id.* at 356.

[49] *Id.* at 355-56.

[50] *Id.* at 360.

[51] 472 U.S. 797 (1985).

[52] *Id.* at 811-12.

[53] *Id*. at 812.

[54] NEWBERG, *supra* note 31, at § 8.02.

[55] *See* 32B AM. JUR. 2D *Federal Courts* § 2056 (1996).

For individual notice to identifiable class members, first class mail to the recipient's last known address is the traditional method of transmission.[56] Notably, most courts have not required that the notice be sent by certified or registered mail.[57] Although these methods may be more reliable and more likely to reach their recipient, courts find that the expense is unjustified.[58]

Courts have allowed for methods of transmission in large classes that are less costly than first-class mail, particularly in light of *Eisen*'s clarification that plaintiffs must bear the cost of notice. One such method is bulk mailing.[59] In one particularly large class action, the court allowed notice printed on a single-sheet mailer or as a postcard.[60] Another common method is to include notice in the defendant's own periodic mailings to the class members, such as in monthly statements, billings, or pay envelopes.[61] The Supreme Court pointed out this cost-effective alternative in *Oppenheimer Fund*.[62]

Although the *Eisen* Court remarked that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs,"[63] courts have traditionally given consideration to costs when deciding how notice should be delivered to class members. The discretion given to district courts in overseeing notice and the broad standard of reasonableness required by due process have allowed courts to be creative in ordering the transmission of notice.

III. THE "NUTS AND BOLTS" OF E-MAIL

The most popular and creative new method of individualized communication is electronic mail, more commonly known as "e-mail." E-mail is one of many services provided on the vast network of interconnected computers known as the Internet. In just the few short years since the Internet and services such as e-mail became

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[56]*See* MANUAL FOR COMPLEX LITIGATION 3d, *supra* note 15, at § 30.211; PRACTICING LAW INSTITUTE, *supra* note 8, at 277; Marcia G. Robeson, Annotation, *What Constitutes "Best Notice Practicable," Required by Rule 23 (c) (2) of Federal Rules of Civil Procedure, in Class Actions Brought Under Rule 23(b) (3)*, 32 A.L.R. FED. 102 § 4 (1977).

[57]*See* Cayuga Indian Nation v. Carey, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981) (notwithstanding contention that class members might disregard a first-class letter and pay closer attention to a certified letter, mailing notice of class action by first-class mail is sufficient); Roberts v. Heim, 130 F.R.D. 416, 423 (N.D. Cal. 1988) ("[n]otice need not be sent by registered mail.").

[58]*See Cayuga Indian Nation*, 89 F.R.D. at 632-33.

[59]PRACTICING LAW INSTITUTE, *supra* note 8, at 277.

[60]*In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D.N.Y. 1971).

[61]*See* Bogosovian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1477, 1484 (E.D.N.Y. 1989). *See also* NEWBERG, *supra* note 31, at § 8.06; MANUAL FOR COMPLEX LITIGATION 3d, *supra* note 15, at § 30.211.

[62]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 355 n.22 (1978).

[63]Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

accessible to the mainstream public, they are largely responsible for transforming America into a highly computer-dependent society.[64]

The Internet is not a tangible entity, but rather "a giant network which interconnects innumerable smaller groups of linked computer networks."[65] Each of the smaller networks is administrated, maintained, and funded by private companies, educational institutions, and other organizations.[66] An individual computer connects to the network through a modem, which dials into one of many central computers in the network through traditional telephone lines.[67] Although an individual computer can access the Internet in a number of ways, many users pay commercial "Internet service providers" or "online services" to connect them to the Internet.[68] This connection enables users to communicate and exchange information in textual, audio, and video form.[69]

Once an individual connects to the Internet, that individual has access to a variety of services. One popular service is the World Wide Web (WWW), which links together information stored on computers connected to the Internet.[70] Another service, Internet Relay Chat (IRC), is similar to a telephone conversation except that the participants type to each other instead of speak to each other; the parties watch each other's words appear on the screen as they are being typed.[71]

The most popular service on the Internet is e-mail.[72] While the WWW is analogous to visiting a library and IRC as analogous to talking on the telephone, e-mail is analogous to sending a finished letter through the mail.[73] In order to send and receive e-mail, an Internet user must have an e-mail address.[74] Service providers and

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[64]*See* Pike, *supra* note 1; *see also Communication Upgrade: E-mail is as Popular as Print Media*, HR FOCUS, May 1995, at 17 (almost 9 out of 10 Fortune 100 corporations use e-mail for person-to-person communications); *Internet Use Changing U.S. Industry*, EDITOR & PUBLISHER, Apr. 4, 1998, at 23 (in a survey of senior executives at more than 400 U.S. companies, 87% said they personally use the Internet and 98% reported they use it to distribute information about their companies; 74% predicted that e-mail will be a key source for businesses by the year 2005).

[65]American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *affirmed*, 521 U.S. 844 (1997).

[66]JOSHUA EDDINGS, HOW THE INTERNET WORKS 13 (1994).

[67]DOUGLAS E. COMER, THE INTERNET BOOK 32-33 (2d ed. 1997).

[68]*American Civil Liberties Union*, 929 F. Supp. at 833.

[69]*See id.* at 834.

[70]DAVID B. WHITTLE, CYBERSPACE: THE HUMAN DIMENSION 201 (1997). The World Wide Web contains millions of virtual documents called "web pages." Each page contains highlighted links ("hypertext") that, when clicked on by the user's mouse, connect the user to related pages. *See* COMER, *supra* note 67, at 198.

[71]*American Civil Liberties Union*, 929 F. Supp. at 835.

[72]The number of e-mail boxes worldwide is expected to quadruple in the next two years to 1 billion. Jane Hodges, *Why These Guys Want to Handle the World's E-mail*, FORTUNE, Feb. 15, 1999, at 149.

[73]*See* WHITTLE, *supra* note 70, at 51.

[74]*See* COMER, *supra* note 67, at 146.

online services that connect users to the Internet generally provide e-mail accounts with e-mail addresses.[75] An e-mail address is like a street address but is assigned to an individual or an organization rather than a geographic location.[76] E-mail addresses follow a standardized format: the user's name or alias, an "@" symbol, and the domain.[77] The domain is required as part of the Domain Name System (DNS), a system of naming the individual networks and computers that make up the Internet.[78] The domain, like a street address, tells the e-mail provider exactly which computer to deliver an e-mail message to.[79]

Once a user has an e-mail address, he or she can compose and send textual documents through the Internet to other individuals' e-mail addresses.[80] The service provider or online service works like the United States Postal Service in delivering the e-mail messages to the proper addresses.[81] The provider/service stores an e-mail message in a central computer until its intended recipient connects to the Internet and accesses his or her e-mail account, at which time the provider/service delivers the message into the recipient's e-mail box for the recipient to read.[82] Unlike traditional mail, which can take days to be delivered, e-mail is delivered almost instantaneously.[83]

IV. HOW E-MAIL SATISFIES DUE PROCESS REQUIREMENTS

As Internet usage becomes more popular and the number of individuals with e-mail addresses grows, individual notice in a (b)(3) class action can be sent efficiently and inexpensively by e-mail rather than by first-class mail. The traditional standards of due process do present some obstacles to e-mail notice: there are questions as to the practicality and reliability of sending notice by e-mail. But the flexibility of due process and the fact that e-mail technology will continue to improve should make it a viable and constitutional avenue for sending notice in the very near future.

A. Notice by E-Mail Meets the Eisen Standard of "Individual Notice"

E-mail notice meets the most fundamental due process standard in class actions: the requirement in Rule 23(c)(2) and *Eisen* of individual notice to class members that are identifiable through reasonable effort.[84] "E-mail is a personal communication

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[75]Popular services include America Online and Prodigy.

[76]*See* WHITTLE, *supra* note 70, at 51.

[77]*See id.*; *see also* EDDINGS, *supra* note 66, at 91-92.

[78]EDDINGS, *supra* note 66, at 91.

[79]*Id.*

[80]*Id.*

[81]*Id.* at 82-83.

[82]*Id.*

[83]WHITTLE, *supra* note 70, at 51.

[84]*See* FED. R. CIV. P. 23(c) (2); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974).

sent directly from one user to another."[85] Each address is attached to a person rather than a geographic location.[86] Because e-mail is a textual document that is "affirmatively directed" at a particular user,[87] it is clearly a form of individual notice, meeting the due process standard set forth in *Eisen*.

One potential problem under *Eisen* is whether e-mail notice would be the "best notice practicable under the circumstances."[88] By requiring the "best" notice practicable, the standard can potentially be misconstrued as mandating that only one method of sending notice can meet the due process requirements. However, the *Eisen* Court refused to require that one method of transmission gives the best notice practicable, only saying that individual notice was the best notice practicable when the members can be identified.[89] Following suit, courts have generally recognized that individual notice *is* the best notice practicable, not that any particular method of sending that individual notice is always the best notice practicable.[90] Largely, courts assumed individual notice meant first-class mail because, until the advent of e-mail, it was the only method of contacting large numbers of people.

Those courts that have required that individual notice be sent a certain way, such as by first-class mail, have done so not because it is always the "best" notice, but because it has been "practicable under the circumstances."[91] First class mail has traditionally been practicable under almost all circumstances because street addresses of class members are easily ascertainable. Since e-mail is a form of individual notice that is now "practicable," it can meet the "best notice practicable" standard for purposes of due process.

The more difficult problem that e-mail notice has under the *Eisen* standard is whether class members' e-mail addresses can be obtained through "reasonable effort." This is not an issue of due process, but rather an issue of practicability and feasibility. One reason e-mail notice may not be practicable is because many people still do not have e-mail addresses.[92] Although the number of people with e-mail addresses is growing exponentially,[93] e-mail addresses are still not as common as

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[85]United States v. Maxwell, 45 M.J. 406, 411 (C.A.A.F. 1996); *see also* Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 951 (C.D. Cal. 1997) (e-mail is a form of "one-to-one communication").

[86]WHITTLE, *supra* note 70, at 51-52.

[87]Compuserve Inc., v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1021 (S.D. Ohio 1997).

[88]*Eisen*, 417 U.S. at 173-75.

[89]*Id.*

[90]*See In re* Nissan Motor Corp. Antitrust Litig., 552 F.2d 1088 (5th Cir. 1977); *In re* "Agent Orange" Product Liability Litig., 100 F.R.D. 718 (E.D.N.Y. 1983); Steiner v. Equimark Corp., 96 F.R.D. 603 (W.D. Pa. 1983).

[91]*See* Bremiller v. Cleveland Psychiatric Inst., 898 F. Supp. 572 (N.D. Ohio 1995); Ungar v. Dunkin' Donuts of America, Inc., 68 F.R.D. 65 (D.C.Pa.), *rev'd on other grounds*, (531 F.2d 1211 (3d Cir. 1975).

[92]*See* John G. Auerbach, *Getting the Message*, WALL ST. J., June 19, 1997, at R22 (stating that 20% of the U.S. population lives in households wired for e-mail).

[93]*See supra* note 67.

street addresses.[94] Another reason for the problem is that e-mail addresses do not automatically include the individual's full name, making it potentially more difficult to find an individual's e-mail address rather than a street address.[95] A third reason why e-mail addresses may not be obtainable through reasonable effort is that there is no central directory of e-mail addresses.[96]

A number of these obstacles have or will have solutions in the near future. The staggering growth rate of e-mail use forecasts that e-mail addresses probably will be as common as street addresses in the near future.[97] Although e-mail addresses do not automatically contain the user's full name, numerous Internet sites provide free "people finders" or "white pages," in which you type the name of the individual and the service will find his or her e-mail address.[98] Third, although there is no central directory of e-mail addresses, a number of directories do exist.[99] The people finders and Internet white pages are examples of such directories.[100]

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[94]*See* Auerbach, *supra* note 92.

[95]E-mail addresses follow a standard format: the user's name or alias, followed by an @ symbol, followed by the domain (the computer networks through which the message must be routed to reach its recipient). WHITTLE, *supra* note 70, at 52. The problem is that many users do not include their full name in their address and are not required to do so; therefore, one cannot necessarily tell which individual is at an e-mail address by looking only at the address. *See Id.*

[96]*Netcom Search Frequently Asked Questions* <http://in-105.infospace.com/_1_410DUDE0208VLEG_info.netcom/faq2.htm#wp>. When the Internet was small, a central directory was feasible. EDDINGS, *supra* note 66, at 105. However, maintaining a central database is now impracticable because of the size of the database and the constant changes necessary to keep it current. *Id.*

[97]Although economic factors had been an obstacle for many in getting online, particularly because personal computers were expensive, this problem appears to be disappearing. Individuals can now gain Internet access in many places without having to buy a personal computer. *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 833 (E.D. Pa. 1996), *affirmed*, 521 U.S. 844 (1997) (many have free access at work; there is also free access at libraries and cheap access at coffee shops). Individuals can also obtain e-mail addresses for free. *See MSN Hotmail* (visited Mar. 29, 1999) <http://www.hotmail.com>. Computer systems are steadily dropping in price and a large secondary market now exists. Although Internet use was once a luxury for the upper classes, statistics now show that the demographics of the Internet now mirror the demographics of the country's population. Hoag Levins, *Big Net News: It's Not News Anymore*, EDITOR & PUBLISHER, Sept. 1998, at 2.

[98]*See Netcom US People Finder* (visited Mar. 29, 1999) <http://www.netcom.com/whowhere.html>; *WhoWhere? People Finder* (visited Mar. 29, 1999) <http://www.whowhere.lycos.com>.

[99]*See* EDDINGS, *supra* note 66, at 105. Similarly, people do not generally use a directory of street addresses that includes the addresses of everyone in the United States; traditional phone and address directories are regional. While street address directories are geographically regional, e-mail address directories are the virtual equivalent - they are usually regional by individual network. *See Id.*; *see also Netcom Search Frequently Asked Questions* (visited Mar. 29, 1999) <http://in- 105.infospace.com/_1_410DUDE0208VLEG_info.netcom/faq2.htm#wp>.

[100]*See* Netcom US People Finder, supra note 97; *WhoWhere? People Finder*, *supra* note 97.

Application of the Supreme Court's holding in *Oppenheimer Fund*, which permits a court to order a defendant to perform tasks that will save costs in sending notice,[101] will perhaps diminish the difficulty in locating an individual's e-mail address more than any of the above alternatives. As e-mail addresses become more common, defendants of class actions will be more likely to have lists of class members' e-mail addresses, which, like street addresses, the court can order the defendant to produce.[102]

Because of the present problems of practicability, class actions involving Internet services or businesses will be the first types of classes were e-mail notice is feasible because e-mail addresses of the class members are easily obtainable. The *Fine* case demonstrates this proposition; *Fine* is a class action suit against America Online, Inc., an Internet service provider, by its monthly subscribers for violation of the Ohio Consumer Sales Practices Act and breach of contract.[103] As *Oppenheimer Fund* permits, the trial court in *Fine* ordered America Online to provide the plaintiffs with the e-mail addresses of class members.[104]

Class action notice by e-mail in (b)(3) classes satisfies the *Eisen* requirement that individual notice is the best notice practicable when individuals and their addresses can be obtained by reasonable effort. The practicability of obtaining the e-mail addresses of class members will increase as more people go online and the services for finding e-mail addresses improve.

B. E-Mail Notice Meets the Mullane Standard Because it is Reasonably Calculated to Apprise the Class Members of the Action

E-Mail notice meets the due process standards set forth by the Supreme Court in *Mullane*.[105] Because e-mail is a form of individual notice under *Eisen*, it is "reasonably calculated to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections."[106] Due process does not require actual notice in a class action, and since e-mail is a reliable form of notice, it meets the broad standards of reasonableness in *Mullane*.

The *Mullane* standard is primarily concerned with the inadequacies of publication notice.[107] The Court pointed out that publication notice is quite likely to fail in reaching its intended recipients; therefore, it is not "reasonably certain to

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[101]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356-58 (1978).

[102]*Id.*

[103]Class Action Complaint, Fine v. America Online, Inc., No. 97CV118102 (Lorain Co. Ct. of Common Pleas Ohio, Feb. 10, 1997).

[104]Order Approving Class Notice and Directing Distribution Thereof, Fine v. America Online, Inc., No. 97CV118102 (Lorain Co. Ct. of Common Pleas Ohio, Feb. 10, 1997) ("[D]efendant America Online . . . shall provide to plaintiffs' counsel the names . . . and user E-mail addresses of the members of the class.").

[105]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[106]*Id.* at 314.

[107]*Id.* at 315-17.

inform those affected."[108] *Mullane* stands for the proposition that while publication is not reasonably calculated to reach known class members, individual notice is.[109] Both the Rule 23 Advisory Committee and the Supreme Court in *Eisen* recognized this by citing to *Mullane* when requiring individual notice.[110] Therefore, the important distinction made in *Mullane* is between publication and individual notice, not between methods of sending individual notice.[111] Because it is a form of individual notice, e-mail notice meets the *Mullane* standard.

Although e-mail is not absolutely certain to reach its intended recipient, neither *Mullane*[112] nor any other Supreme Court decision requires actual notice in a class action.[113] Due process does not require that class members receive personal service, or even certified or registered mail.[114] As the *Mullane* Court pointed out, "[w]e think that . . . reasonable risks that notice might not actually reach every beneficiary are justifiable."[115] The overriding theme of *Mullane* is reasonableness: the notice must be "reasonably calculated" and "reasonably certain" to inform.[116] E-mail is a reasonably reliable method of individual communication, which is all that *Mullane* requires. Millions of e-mail messages reach their intended recipients daily,[117] the sender of each "desirous of actually informing" the recipient of some piece of information. Because e-mail is a form of individual notice that is reasonably certain to reach its recipient, e-mail meets the due process requirements for class action notice.

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[108]*Id.* *Mullane* does, however, approve of publication when the members of the class are not reasonably identifiable because publication is the only method of informing the members of the action. *Id.* The due process safeguard in such cases is adequate representation. *See also* NEWBERG, *supra* note 31, at § 4.46.

[109]*Mullane*, 339 U.S. at 315-17.

[110]*See* FED. R. CIV. P. 23(d) (2) advisory committee notes; *see Eisen*, 417 U.S. at 173-75.

[111]*Mullane*, 339 U.S. at 315-17.

[112]*Id.* at 318-19.

[113]The Supreme Court's holding in *Phillips Petroleum* provided some uncertainty on this point because the Court required that "the plaintiff must receive notice." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985). However, the Court did not specifically hold that actual notice was required. *Id.* Furthermore, the Court cited to *Mullane* and *Eisen*, both of which allow for notice "reasonably calculated" instead of actual notice. *Id.* Therefore, the Supreme Court has not required actual notice. Ikonen v. Hartz Mountain Corp., 122 F.R.D. 258, 260 (S.D. Cal. 1988).

[114]*See Mullane*, 339 U.S. at 318-319. *See also* Cayuga Indian Nation v. Carey, 89 F.R.D. 627, 632-33 (N.D.N.Y. 1981); Peters v. Nat'l R.R. Passenger Corp., 966 F.2d. 1483, 1485-87 (D.C. Cir. 1992); *In re* Four Seasons Securities Laws Litig., 63 F.R.D. 422, 430 (W.D. Ok. 1974); 32B AM. JUR. 2D, *supra* note 55 at § 2056; NEWBERG, *supra* note 31, at § 8.02.

[115]*Mullane*, 339 U.S. at 319.

[116]*Id.* at 314-15.

[117]*See generally supra* note 2. The reliability of e-mail will be further discussed in Part IV.E.1 in comparison with first-class mail.

C. Due Process is a Flexible Concept, Allowing Room for Methods of Transmitting Notice Such As E-Mail

The Supreme Court's due process/notice jurisprudence leaves no doubt that due process is a flexible concept, guided by practicality. This is one of the reasons why district court judges are given discretion in deciding what constitutes proper notice in each case.[118] That flexibility allows for notice by e-mail in a class action.

Through *Mullane*, the Supreme Court established that the standards for due process in a class action are flexible.[119] As discussed throughout this Note, the broad standard of reasonableness that pervades the *Mullane* opinion leaves considerable leeway for different avenues of providing notice. As the Court stated after setting out the requirement that notice be reasonably calculated to apprise interested parties of the pendency of the action, "[b]ut if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied."[120] Where e-mail notice is practical in a particular case, *Mullane's* due process standards allow for it.

Additionally, the Supreme Court's decision in the *Oppenheimer Fund* case supports the proposition that flexibility is inherent in the concept of due process. Holding that "[a] district court necessarily has some discretion in deciding the composition of a proper class and how notice should be sent,"[121] the Court created the necessary room to allow for class action notice by e-mail.

The Supreme Court has clearly established that due process is not a fixed concept with a rigid set of requirements that must be applied in every single case. Rather, due process is flexible and practical, dependent on the circumstances presented in each action. The fact that the Court has approved of the considerable judicial discretion of Rule 23 that allows judges to control the form of notice supports the notion that due process in a class action suit is flexible. Because due process is an inherently flexible concept, courts should allow class action notice by e-mail in actions in which the e-mail addresses of class members are available or reasonably ascertainable.

D. E-Mail is Analogous to First-Class Mail, an Accepted Form of Individual Notice

One of the most persuasive reasons that notice by e-mail meets due process standards is that it is comparable to first-class mail, the most widely accepted method

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[118] *See* FED. R. CIV. P. 23(c) (2); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 360 (1978).

[119] *Mullane*, 339 U.S. at 314-15.

[120] *Id.* In *Schroeder v. New York*, 371 U.S. 208, 212 (1962), the Court expanded upon *Mullane*'s flexibility, stating that in *Mullane*,

> [we] thoroughly canvassed the problem of sufficiency of notice under the Due Process Clause, pointing out the reasons behind the basic constitutional rule, as well as the practical considerations which make it impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.

Id. at 212.

[121] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 360 (1978).

of transmitting individual notice.[122] The mere name alone, e-"mail," demonstrates the analogy. Although e-mail and first-class mail are not exactly the same, the similarities are so strong that e-mail, like first-class mail, should satisfy due process requirements.

E-mail and traditional mail are so similar because the processes by which they are created and sent parallel one another.[123] In each, the process begins with the creation by the sender of a textual document.[124] The sender then "mails" this document to an individual at a designated address.[125] A carrier, the postal service for traditional mail and the online service provider for e-mail, delivers the mail into the recipient's mailbox.[126] Both mails wait in the mailbox until the recipient "checks" it, at which time he or she can then read the document.[127]

From the time e-mail first became known to the public, it has been compared to traditional mail.[128] Numerous commentators analyzing Internet legal issues — from bulletin board operator liability for copyright infringement[129] to personal jurisdiction based on Internet contacts[130] — have followed suit.[131]

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[122]*See supra* note 56.

[123]*See* Jim Held*, Getting Started with Electronic Mail*, MACWORLD, Feb. 1989, at 105.

[124]*See supra* Part III.

[125]*See supra* Part III.

[126]*See supra* Part III.

[127]*See supra* Part III.

[128]*See* Marie Alvich, *The Paper Race*, HOME OFFICE COMPUTING, November 1988, at 66; Jeffrey Bairstow, *Electronic Mail*, INC. OFFICE GUIDE, 1988, at 73; *Electronic Mail: Plain Fax*, THE ECONOMIST, Jan. 17, 1987, at 78; Held, *supra* note 123, at 105. As early as 1982, a study by the United States Congress' Office of Technology Assessment recognized that electronic mail would eventually compete with and have a serious impact on the future of the United States Postal Service. *Office of Technology Assessment of the Congress of the United States*, Report, IMPLICATIONS OF ELECTRONIC MAIL AND MESSAGE SYSTEMS FOR THE U.S. POSTAL SERVICE (August 1982).

[129]*See* Kelly Tickle, *The Vicarious Liability of Electronic Bulletin Board Operators for the Copyright Infringement Occurring on Their Bulletin Boards*, 80 IOWA L.REV. 391, 418 (1995) ("'E-mail' is short-hand for electronic mail, and is similar to traditional mail.").

[130]*See* Friel, *supra* note 5, at 311("E-mail has similarities with conventional 'snail mail.'").

[131]*See* Stacy B. Veeder, *Electronic Mail and Privacy*, JOURNAL OF ACADEMIC LIBRARIANSHIP, Mar. 1995, at 123("E-mail has been compared variously to first-class postal mail, telephony, routine office paperwork, and face-to-face communications."); Frieling, *supra* note 3, at 121; David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 12 COMPUTER L.J. 101, 153 (1993) ("Since a major use for computer information systems is sending e-mail, it is only sensible to compare such a use to the U.S. mail."); Keith B. Norman, *The ASB Home Page: Alabama Lawyers Go On-Line For a Wealth of Information,* 57 ALA. LAW. 328, 328 (1996) ("First class mail, or snail mail, cannot compete with E-mail."); Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 471-72 (1998) ("[E]-mail messages are indistinguishable from snail-mail letters in regard to the elements of defamation."); John T. Soma & Alexander J. Neudeck, *The Internet and the Single Document Rule: Searching For the Four Corners of the Electronic Paper*, 78 J. PAT. & TRADEMARK OFF.

Recognizing the similarities, a number of federal courts have recognized e-mail as the equivalent of first-class mail. In *American Civil Liberties Union v. Reno*, which includes an extensive and thorough discussion of the technology behind the Internet,[132] the District Court for the Eastern District of Pennsylvania recognized that e-mail is "comparable in principle to sending a first class letter."[133] In *United States v. Charbonneau*, the federal district court for the Southern District of Ohio stated that "[e]-mail is almost equivalent to sending a letter via the mails."[134]

E. Differences Between E-Mail and First-Class Mail Are Minor in Light of the Flexible Due Process Standards and the Improvements in E-Mail Technology

Although e-mail and first-class mail parallel each other, there are differences between the two that are potentially significant for purposes of due process. The biggest differences are in the reliability, security, and appearance of the two forms of communication. However, these differences are either overcome by the broad concept of reasonableness that predominates due process, rendered irrelevant for purposes of due process, or will diminish as e-mail technology improves. The similarities between the two are compelling enough to overcome the differences so that e-mail, like first-class mail, is a constitutional form of class action notice.

1. Differences in Reliability

One difference between e-mail and first-class mail involves issues of reliability. If e-mail is significantly less reliable than postal mail, it may not be "reasonably certain" under *Mullane* to inform class members of the action and the opportunity to exercise their rights.[135] One argument that e-mail is not as "reasonably certain" to reach its recipient, and therefore does not meet due process standards like traditional mail does, is that the postal service, unlike e-mail providers, will forward an individual's mail when he or she changes addresses.[136] Another potential difference in reliability has to do with who controls each form of mail: because traditional postal mail is authorized by the Constitution,[137] protected by statute,[138] and controlled by the government,[139] some could argue that it is more reliable than e-mail, which is not controlled by one central authority.[140]

SOC'Y 751, 754 (1996) (["E-mail allows users to communicate typewritten messages, much like postal mail (snail mail), except much faster.").

[132]929 F. Supp. at 830-49.

[133]*Id.* at 834. *See also* Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 440 (E.D. Pa. 1996) (*citing American Civil Liberties Union*, 929 F. Supp. at 834).

[134]979 F. Supp. 1177, 1184 (S.D. Ohio 1997).

[135]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[136]*See* Victoria Hall, *Return to Sender*, HOME OFFICE COMPUTING, Jan. 1997, at 50.

[137]U.S. CONST. art. I, § 8.

[138]18 U.S.C. § 1702 (1994).

[139]David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L.J. SCI. & TECH. 79, 84 (1993).

[140]*See id.*

The problem of forwarding is the strongest argument that e-mail is not as certain as first-class mail to reach its intended recipient and therefore does not meet the *Mullane* test. It is not unusual for e-mail users to change Internet service providers, and therefore, e-mail addresses.[141] However, most service providers do not forward mail; once a user leaves a provider, the user is no longer paying for services and therefore the provider has no reason to forward e-mail to a new address.[142] Therefore, if class action notice is sent to an old e-mail address, it is less likely to reach the recipient than if the notice is sent by postal mail. This problem has only recently come to light and a number of solutions are being developed. Several companies on the Internet are now offering forwarding services.[143] The company provides a user with a permanent e-mail address and forwards the user's mail to the user's current e-mail service provider.[144] The problem with this service is the possibility that the forwarding service could go out of business or that the customer could become unsatisfied and want to change services, in which case the user would be right back where he or she started, with an outdated e-mail address.[145] Currently, the only permanent solution is for users to register their own domain name and only use e-mail providers that will host their domain.[146]

The difference in forwarding services between e-mail and postal mail is a potential problem for purposes of due process in a (b)(3) class action because e-mail notice is not certain to reach its intended recipient if he or she has changed e-mail addresses. But the problem is relatively small for three reasons. First, the *Mullane* standard is a broad standard of reasonableness, allowing room for the possibility that notice may not reach its destination.[147] Although e-mail may not be absolutely certain to reach its intended recipient, it is still safe to say that the vast majority of messages reach their desired destination, making it "reasonably certain" under *Mullane* that e-mail notice will apprise class members of the action.[148]

Second, e-mail is an evolving technology that is improving daily due to the competitive nature of the market. The more consumer demand there is for reliable forwarding services, the more eager companies will be to find a solution to the problem.

Third, e-mail makes up for its forwarding deficiencies because it is more reliable than postal mail in a number of other ways. The fact that e-mail is controlled by

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[141]The author has had six different e-mail addresses from 1993 until the time of this writing.

[142]*See* Hall, *supra* note 136, at 50.

[143]*See Yahoo! Forwarding Services (visited Mar. 29, 1999)* <http://dir.yahoo.com/Business_and_Economy/Companies/Internet_Services/E-mail_Providers/Forwarding_Services>. The forwarding services generally charge a monthly or yearly rate, although some services will forward for free if the user allows an advertisement at the bottom of each message the service processes. *See* Hall, *supra* note 136, at 52.

[144]*See* Hall, *supra* note 136 at 52.

[145]*Id.*

[146]*Id.*

[147]*See* Hall, *supra* note 136; Part IV.B.

[148]*See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

many different entities may actually make it more reliable than the postal mail, since the competition for e-mail users causes service providers to ensure that their services are reliable. Also, because e-mail is delivered much more quickly than traditional mail, there is less time spent en route, during which traditional mail can be lost.[149]

For all practical purposes, individuals and businesses believe e-mail is just as reliable as postal mail, if not more so. Millions of documents that used to be sent by mail are now being sent by e-mail, including important documents and correspondence.[150] If the general public has put its faith in the reliability of e-mail delivery in comparison with first class mail, then e-mail notice in a class action should, like first class mail, meet the requisite due process standards.

2. Differences in Security

Another difference between e-mail and postal mail is that e-mail may be less secure than postal mail. Internet security has been a subject of much debate.[151] As the District Court for the Eastern District of Pennsylvania pointed out, "unlike postal mail, simple e-mail generally is not 'sealed' or secure, and can be accessed or viewed on intermediate computers between the sender and the recipient."[152] E-mail is not in an envelope the way postal mail is, protecting it from outside readers, such as service providers. If e-mail is substantially less secure than postal mail, the two mails may be different enough that e-mail should not satisfy due process the way postal mail does.

The answer to the problem is quite simple: the fact that someone else can read a user's e-mail notice really does not matter for purposes of due process in class action notice. None of the due process standards set forth by the United States Supreme Court require that the notice be secure from outside readers.[153] In fact, if notice is published, which due process permits for unlocatable class members, potentially millions of people who are not in the class will read the notice.[154] Although an individual e-mail message, unlike published notice, is connected to an individual,

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[149]*See* Friel, *supra* note 5, at 311-12 ("[E]-mail, when sent, gets delivered instantaneously to the recipient."); Tickle, *supra* note 129, at 394-95 ("E-mail is interactive in nature and can involve almost instantaneous communication, more like a telephone than regular mail."); Norman, *supra* note 131, at 328 ("First class mail, or snail mail, cannot compete with e-mail because the message or the message with attached document is delivered instantaneously.").

[150]*See* Sundstrom, *supra* note 2, at 2064 ("Electronic mail . . . is rapidly supplementing, and often replacing, traditional forms of personal and business communication."); David E. Haddock, *As a Matter of Fact, I do Own the Whole Damned Road: Municipal Impediments to Advance Telecommunications Services Through Control of the Public Right of Way,* 28 PAC. L.J. 947 (1997) ("[M]any Americans are more likely to send electronic rather than paper mail.").

[151]*See* Denise Samoriski, et al., *Electronic Mail, Privacy, and the Electronic Communications Privacy Act of 1986*, JOURNAL OF BROADCASTING & ELECTRONIC MEDIA, Winter 1996, at 60.

[152]American Civil Liberties Union v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

[153]*See supra* Part II.B.

[154]*See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).

some courts have allowed individual notice to be sent in forms that don't protect from the uninvited eye, such as on post cards.[155]

The fact that an intermediary could read a user's e-mail does matter in other areas of law, particularly regarding the Fourth Amendment's protection from unreasonable searches and seizures.[156] For instance, the District Court for the Southern District of Ohio has recognized that individuals have a reasonable expectation of privacy when transmitting e-mail and that police officials cannot intercept e-mail transmissions without probable cause and a search warrant.[157] But the Supreme Court has not identified privacy as an issue for purposes of due process in a class action and e-mail security should not be an issue under the traditional due process standards.

Although not dispositive of the constitutionality of e-mail notice, security measures are being developed for e-mail so that it is as secure from the uninvited eye as traditional mail. One such measure is encryption.[158] Encryption software scrambles the message while it is in transit, then unscramble it once the recipient receives it.[159] Encryption can be analogized to an envelope for post mail.[160] Furthermore, both forms of mail are protected from interception by statute.[161] Postal laws protect first-class mail,[162] while the Electronic Communications Privacy Act of 1986 protects e-mail.[163]

Any differences in security between e-mail notice and notice by traditional mail are irrelevant for purposes of due process. The fact that an intermediary could read an e-mail message if it is not sealed has no bearing on the constitutionality of e-mail class action notice under the *Mullane* standard. Therefore, class action notice by e-mail should satisfy due process requirements, just as first-class mail does.

3. Differences in Appearance

A final difference between e-mail and postal mail that may be material for purposes of due process is the difference in appearance between e-mail and postal mail. While postal mail is tangible, e-mail is not.[164] E-mail is often considered to be

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[155]*See In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 290 (S.D.N.Y. 1971).

[156]*See* United States v. Charbonneau, 979 F. Supp. 1177 (S.D. Ohio 1997); United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996); Sundstrom, *supra* note 2.

[157]*Charbonneau*, 979 F. Supp. at 1184.

[158]EDDINGS, *supra* note 66, at 183.

[159]*Id.*

[160]*See* Morgan, *supra* note 9, at 98.

[161]Loundy, *supra* note 131, at 153-54 ("U.S. mail, or 'snail mail,' is governed by a statute which gives "regular" mail the same kind of privacy that the Electronic Communications Privacy Act gives E-mail.").

[162]18 U.S.C. § 1702.

[163]18 U.S.C. § 2510 et seq. (1994). The statutes protect both mails from interception in transit and while being stored. Loundy, *supra* note 131, at 154.

[164]*See* Salbu, *supra* note 131, at 472.

less formal than traditional mail.[165] If postal mail is more tangible and "official" in appearance than e-mail, class members might take notice by postal mail more seriously and be less likely to disregard postal notice as "junk mail." If the difference is strong enough, e-mail may not be "reasonably calculated" to reach its recipient under the *Mullane* standard.

However, any differences between the appearances of e-mail and first-class mail are trivial and irrelevant. It is true that postal mail is tangible while e-mail is not. But just as there is no requirement that notice be read to be accurate,[166] there is no requirement that it be tangible to be accurate either.[167] Courts have refused to require more "official" forms of notice, such as certified mail, registered mail, or service of process, showing that an official appearance does not make one form of notice more constitutional than another.[168] If the recipient disregards the mail as junk mail, that is the fault of the recipient, not the sender; the sender still reasonably attempted to apprise the recipient of the action, and due process does not require actual notice.[169]

Although it is immaterial for purposes of due process, e-mail is evolving to look more "official." E-mail can be used as an informal method of communication, but individuals are also using it to send more formal correspondences as well.[170] Tools such as scanners and formatting programs such as Adobe Acrobat allow users to compose and send an e-mail message that looks exactly like a paper document.[171] Additionally, it is now possible to digitally sign an e-mail document, a further method of authentication.[172] As with the areas of reliability and security, the differences in appearance between e-mail and traditional mail are so minor that they should not overcome the many similarities between the two forms of individual notice. E-mail notice, like notice by first-class mail, should meet the due process requirements in a class action lawsuit.

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[165]*See* Ian C. Ballon, *How Companies Can Reduce the Costs and Risks Associated with Electronic Discovery*, 15 No. 7 COMPUTER LAW. 8 (1998).

[166]*Id.*

[167]*See* Salbu, *supra* note 131, at 472 ("[T]he distinguishing element[] . . . of tangibility [is] not [a] meaningful difference[] in regard to the law of defamation."). Additionally, if tangibility does make a difference, e-mail messages can be printed out and kept in tangible form.

[168]*Id.*

[169]*Id.*

[170]*See* Samoriski, *supra* note 151, at 60.

[171]A scanner is a machine that attaches to a computer that will scan a document like a photocopy; the copy that is saved in the computer looks exactly like the paper version. Adobe Acrobat documents "are created with a portable document form (PDF) that enables documents to be electronically published without losing their original textual and design layout." Harrison, *supra* note 9, at 477.

[172]See Bradley J. Hillis, *From An Internet E-Mail Directory to a Secure Communications Network*, PROSECUTOR, Dec. 1998, at 30-31.

V. POLICY CONSIDERATIONS IN CLASS ACTIONS ARE COMPELLING REASONS TO ALLOW E-MAIL NOTICE

Individual notice by e-mail in a (b)(3) class action should meet the due process requirements set forth by the Supreme Court for the many reasons set forth in this note, the most compelling of which is that e-mail is so similar to first-class mail.[173] But there is one way in which e-mail notice is superior to notice by first-class mail: cost savings.[174] Because of that cost savings, notice by e-mail will aid class plaintiffs in bringing viable claims much more effectively than notice by first-class mail, which can sometimes be cost prohibitive.[175] Since e-mail notice should meet the due process requirements for class action notice and is a much less expensive way to transmit notice, it will become the preferred way to send notice, especially in large class actions.

The Supreme Court's decision in *Eisen* made it clear that cost was not to be a consideration in deciding what type of notice is required in a given situation and that the representative plaintiffs must bear the cost of notice.[176] However, this position ignores one of the primary purposes of Rule 23: to allow a method of recovery for the small claimant where it would be impracticable for the claimant to sue individually.[177] If the costs of notice are prohibitive, then potentially meritorious claims are extinguished.[178] The decision in *Eisen* has been largely criticized for undermining Rule 23 and bringing the end to claims that cannot be brought any other way.[179] There have even been attempts to amend Rule 23 to allow cost of notice to be a legitimate consideration in class actions.[180]

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[173]*See supra* Part IV.D.

[174]*See* Frieling, *supra* note 3, at 121 ("It [e-mail] delivers what mail always promised, and never provided: virtually instant communications at any distance, at a very low cost."); Held, *supra* note 123, at 105 ("Businesses are discovering that E-mail is an excellent way for people to communicate quickly, without the interruptions of phone calls or the expense of express couriers."; *see* Norman, *supra* note 131, at 328 ("[E]-mail can . . . be less expensive than other communication mediums because no paper is used.").

[175]*See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974).

[176]*Id.*

[177]*See infra* note 180.

[178]*Id.*

[179]*See* Zachary A. Smith, *Class Action: State Notification Requirements After Eisen*, 8 W. ST. L. REV. 1, 6 (1980) (pointing out that the number of class actions brought in federal court for the year after *Eisen* decreased 9.6%); Duane W. Reno, *Notice and Due Process in Federal Class Actions: A Requiem for Revised Rule 23*, 2 HASTINGS CONST. L.Q. 479, 516 (1975) ("The Supreme Court's interpretation of the Rule as requiring that class representatives to bear the cost of the notice presently required by the Rule . . . serves to discourage small claimants from filing class suits, and further defeats the purposes of the Rule."); Lucy West Behymer, Case Comment, 16 B.C. INDUST. & COMM. L. REV. 254 (1975); *Newberg*, *supra* note 31, at § 8.03 ("The consequence of the Eisen II (and ultimately Eisen IV) refusal to weigh cost factors as a moderating practicability is the sacrifice of potentially meritorious claims, which the court had warned against in the very same breath."); CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE 2d § 1788 at 233-34 (1986) ("The effect of this limitation is to make the initiation of class actions more burdensome.").

Since the Supreme Court's decision in *Eisen*, attorneys bringing class actions have had to work to circumvent the cost allocation mandate. One avenue, which Justice Douglas advocated in his *Eisen* dissent, has been to break the class down into subclasses and try one subclass as a test case first.[181] Since the subclass would be small, the costs of notice would be diminished.[182]

Ultimately, the Supreme Court did take a step back from *Eisen*'s rigid stance on cost allocation with its decision in *Oppenheimer Fund*. There the Court held that district courts have the discretion to order a defendant to perform tasks, such as identifying class members or compiling their addresses, if the defendant can do so at less cost than the plaintiff class representatives, as well as discretion to allocate the cost of those tasks to the defendant.[183] The Court stated that "[it is not] improper for the court to consider the potential impact that rulings on these issues may have on the expense that the representative plaintiff must bear in order to send the notice."[184] Both before and after the *Oppenheimer Fund* decision, attorneys have tried to alleviate the costs of notice by including notice in the defendant's regular correspondence with class members.[185] Some courts also have allowed costs to be paid out of a settlement fund set up in a related or overlapping action.[186]

Although the *Eisen* Court clearly stated that cost should not be a factor in deciding what is proper notice in a class action, cost has always been a factor that even the Supreme Court has considered, even if only subconsciously. In *Mullane*, the Court refused to require personal service, citing expense as one reason.[187] The sheer fact that the Court has not required actual notice and has never required that notice be sent by certified or registered mail rather than first-class mail also demonstrates that the Court impliedly considers cost a factor in deciding what method of notice satisfies due process requirements.[188]

Class action notice by e-mail is an excellent answer to the problem of notice costs, especially in large class actions. Notice by e-mail would not involve the costs of paper, printing, and postage incurred from notice by traditional mail. The only

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As mentioned in Part II.B of this note, *Eisen* was the product of many years of litigation and several trips up and down through the federal judicial system. At one point, the United States District Court for the Southern District of New York had allowed for allocation of the cost of notice to the defendant of a large class action if the plaintiff could show a strong likelihood of success on the merits. Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 269-71 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974).

[180]*See, e.g.,* Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 42 (1996).

[181]*Eisen*, 417 U.S. at 179-186 (Douglas, J., dissenting); *see also* Robeson, *supra* note 56, at § 2b.

[182]*Eisen*, 417 U.S. at 179-86.

[183]Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 356-58 (1978).

[184]*Id.* at 360.

[185]*See supra* note 61.

[186]*See* NEWBERG, *supra* note 31, at § 8.06.

[187]Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-19 (1950).

[188]*See supra* note 111-12.

costs for e-mail notice would be the monthly online service fee, generally less than twenty dollars, and any labor needed to compile the class list and type in the e-mail addresses. In the *Eisen* case, postage costs alone for the class of at least 2,250,000 class members[189] would be $742,500 at today's first class postage rate.[190] Notice by e-mail would save a tremendous amount of money, especially if the class attorneys can obtain the names and e-mail addresses of class members from the defendants under *Oppenheimer Fund*.

The cost savings of e-mail notice would not just benefit (b)(3) plaintiffs, but also defendants of class actions as well. Costs of notice in a (b)(3) class action can be allocated to the defendant as part of a settlement agreement.[191] The notice required by Rule 23(e), which applies to all 3 types of classes, is often paid for by defendants as part of settlement as well.[192] Although Rule 23(e) is silent as to the due process requirements for settlement notice under the rule, most courts hold that the requirements for certification notice, under 23(c)(2), including individual notice, also apply to 23(e).[193] Therefore, defendants of class actions as well as plaintiff class members would benefit from the cost savings of notice by e-mail.

Although, as the *Eisen* decision makes clear, rights should not be sacrificed for the sake of cost, cost has traditionally been a factor in formulating due process requirements and in deciding how individual notice must be sent to members of (b)(3) class actions. And since notice by e-mail does meet the requirements of due process, class members' rights would not be sacrificed for cost. Additionally, e-mail notice best advances the policy behind Rule 23 of allowing an avenue for the small claimant to obtain relief. The tremendous cost savings of sending notice of a class action by e-mail rather than by traditional mail is a compelling reason why district court judges should seriously consider allowing individual notice to be sent by e-mail when it is practicable.

VI. CONCLUSION

In the last decade, American society has entered the computer age. With the tremendous growth of the Internet and the popularity of services such as e-mail, Americans are increasingly becoming dependent on an entity that will soon become an integral part of Americana. With this new entity, as with any new invention, comes adjustments. As the District Court of Appeals for the Armed Forces noted:

> New technologies create interesting challenges to long established legal concepts. Thus, just as when the telephone gained nationwide use and acceptance, when automobiles became the established mode of transportation, and when cellular telephones came into widespread use, now personal computers, hooked up to large networks, are so widely used

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[189] *Eisen*, 417 U.S. at 175.

[190] The present first-class postage rate is thirty-three cents.

[191] *See* Millstein v. Huck, 600 F.Supp. 254, 256 (E.D.N.Y. 1984).

[192] MANUAL FOR COMPLEX LITIGATION 3d, *supra* note 15 at 227.

[193] *Id.*; *see also* Kevin D. Hart, Annotation, *Propriety Of Notice of Voluntary Dismissal or Compromise of Class Action, Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure*, 52 A.L.R. FED. 457 (1981).

> that the scope of the Fourth Amendment core concepts of "privacy" as applied to them must be reexamined.[194]

Soon that day will come for the Fifth and Fourteenth Amendment concepts of due process as well. When that day does come, courts should not hesitate to allow individual notice of a class action to be sent by e-mail. E-mail meets the most stringent due process requirement for class action notice, individual notice,[195] and fits well into the reasonableness standards of *Mullane* and the flexibility that due process has traditionally allowed.[196] Most importantly, e-mail is the functional equivalent of first-class mail, as millions of Internet users already recognize.[197] Although there are some differences between the two, those differences are either irrelevant for purposes of due process or will be extinguished as the young technology of e-mail develops.[198]

Additionally, notice by e-mail will further the policy behind class action litigation and Rule 23(b)(3). If the costs of notice are prohibitive, and sometimes are when notice is sent by first-class mail, then potentially meritorious claims are extinguished because they are too small to bring individually.[199] Where e-mail meets due process requirements and is much less expensive than any other form of individual notice, courts should not only be ready, but eager, to allow notice by e-mail in order to give full effect to the purpose behind class action litigation.

E-mail could revolutionize not only notice in a class action, but the very nature of class litigation itself. Just as class attorneys could send notice of opt out rights by e-mail rather than postal mail, class members could exercise their opt-out rights by e-mail.[200] Contact between class counsel and absent class members may no longer be limited to a notice of certification and a notice of settlement. Class counsel could keep class members informed of activity in the suit conveniently and at almost no cost by creating a list of their e-mail addresses and forwarding one message to all members with a click of the mouse.[201]

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[194]United States v. Maxwell, 45 M.J. 406, 410 (C.A.A.F. 1996).

[195]*See supra* Part IV.A.

[196]*See supra* Part IV.B and IV.C.

[197]*See supra* Part IV.D.

[198]*See supra* Part IV.E.1, IV.E.2, and IV.E.3.

[199]*See supra* note 180.

[200]If courts do allow opt outs by e-mail, class members may be more likely to exercise their opt out rights because e-mail is so convenient. One possible effect of the increase of opt outs is that more classes will be decertified. The potential ramifications of allowing class members to opt out by e-mail are beyond the scope of this Note; however, since it is likely that the number of class actions brought will increase due to the cost savings of sending notice by e-mail, the author suggests that the increase in opt outs and decertifications will be a valuable way of weeding out cases that should not be brought as class actions.

[201]This would be especially easy because a list of class members would already be available from sending the (c) (2) notice; that list can be saved in the attorney's e-mail software and be accessed whenever necessary with almost no effort.

The major obstacle to class action notice by e-mail at present is not the Constitution, but practicality.[202] Although millions of individuals do use e-mail, the numbers show that it is still far from a household staple.[203] However, what is most important is not the number of current users, but the growth rate, which no one can deny is exponential.[204] It is only a matter of time before e-mail is as common as traditional mail and e-mail overtakes "snail" mail as the preferred method of transmitting individual notice in a 23(b)(3) class action.

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[202]*See supra* pp. 19-21.

[203]*See supra* note 2.

[204]*See* Hodges, *supra* note 72.

[205]The author wishes to thank her advisor, Professor Phyllis Crocker, for her guidance and help. The author also wishes to express her gratitude to her family for their unconditional support and love through many years of schooling.