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The Coming Revolution in Class Action Notices: Reaching the Universe of Claimants through Technologies

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INTRODUCTION

New technologies, social networking sites, blogs, and other interactive online platforms are playing an increasing part of North Americans' lives. As of June 2017, Facebook had, on average, 1.32 billion daily active users and 2.01 billion monthly active users.[1] Generation X spends the most time on social media, with approximately seven hours per week, while Generation Y comes in second, spending a little more than six hours per week doing the same.[2] The heaviest users are female, who spend one quarter of their time online on social media, with males correspondingly spending 19% of their time doing so.[3] Data on average weekly reach rates teaches us and marketers about the different types of consumers and how they may be reached in different ways, including in the class action context. If asked how best to reach class members by way of notice, Siri would certainly answer "The coming revolution in class action notice will be digitized." I will argue here that Siri is correct in saying so. The future holds in technologies and digital media in class actions too.

The class action device is an exceptional[4] and powerful tool with tremendous impact on the economy, on court activity, on plaintiffs' compensation and on

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1 Data found online: < newsroom.fb.com/company-info/ > .

2 Sean Casey, President of Nielsen Social, "2016 Nielsen Social Media Report Social Studies: A Look at the Social Landscape," (January 2017) online: < www.nielsen.com/us/en/insights/reports/2017/2016-nielsen-social-media-report.html > .

3 *Ibid.*

4 But see Sergio J Campos, "The Class Action Awakens," (15 February 2018) University of Miami Legal Studies Research Paper No. 18-5. Online: < ssrn.com/abstract = 3124353 > , DOI: < 10.2139/ssrn.3124353 > (arguing that a "functional view" has been developed recently in the U.S. Supreme Court, one that does not view the class action as exceptional, but as one of many equally permissible tools to serve the objectives of substantive law).

defendants' deterrence. Its exceptionalism,[5] largely evident from its many derogations to fundamental judicial law principles applicable to the unitary action,[6] is justified by the rules-based assurance of a "most appropriate" notice being sent to the members, and of these members' fundamental rights to opt-out and to object, afforded before they are collectively bound to a judgment or a settlement. Over the years, scholars have studied the class action's theoretical subtleties with great interest, predicting its great future, and sometimes, its demise.[7] What has been missing from these studies is empirical evidence that the system works, that the class action outcomes justify the efforts placed to litigate them, and that this "extraordinary" class action system in effect serves to bring money into the hands of the members.

Since its creation in May 2015, the University of Montreal's Class Actions Lab has worked towards obtaining data sufficient to draw conclusions about class action outcomes. In a funded project dedicated to member compensation through class actions, the "Class Action Member Compensation Project" [or "Compensation Project"], the Lab's team has so far consulted 854 class action case files arising from the Canadian Province of Quebec, Montreal District, in view of drawing a portrait of class action compensation over the course of the past twenty years (1997-2017). More fundamentally, the ultimate goal in the Lab's project has been to obtain data about moneys distributed as counsel fees and class member distributions and to calculate distribution and compensation rates. After three summers spent closely reviewing the files, the Lab has selected 108 files appropriate for individual case studies, based upon the existence of data relative to monetary distributions within these files. Conducted in collaboration with major actors of the Canadian civil justice system involved in class actions such as judges, law firms, bar associations, law associations, and Quebec's Government-funded class proceedings fund, the Project is ongoing, and set to conclude in 2022.

In one recent article I published as Lab Director, I disclose the Lab's first important series of data and results, also largely confirming that the class action does serve to compensate Quebec citizens.[8] Indeed, I have found that in more

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5 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 at 2550 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" (quoting *Califano v. Yamasaki*, 442 U.S. 682 at 700—701 (1979))).

6 Catherine Piché, « L'emprise des cinq doigts de Frankenstein : réflexion en cinq temps sur l'action collective », in Catherine Piché & Nathalie Vézina, *Le recours collectif à la croisée des systèmes et des traditions : monstre de Frankenstein ou modèle rêvé de procédure civile? Actes du colloque du 15 mai 2015 de l'Association québécoise de droit comparé* (Thomson Reuters, 2017) at 9.

7 I could be citing many authors here. E.g., Brian T Fitzpatrick, "The End of Class Actions?," (2015) 57:1 Ariz L Rev 161; Vanderbilt Public Law Research Paper No. 15-2; Vanderbilt Law and Economics Research Paper No. 15-5, online: <ssrn.com/abstract=2576304>; Robert H Klonoff, "The Decline of Class Actions," (2013) 90 Wash U L Rev 729; Myriam Gilles, "Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action," (2005) 104:3 Mich L Rev 373.

than half of the cases studied (in which significant data was found to calculate rates), a large majority of the class' members was compensated.[9] In the face of U.S. legislators' recent interest in making the class action procedure fairer and more efficient, and in predicting its outcomes better and with enhanced transparency,[10] these results appear to be both positive and valuable.

This paper will discuss a follow-up research question to the Lab's Class Member Compensation Project, which is whether a correlation may be drawn between the types and modalities of notices sent to class action members and the rate of compensation. Notices are essential to fair procedure in all class action regimes, but it is difficult to know for sure whether these notices have reached their intended addressee in such a way as to make them aware of the case and its potential distributions, and eventually allow for this distribution to be completed. Indeed, when the best means to provide notice are not used, class members risk not learning of the class action, and "a person who doesn't hear about [such an action] that includes him/her loses his/her property rights — potentially for a very big claim."[11]

If a collective approach to compensation is favored, in the hopes of compensating a substantial majority of class members,[12] class notices should aim to compensate at least 50% of the members. My hypothesis here is that technologies will help doing just that. In this paper, I ask whether this hypothesis is supported by the data and which forms of notice are actually most effective at reaching and compensating members. I argue that we have come to a revolution in class action notice, a digital revolution. In traditional forms of notice, reduced cost has almost always meant reduced probability of achieving actual notice. By contrast, properly designed e-notices are potentially transformative because they serve to lower the cost of notice while increasing reach rates in time and space. With the support of empirical data, I demonstrate that cases making use of technological notices serve to compensate members more efficaciously, with a distribution (or take-up) rate of 69% for this sub-set of cases.

In Section I, I highlight the legal standards governing class action notices throughout North America, including the purpose of class notices and the means

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8 Catherine Piché, "Class Action Value," (2018) 19:1 Theor Inq L 261.

9 *Ibid*. Also see Catherine Piché, "Class Actions in Quebec: "First Empirical Report of the Class Actions Lab," (May 2018) on file with author.

10 April 2016 Judicial Conference's Advisory Committee on Civil Rules, online: <www.uscourts.gov/sites/default/files/2016-04-civil-agenda_book_0.pdf>; H.R.985 — 115th Congress (2017-2018), "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017," online <www.congress.gov/bill/115th-congress/house-bill/985>. The Act passed the house amended on 9 March 2017.

11 Todd B Hilsee et al., "Hurricanes, Mobility, and Due Process: The "Desire-to-Inform" Requirement for Effective Class Action Notice is Highlighted by Katrina," (2006) 80 Tul L Rev 1771 at 1783 [Hilsee, *Hurricanes*].

12 This was and has been my position as a class actions scholar. In my view, class action success is largely achieved when a substantial majority of class members are compensated through the class action: see, e.g., Piché, *Class Action Value*, *supra* note 8.

of providing direct or indirect notice, mainly traditionally. I include a discussion of the limitations that traditional means of providing notice face. In Section II, I discuss the modern technologies used in class action notices, their advantages and limitations, and how courts and parties are using them to provide notice, including recent technological advances used in this context. In Section III, I present the Class Action Lab Class Member Compensation Project, beginning with my research method and initial hypothesis. Finally, Section IV addresses the correlation between enhanced distributions (take-up) rates and technological notices, based upon the Lab's data. This section serves to prove, based on this data, that new technologies and social media are more effective at targeting and informing members, as well as helping to compensate them. I conclude that courts must embrace technological notices and use it to shape communications with members in the future, in view of enhancing class member compensation at a lower cost.

I. LEGAL STANDARDS GOVERNING CLASS ACTION NOTICES

a. Purpose of Class Action Notices

i. Informing Class Members

By their nature, class actions are tremendously challenging in terms of ensuring effective communication between counsel and the class members. Class members are automatically made parties to the lawsuit without having expressly consented, unless they opt out of the proceedings. Judgments and settlements will bind those members that do not opt out as a matter of *res judicata* or by a binding release agreed to on behalf of the class. Identities of the class members are, in the majority of cases, unknown to counsel, and more often than not, the class defined is so large that it is virtually impossible for members to be known on an individual basis. In this context, the challenge is that principles of just (or due) process and of procedural fairness require that individuals who are concerned with the litigation are informed of its existence and of its main stages. Accordingly, the class action notice serves as an assurance that the putative class members have been informed of the class action and of its main stages, and that they have implicitly been made aware of the action and can decide whether or not they wish to be bound by the action and its outcome.

As such, the purpose of the class action notice is to advise potential class members of the major steps in the litigation, including notice of certification, of settlement conclusion and approval, of the resolution of the common issues trial, and of the start of a claims process and distribution of funds. Precisely, the notice of certification will state who is included in the certified class action and will provide instructions for opting out of the class action. The notice of settlement will summarize the fundamental terms of the settlement and advise the members of their rights to make oral or written submissions to the court in that regard. The notice of resolution of the common issues trial will advise of the outcome of the common issues trial. Finally, the notice of the claims process will provide

instructions on how to file a claim form in order to participate in a class action settlement or court award, within a certain date by which the claim forms must be filed.

ii. Adequate Notice and Due Process Considerations

Class members must be afforded effective notice of their right to opt-out, of their right to oppose or support an eventual settlement and of their possibilities in participating in distributions through settlement or judgment. Access to justice and compensation directly depend upon adequate notice.[13] For the Ontario Court of Appeal, inadequate notices can result in a "denial of justice."[14] As such, without an appropriate notice transmitted to the class and real possibility of compensation being provided, class members are not compensated appropriately. To push the argument further, I will argue that without compensation there may hardly be any deterrence, as defendants escape responsibility and are not incentivized through monetary "punishment" to modify their behavior. In this paper, I ask whether the quality and type of notice provided to members affects the extent of member compensation and whether there is a correlation between more effective notices and higher distribution (or "take-up") rates.

In the United States, class action notice must follow due process requirements, as outlined by the Supreme Court in *Mullane v. Central Hannover Bank and Trust Company*[15]:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality 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

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[13] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para 28 ("Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied."); J Kalajdzic, *Class Actions in Canada: The Promise and the Reality of Access to Justice*, (Vancouver: UBC Press, 2018) [Forthcoming]; Frank Iacobucci, "What is Access to Justice in the Context of Class Actions?," (2011) 53 SCLR 17 at 20; Jasminka Kalajdzic, "Access to a Just Result: Revisiting Settlement Standards and Cy près Distributions," (2010) 6 Can. Class Action Rev 215 at 216-221; Mathew Good, "Access to Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions," 47 Alta L Rev 185 (2009); Craig Jones, *Theory of Class Actions*, (Toronto: Irwin Law, 2003) (focusing his analysis on behaviour modification).

[14] *Currie c. MacDonald's Restaurants of Canada Ltd.* (2005), 250 D.L.R. (4th) 224, 74 O.R. (3d) 321 (C.A.), where the Ontario Court of Appeal decided whether it should recognize a settlement reached in a U.S. class action. An Illinois court had previously approved the form and content of the settlement notice directed to members resident in the U.S. and Canada. The Court refused to enforce the settlement against Canadian residents because it found the notice given to Canadian members inadequate.

[15] 339 U.S. 306 at 314 (1950) at 314. Based on these considerations, the Court asked the parties to provide individual notice by mail to the members of the trust at issue, with known addresses. Notice by publication sufficed as a common form of substitute notice.

> their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.

Some years later, the Supreme Court specifically addressed the due process requirements in class action notices in the seminal case of *Eisen v. Carlisle & Jacquelin*, thereby finding that "the names and addresses of 2,250,000 class members [were] easily ascertainable, and there [was] nothing to show that individual notice [could not] be mailed to each."[16] For the Court, individual notice to identifiable members was not discretionary, but mandatory,[17] and the plaintiff needed to bear the cost of notice to the members of his class.[18] Accordingly, in the U.S., individual notice, where impossible, must be substituted by "the best available substitute".

In money damages class actions brought in federal court pursuant to *Federal Rule of Civil Procedure* 23(b)(3), sending a notice to class members is required under the Due Process Clause in order to establish the binding effect of opt-out class actions[19]. The federal rules and due process in fact require the court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[20] The rule further provides what the notice must state, including "the binding effect of a class judgments on the members under Rule 23(c)(3)."[21] This rule contrasts with the rule for 23(b)(1) and (2) class actions, in which the court "may direct appropriate notice to the class".[22] To satisfy these requirements, U.S. courts have approved notice plans that use first-class mail for direct notice, where class members are identifiable and contact information is available, often in combination with publication notice disseminated through traditional forms of media such as newspapers, magazines, and television or radio advertisements. Are these traditional forms of notices still reasonable, and do they truly provide "the best notice that is

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16 417 U.S. 156 (1974) at 175 [*Eisen*].

17 *Ibid* at 176.

18 *Ibid* at 177.

19 Fed. R. Civ. P. 23(b)(3). William B Rubenstein, Alba Conte & Herbert B Newberg, *Newberg on class actions*, 5th ed (St. Paul: Thompson West, 2017) at § 4:47 and 18:43 [*Newberg*].

20 Fed. R. Civ. P. 23(c)(2)(B); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 798, 812 (1985) (the Supreme Court declined to rule on whether due process was required for injunctive or other class actions).

21 Fed. R. Civ. P. 23(c)(2)(B)(vii). The judgment must "include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." Fed. R. Civ.P. 23(c)(3)(B).

22 Fed. R. Civ. P. 23(c)(2)(A). Class actions in state courts have similar rules regarding notice to the members: Elizabeth J Cabraser & Fabrice Vincent eds., *Am. Bar. Ass'n, Fifty-State Survey: 2014-15: The Law of Class Action ix,* (ABA Publishing, 2015).

practicable under the circumstances", or are they now outdated, given society's customs and the evolution of media and technology?

In the class actions law context, due process doctrine mandates that no absent class member be bound by a judgment without adequate representation.[23] Due process does not, however, require that a class member *actually receive* notice.[24] Accordingly, in money damages class actions, absent class members are entitled to notice and the right to opt out.[25]

iii. Three Conceptions of Due Process in Class Actions Law

For Professor Alexandra Lahav, there are three conceptions of due process "embedded" in class actions law:

> "*Traditional" due process* is based on the due process parameters traditionally available in Anglo-American law. *"Cost-benefit" due process*, [. . .], balances the desire for accuracy with the need to efficiently dispose of the great mass of litigation. *"Dignitary" due process* values participation in legal proceedings as a way of demonstrating respect for individual dignity.[26]

Fundamentally, Lahav is right to say that the right to a "day in court" at the foundation of traditional due process translates, in the class action context, to providing a right to individually opt-out, to defeat certification by bringing individual defenses, or to object to settlement and eventually attack collaterally even as an absent class member.[27] The cost-benefit approach recognizes that the benefits of class actions are proportional to the costs of binding absent parties without express consent, and asks whether the collective procedure is justified when it vindicates rights that would not be vindicated in non-class actions.[28] As for dignitary due process, it emphasizes the values of participation and individual autonomy in class actions.[29]

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[23] *Hansberry v. Lee*, 311 U.S. 32, 43 (1940) (court held that a class action cannot bind a litigant absent adequate representation); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), affd in part, vacated in part 539 U.S. 111 (2003) (where Agent Orange class action members who had not opted out and had injuries that occurred after the close of settlement were able to sue), affd in part, vacated in part, 539 U.S. 111 (2003).

[24] See, e.g., *Moralez v. Whole Foods Mkt.*, Inc., 897 F. Supp. 2d 987, 1000 (N.D.Cal. 2012). See however *Eisen*, *supra* note 16, which held that individual notice was required for 2,250,000 class members whose names and addresses were known and easily ascertainable. The Supreme Court further cited the *Mullane* case, thereby reminding the parties that "notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process." *Ibid* at 174 (citing *Mullan*e, 339 U.S. at 314).

[25] *Shutts*, *supra* note 20 at 812.

[26] Alexandra D Lahav, "Due Process and the Future of Class Actions," 2012 44 Loy U Chicago LJ 545 at 546.

[27] *Ibid* at 549.

[28] *Ibid* at 551 and 554. Also see Samuel Issacharoff, "Private Claims, Aggregate Rights," (2008) 2008 Sup Ct Rev 183 at 208.

Professor Lahav interestingly suggests that there is a fourth conception which justifies the class action, a due process requirement of *process equality*, according to which "similarly situated individuals deserve similar outcomes and [according to which] the rules of the legal system must tend to equalize the ability of system participants to participate."[30] For Lahav, process equality could entitle similarly situated individuals to similar outcomes and thus lead to rejecting processes that lead to unequal treatment of similarly situated litigants without explanation.[31] In my view, this proposition, while noteworthy, could become too restrictive in the class actions law context and lead to limitations on the use of sub-classes. These restrictions would eventually erode the collective conception of justice inherent to class actions.

iv. Rationale for Judicial Approval of Class Action Notices

In a 1982 comprehensive study of historical importance about class actions law, reform, and policy in Canada, the Ontario Law Reform Commission explained that the class action notice serves the following three purposes: ensuring that the interests of class members are adequately represented, advising the class members of a right to opt out of a class proceeding, and informing class members of what they have to do to participate if there is a judgment in favor of the class.[32]

The Commission's recommendations concerning notice to class members were considered by legal academics to be very controversial.[33] Indeed, in a proposal for a *Class Action Act*, the Commission suggested that the court be given a discretion with respect to whether class members would be notified after certification.[34] This essentially meant that a class member could *not receive* notice that the action had been certified. Furthermore, this member could be denied the right to exclude himself even after having received notice and applying to be excluded.[35] These recommendations were not entirely followed by the Canadian provinces' legislations, and what those legislations provide is for a right to opt-out and discretionary notices at critical stages of the class action.

In fact, notice provisions in all Canadian class proceedings statutes require that notice be approved by the court, before and after certification and before and after the opt-out period expires.[36] Contrary to the U.S. Rule 23, which

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29 *Ibid* at 555.

30 *Ibid.*

31 *Ibid* at 556.

32 Ontario Law Reform Commission, *Report on Class Actions*, (Toronto: Ministry of Attorney General, 1982), (3 vols.), at Ch. 3 [*OLRC Report*]

33 Thomas A Cromwell, "An Examination of the Ontario Law Reform Commission Report on Class Actions," (1983) 15 Ottawa L Rev. 587 at 592.

34 *Class Action Act*, proposed Act by the Ontario Law Reform Commission, S. 16.

35 *Ibid*, s. 20.

36 See, e.g., *Mangan v. Inco Ltd.* (1998), 38 O.R. (3d) 703 (Ont. Ct. (Gen. Div.)) and

makes notice mandatory for monetary relief class actions and requires the judge to direct the best notice that is practicable under the circumstances, provisions under Canadian statutes confer discretion on judges to dispense with notice if considered appropriate, given the cost of notice, size and nature of the class, and class members' places of residence.[37] In Quebec, according to Quebec's *Code of Civil Procedure* [C.C.P.], a notice must be sent to class members when a court certifies a class action,[38] before a settlement approval hearing,[39] when a judgment has become final,[40] and when individual recovery of claims is ordered.[41] Ultimately, courts bear the responsibility of determining the date, form, and method of publication of the notice.[42]

My analysis of the caselaw tends to show, however, that judges are approving notices without having previously become involved in notice plan conception or having discussed reach statistics.[43] In smaller cases where

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Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 17 (notice of certification), 18 (notice where individual participation is required), 19 (notice to protect interests of affected persons), 20 (court approval), 21 (court order), 22 (costs of notice), 23 (notice of use of statistical evidence). Also see *Class Proceedings Act*, S.A. 2003, c. C-16.5, ss. 20-25 (Alberta), *Class Proceedings Act*, R.S.B.C. 1996, c. 50, ss. 19-24 (British Columbia), *Class Proceedings Act*, C.C.S.M. c. C.130, ss. 19-25 (Manitoba), *Class Proceedings Act*, R.S.N.B. 2011, c.125, ss. 21-26 (New Brunswick), *Class Actions Act*, S.N.L. 2001, c. C-18.1, ss. 19-24 (Newfoundland and Labrador), *Class Actions Act*, S.S. 2001, c. C-12.01, ss. 22-27 (Saskatchewan), and *Class Proceedings Act, S.N.S. 2007*, c. 28, ss.22-27 (Nova Scotia).

37 *OLRC Report*, *supra* note 32 at 511: "If the costs outweigh the interests of the class members—as for example, where the claims of class members are small and the effect of ordering notice would be to prevent the class action from proceeding—it should be open to the court to dispense with notice." The typical factors to consider for dispensing with notice are: the cost of giving notice, the nature of the relief sought, the size of the individual claims of the members, the number of class members, and the places of residence of the members. See for instance, S.O. 1992, c. 6, s. 17(3) (Ontario).

38 *Code of Civil Procedure*, CQLR c C-25.01, art 579 [CCP].

39 *Ibid,* Art. 590 CCP.

40 *Ibid*, Art. 591 CCP.

41 *Ibid,* Art. 599 CCP.

42 *Ibid,* Art. 579, para 2 CCP ("The *court* determines the date, form and method of publication of the notice" [emphasis added]); see also *Class Proceedings Act*, S.O. 1992, c. 6, s. 17(3) [*ON CPA*] ("The *court* shall make an order setting out when and by what means notice shall be given under this section" [emphasis added]); Fed. R. Civ. P. 23(c)(2)(b) ("the *court* must direct to class members the best notice that is practicable under the circumstances" [emphasis added]).

43 See, e.g., *Option consommateurs v. Volkswagen Group Canada Inc.*, 2016 QCCS 6809 at paras 1-6, 23-25 (The notice plan of a 2.1 billion CAN$ settlement was approved based upon the following (lack of) details:

> [1] Considering the Application for Preliminary Orders for the Approval of a Settlement Agreement;
> [2] Considering Exhibits 1 to 4 to the Application;
> [3] Considering the Affidavit of Mtre Sylvie De Bellefeuille;

settlement funds are limited, notice plans are sometimes approved without evidence that the class members will actually be reached or reachable.[44] In fact, courts will only become involved in establishing the notice plan when plaintiff and defendant cannot agree on a specific one.[45]

v. Complexity of Notices

Appropriate notice to class members provides meaning to the right to opt-out and serves to allow members to exercise their right in an informed manner.[46] In practice, the necessity to inform class members of potential effects to their individual rights usually takes the form of a notice written in complex legal terms which, quite unfortunately, frequently is not easily understood by laypeople.[47] In the words of the Honorable Justice LeBel of the Supreme Court of Canada,

> In many class proceedings, the representative acts on behalf of a very large class. The decision that is made not only affects the representative and the defendants but may also affect all claimants in the classes covered by the action. For this reason, adequate information is

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[4] Considering the submissions of counsel for the Parties;
[5] Considering that this Court was advised that Ricepoint Administration Inc. consents to the requested appointments;
[6] Considering that the Parties all consent to this judgment;
For these reasons, the Court: [. . .]
[23] Approves the Pre-Approval Notice substantially in the form attached to the Application as Exhibits 2 and 3;
[24] Approves the Notice Program substantially in the form attached to the Application as Exhibit 4;
[25] Orders that Pre-Approval Notice shall be disseminated in accordance with the Notice Program; (. . .).

44 See, e.g., *Markus c. Reebok Canada inc.*, 2012 QCCS 3562 at paras 43ff [*Reebok*] (Appendix I only includes a list of newspapers and magazines without providing any statistics or evidences); See especially Todd B Hilsee, Shannon R Wheatman & Gina M Intrepido, "Do You Really Want Me to Know My Rights-The Ethics behind Due Process in Class Action Notice Is More than Just Plain Language: A Desire to Actually Inform," (2004) 18 Geo J Leg Ethics 1359 [Hilsee, *Desire to Actually Inform*], at 1370ff ("Leading notice experts have adopted the reach model for ensuring that notice programs reach substantial percentages of their class members based on documented audience statistics, but many notice programs still proceed without such data and can result in disaster..."). See also Stéphanie Poulin, *Recours collectifs : deux modèles d'avis pour mieux communiquer avec les membres*, Option consommateurs Working paper (2011) [Poulin] online : < www.ic.gc.ca/app/oca/crd/dcmnt.do?id = 4180&lang = fra > .

45 See, e.g., *Boyer c. Agence métropolitaine de transport (AMT)*, 2015 QCCS 128 [*AMT supplementary notice*].

46 In reality, very few people opt out of class proceedings, in the U.S., at least: see Theodore Eisenberg & Geoffrey Miller, "The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues," (2004) 57 Vand L Rev 1529 (The median percentage of class members opting out, in the 143 cases in which the opinion reveals both the number of opt-outs and the number of class members, is a mere 0.1 percent" at 1546). This tendancy is noted anecdotally in Canada as well.

47 Hilsee, *Desire to Actually Inform*, *supra* note 44 at 1365.

necessary to satisfy the requirement that individual rights be safeguarded in a class proceeding.[48]

b. Means of Providing Notice

i. Cost-Benefit Approach and Reaching the Members

In class actions, notices and notice plans must be designed carefully such as to efficaciously reach the claimants, in the hopes of maximizing the likelihood that the intended recipients will be made aware of the proceedings and will be able to participate in the distributions. Notices and notice plans must be tailored to the needs of the case in a way that "makes it likely that the information will reach the intended recipients."[49] Canadian courts have adopted a cost-benefit approach when judging on a specific notice procedure.[50] While individual notices are subject to the court's discretion in Quebec[51] and in Ontario,[52] the Quebec Bar's *Guide to notices to Class Members* provides that direct contact with members remains preferable.[53] Indeed, as stated above, the purpose of providing notice of certification, for instance, is to advise class members that the action has been certified and to give those members a chance to opt out should they wish to pursue the action individually. Members must be able to make informed decisions about their options in the procedure.

ii. "Best Notice Practicable" Standard

In the United States, as discussed above, Federal Rule 23(c)(2)(b) mandates using "the best notice that is practicable under the circumstances, including

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48 *Lépine c. Société Canadienne des postes*, 2009 SCC 16, at para 42.

49 *Lépine*, *ibid* at para 43.

50 *AMT supplementary notice*, *supra* note 45; *Vaughan c. New York Life Insurance Co.*, 2002 CarswellQue 2198 (C.S. Que.) [*Vaughan*].

51 In Quebec, notices are required after certification of a class action (arts 576 para 2, 579 para 1 CCP), before approving a settlement (art 590 para 1 CCP) and once a judgment has become final (art 591 para 2 CCP). Individual notice is evaluated regarding "the nature of the class action, the composition of the class and the geographical location of its members" (art 579 para 2 CCP); see, e.g., *Vaughan, ibid*.

52 In Ontario, certification notices aren't even mandatory since the court can dispense the notice requirement in regard to specified criteria like "the cost of giving notice' or "the size of individual claims of the class members" (*ON CPA*, s. 17(2)-(3)). British-Colombia's legal requirements regarding notices are similar with Ontario (*Class Proceedings Act*, RSBC 1996, c 50, s. 19(2)-(3)). See also Warren K Winkler et al, *The Law of Class Actions in Canada*, (Toronto: Thomson Reuters, 2014) at 200; Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective*, (Portland: Hart Publishing, 2004) at 343ff.

53 Barreau du Quebec, "Guide to notices to class members" (Montreal: Barreau du Quebec, March 2016) at 7, online: <http://www.barreau.qc.ca/pdf/publications/guide-notices-members-class-actions.pdf>. See also Federal Judicial Center, "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide," (Washington DC: Federal Judicial Center, 1 January 2010) at 2 [FJC Checklist].

individual notice to all members who can be identified through reasonable effort."[54] Decades ago in *Mullane*, the U.S. Supreme Court held that within "the limits of practicability," notice must be "such as is reasonably calculated to reach interested parties."[55] In that case, since the names and addresses of the beneficiaries were known, the court ruled that reaching members directly was not impracticable, and that newspaper notices were not sufficient.[56] In *Eisen*, the U.S. Supreme Court held that Federal Rule 23 makes direct notice to identifiable class members imperative no matter the cost of individually reaching everyone, requiring that a notice be sent to each of the 2,250,000 class members.[57]

iii. Direct and Indirect Notices

Canadian class action statutes provide that notice may be delivered personally or by mail, by posting, by advertising or publishing, by individual notice to a sample group within the class or by any means or a combination of means that the court will find appropriate. Direct mailings or communications with those members, such as messages in bills or monthly statements, traditional mailings or emails, or text messages, are generally found to reach the members more effectively and to be preferable. When a class member's contact information is known, individual notices are preferred. Conversely, when this information is not known, defendants may be ordered to conserve or communicate nominal information about the members related to the matter in dispute to facilitate communications.[58]

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[54] Fed. R. Civ. P. 23(c)(2)(b) is only applicable to class actions certified under Fed R Civ P 23(b)(3) and applies to the certification notice. While the settlement notice required under Fed. R. Civ. P. 23(e)(1) is not mandated to be individualised under Rule 23, the *Manual for Complex Litigation* states that "[a]s with certification notices, individual notice is required, where practicable, in Fed. R. Civ. P. 23(b)(3) actions" (Federal Judicial Centre, *Manual for Complex Litigation*, 4th ed (Washington DC: Federal Judicial Centre, 1 March 2004) at § 21.312 [Manual for Complex Litigation]. See *Newberg*, *supra* note at § 8:15. Class actions certified under Fed. R. Civ. P. 23(b)(1)-(2) aren't required to provide individual notice. See Newberg, *ibid* at § 8:4; and *Manual*, *ibid* at § 21.311.

[55] *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) at 318 [*Mullane*]. Even if *Mullane* was not a class action lawsuit, federal courts applied it in class actions context (William Weiner, "The Class Action, the Federal Court and the Upper Class: Is Notice, and its Consequent Cost, Really Necessary?" (1985) 22:1 *Cal WL Rev* 31 at 53) [Weiner]. See also *Newberg*, *ibid* at § 8:7.

[56] *Mullane*, *ibid* at 318 ("The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses").

[57] *Eisen, supra* note 52 at 175-176.

[58] *Belley v. TD Auto Finance Services Inc/Services de financement auto TD inc.*, 2017 QCCS 2668; *Union des consommateurs c. Air Canada*, 2015 QCCS 753; *Brulé* c. *134 188 Canada Inc.* (1989), AZ-89021438 (Azimut) (Que. S.C.); *Markle v. Toronto (City)* (2004), 42 C.C.P.B. 69, 2004 CarswellOnt 4291 (Ont. S.C.J.); *Farkas* v. *Sunnybrook & Women's*

When direct communication with class members is chosen, first-class mail is traditionally preferred. Effective first-class mail notice requires an updated list of members' addresses. Such lists may be difficult to maintain given that class action cases take many years or even decades before they are resolved by settlement or judgment, and for members to receive a compensation. According to Statistics Canada's National Household Survey of 2011, 38,6% of the Canadian population moved to a different address during the past five years,[59] a time span that is steadily reached by the typical consumer class action case. Accordingly, a great proportion of class members will more likely than not be moving between the onset of the action and its conclusion.

One great example of lengthy class proceedings is the close to two decade-long class-action lawsuit brought by the Quebec victims of the 1998 ice storm, where 19 insurers were sued following the massive power outage that forced millions of residents to leave their homes.[60] In this case, the insurers collectively refused to reimburse additional living expenses occurred during mass evacuations of non-heated residences during the winter.[61] The first settlement concluded between four insurers and the plaintiff was approved more than 14 years after the ice storm occurred.[62]

Under the terms of the settlement, insurers were required to mail a cheque directly to the insured members' last known address.[63] From the 297,870 checks initially mailed to the members, only 122,453 were negotiated (41%).[64] Data gathered by the Class Action Lab, which I will further discuss below, have in fact served to demonstrate that while checks can constitute an effective form of compensation, compensation is only truly effected and the compensatory

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College Health Sciences Centre, 2004 CarswellOnt 9729, [2004] O.J. No. 5134 (Ont. S.C.J.), as cited in Winkler, *supra* note at 202.

59 Statistics Canada, "Mobility Status 5 Years Ago (9), Mother Tongue (8), Legal Marital Status (6), Common-law Status (3), Age Groups (16) and Sex (3) for the Population Aged 5 Years and Over in Private Households of Canada, Provinces, Territories, Census Metropolitan Areas and Census Agglomerations, 2011 National Household Survey" (26 June 2013), *2011 National Household Survey: Data tables*, online: <www12.statcan.gc.ca/nhs-enm/2011/dp-pd/dt-td/Rp-eng.cfm?TABID=2&LANG=E&A=R&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=01&GL=-1&GID=1118296&GK=1&GRP=1&O=D&PID=105554&PRID=0&PTYPE=105277&S=0&SHOWALL=0&SUB=0&Temporal=2013&THEME=97&VID=0&VNAMEE=&VNAMEF=&D1=0&D2=0&D3=0&D4=0&D5=0&D6=0>.

60 *Option Consommateurs c. Union Canadienne*, 2005 CarswellQue 10287, 2005 CanLII 42425 (C.S. Que.).

61 *Ibid.*

62 *Option Consommateurs c. Union Canadienne*, 2012 QCCS 7154.

63 *Ibid* para 12ff.

64 *Option Consommateurs c. Union Canadienne* (19 June 2015), Longueuil 505-06-000006-002, (C.S. Que.) (Auditor's Report, *Rapport d'étape : Seconde distribution*, at 11).

objective met when checks are in fact negotiated by their intended beneficiary members.[65]

Turning back to the ice-storm case in Quebec, the settlement approval judge further ordered that an ad campaign be launched, which was designed to motivate class members to report their new address to a specific website.[66] This campaign relied upon traditional newspaper advertising and a YouTube video advertising.[67] This modest communication plan, which represented 0.27% of the amount agreed to be paid by the remaining defendants, successfully served to incite 9,800 people to visit the administrator website to report their new address.[68]

Accordingly, direct and indirect means of communication are not mutually exclusive and indirect advertising may appropriately complement direct notices, especially when the existing address list is suspected to be outdated. In addition, the high costs involved in providing traditional means of communication[69] are often considered by the courts when evaluating notice plans,[70] and may significantly reduce the recovery available to the members, as I have seen at the Lab during the empirical review of the files chosen in the Member Compensation Project.[71]

c. Challenges in Class Action Notices

When direct communication is not possible or practicable, indirect methods for effective class notices are used, such as newspaper or magazine notices, social

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[65] The sample of cases selected for this paper's purposes shows that take-up rates can substantially drop when the negotiation factor is considered. Rates are much lower when the number of members compensated is considered to include only those members who negotiated checks. While relying on a small and non-random sampling, the Lab's team found that negotiated checks represent 9% to 59% of all checks mailed to class members. Efforts to update address lists will certainly enhance the probability that checks will be negotiated. In addition, it is worth noting here that Professor Brian Fitzpatrick has conducted a study presenting original data on class action settlement distributions in fifteen related small-stakes consumer class action lawsuits against some of the largest banks in the United States. He found that class members were more likely to negotiate checks when the amounts at stake are more significant, as well as in instances where they have been asked to fill out claim forms, thereby making them especially eager to negotiate the ensuing checks.

[66] *Option Consommateurs c. Union canadienne (L'), Cie d'assurances*, 2013 QCCS 5505 at para 4 [*Union Canadienne First Settlement*].

[67] *Option Consommateurs* (19 June 2015), *supra* note 64, (Advertising Agency Service Agreement, at 3-4).

[68] *Ibid* at 6.

[69] See, e.g., Jordan S Ginsberg, *Comment — Class Action Notice: The Internet's Time Has Come*, [2003] U Chicago Leg Forum 739 at 753-55 and 759-760.

[70] See, e.g., *Larson* v. *AT&T Mobility LLC*, 687 F.3d 10, 128 (3d Cir. 2012).

[71] Also see Jay Tidmarsh, *Rethinking Adequacy of Representation*, (2009) 87 Tex L Rev 1137 at 1169, who notes that the expense of class notification may deter class representatives and counsel to pursue class action claims.

media and digital advertising, as well as letters to third parties such as trade associations. These forms of notice are resorted to principally when individual notice needs to be supplemented, when the identity of the members is not ascertainable, or where some of the names and addresses of certain class members are unknown. Printed notices in newspapers (or magazines), however, are less effective now than they used to be. In Canada, merely 33% of the population consumes printed news, and this percentage is even lower in the United States.[72] Since class notices are not published in every newspaper, an even smaller percentage of the Canadian population is reached. Data from GroupM shows that while global digital ad spending is growing yearly, newspaper ad spending is proportionally declining given the changes in consumer reading habits.[73] By way of example, the Quebec newspaper named *La Presse*, which regularly publishes class action notices, decided to evolve to an entirely digital format in 2018, two years after dropping weekday newspaper delivery.[74] Finally, another problem with notices in magazines and newspapers is that their readers are not representative of the general population.[75]

In fact, newspaper class action notices have often been used imperfectly. For instance, the *Bristol Myers* case brought by a class of 4,500 breast implant victims featured massive newspaper and magazine notices, as well as several news conferences broadcasted over the radio and television,[76] but following poor participation rates at the class distributions stage, 65 members asked the court to produce a claim after the deadline, thereby highlighting the failed attempt at traditional notices.

Focus groups conducted on consumers have shown that members can easily be intimidated by the complexity of a legal notice; that in fact, the notice does not draw their attention, and that they do not tend to read it.[77] While class action

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[72] Reuters Institute for the Study of Journalism, *Reuters Institute Digital News Report* 2017 (Oxford: University of Oxford, 2017) at 85, online: < reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf?utm_source = digitalnewsreport.org&utm_medium = referral > [Reuters Institute Report].

[73] Suzanne Vranica & Jack Marshall, "Plummeting Newspaper Ad Revenue Sparks New Wave of Changes," *The Wall Street Journal* (20 October 2016), online: < www.wsj.com/articles/plummeting-newspaper-ad-revenue-sparks-new-wave-of-changes-1476955801 > .

[74] Pierre-Elliott Levasseur, « La Presse deviendra 100 % numérique à partir de 2018 », *La Presse* (1 June 2017), online: < www.lapresse.ca/debats/mot-de-lediteur/201706/01/01-5103410-la-presse-deviendra-100-numerique-a-partir-de-2018.php > ; Guy Crevier, « La Presse papier sera remplacée par La Presse + du lundi au vendredi dès le 1er janvier», *La Presse* (16 September 2015), online : < www.lapresse.ca/debats/mot-de-lediteur/201509/16/01-4901051-la-presse-papier-sera-remplacee-par-la-presse-du-lundi-au-vendredi-des-le-1er-janvier.php > .

[75] Alexander W Aiken, "Class Action Notice in the Digital Age," (2017) 165 U PA L Rev 967 at 981.

[76] *ACEF-Centre c. Bristol-Myers Squibb Co.*, 995 CarswellQue 660, 1995 CanLII 3721 (C.S. Que.).

notices are required to protect individual rights, explaining to class members not only what a class action is and how it works, but the substantive reasoning of the judges in class action decisions is not an easy task. It is especially the case when a notice is published in a newspaper near an ad carefully designed to stand out.[78] In this very competitive market aiming to exploit every consumers' attention, class notices should not be conceived differently. As class action notice expert Todd B. Hilsee has rightly noted, "[if] a business wanted its customers to know about a new product, it would not publish an ad in small, fine print with no headline."[79] Hilsee describes an effective notice as one that: "1) get[s] to the class; 2) [is] noticed; and only then can [. . .] 3) be read and understood."[80]

Traditional means of disseminating notices are still very prevalent in class action practice in North America, despite the technological advances of the past few decades. In this paper's specific dataset, as I will elaborate further below, 23 of the 24 chosen cases involving the use of technologies in class action notices simultaneously used a traditional means of notice. As ably stated by Alexander W. Aiken, courts and parties are creatures of habit, and still prefer those means "not because [they] are inherently superior to modern alternatives, but rather because of longstanding precedent and convention," thereby failing "to fully account for the significant limitations of traditional media."[81] Accordingly, if traditional notices are still used so frequently, it is probably out of habit and tradition, and because those traditional means of notice appear trustworthy, and not because it is more economical to do so, or because those means of notice reach class members more efficaciously.

In fact, reduced costs in traditional notices will actually lead to a reduced probability of achieving actual notice. Indeed, paying less for shorter or less extensive notice publications in newspapers or magazines risks reaching less people and being much less effective. That is why technological notices appear to me to be transformative because their lower cost does not impact reach rates negatively; to the contrary, e-notices are effective at a lower cost, for a longer period of time, and serve to reach many more individuals at once. I will develop this argument further in the next subsection.

II. TECHNOLOGICAL CLASS ACTION NOTICES

Today, millions of North Americans consume media through digital or electronic methods and communicate daily by these means. Online sources are the main genesis of news around the world, surpassing television and print.[82]

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77 Poulin, *supra* note 44 at 31. See also Weiner, *supra* note 55 at 62.

78 *Ibid* at 52.

79 Hilsee, *Desire to Actually Inform*, *supra* note 44 at 1362.

80 *Ibid* at 1360. Also see: Hilsee, *Hurricanes, supra* note 11 at 1783.

81 Aiken, *supra* note 75 at 977.

82 See Reuters Institute Report, *supra* note 72. According to this report, more than half of

Given the fast-paced changes in the way communications are generally handled around the world, and the growing reliance on technological forms of communication, courts have started to increasingly approve technological notice plans. The Internet having become indispensable, mail notices inevitably have been replaced by email notices, and targeted websites and banner advertisements have increasingly been used. As I will discuss below, these technological notices should be resorted to by the parties and embraced by the courts, in such a way as to replace or complement traditional notices.

In November 2015, in the U.S., the Rule 23 Subcommittee to the Federal Advisory Committee on Civil Rules had proposed amendments to Rule 23(c)(2)(B) that recognized advancements in communications and technologies. The proposed amended Rule recognized that the "best notice practicable" standard discussed above in Section I, b) ii) may include "most appropriate" electronic notices:

> For any class certified under Rule 23(b)(3), the court must direct to class members the *best notice that is practicable under the circumstances*, including individual notice [by the most appropriate means, including first-class mail, *electronic* or other means] {by first class mail, *electronic mail* or other appropriate means} to all members who can be identified through reasonable effort.[83]

In addition, the proposed draft committee note relevant to this amendment recognized that "courts and counsel have begun to employ new technology to make notice more effective," and have encouraged the legal community to "take account of current realities."[84] Even if litigants and lawyers continue to rely heavily on traditional notice means in class actions, courts have, in recent years, approved new ways to communicate and distribute class notices. These new notices plans containing some form of electronic or digital communication (including direct email, online banner advertisements, and/or postings on social media and social networking sites), have been approved judicially. The following few pages discuss a few examples in the caselaw of such novel approaches to class notices involving technologies in the U.S. and Canada.

a. Email Notices

Email is widely used in North America and around the world[85] and for that reason, class notices sent to their intended beneficiaries' email addresses are the

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all online users across the 36 countries (54%) say they use social media as a source of news each week.

[83] Advisory Committee on Civil Rules, Nov. 5-6, 2015, online: < www.uscourts.gov/file/18536/download >. The alternative language was suggested by a Subcommittee member.

[84] *Ibid.*

[85] Emailing has been ranked first in the list of preferred activities of the average Canadian Internet user in 2016 (92%). See Canadian Internet Registration Authority, *Domain*

most common alternative (or complement) to first-class traditional mail currently used and approved judicially. In *Browning v. Yahoo! Inc.*, a case dating more than a decade, a Californian District Court described the proposed notice plan involving the use of email as "extensive, multifaceted, and innovative."[86] Class actions against Netflix[87], AT&T[88], Symantec[89], and Louis Vuitton[90] have similarly resorted to email notices in conjunction with physically mailed notices, while another class action against LinkedIn[91] has relied entirely upon email notices. Surprisingly, the United States District Court for the Eastern District of New York ruled in *Karvaly v. eBay, Inc.* that the email notice envisaged was inappropriate due to the "risks of distortion or misleading notification."[92] The New York District Court essentially worried that class members would consider the notice as a scam email or a counterfeited one.[93] In another case, first-class mail was favored over email as the court feared that the electronic notice could be forwarded to non-class members, easily posted elsewhere, and that the reproduction to "large numbers of people [could] compromise the integrity of the notice process".[94] Fortunately, district courts have been more receptive to electronic notices in recent years, and have taken advantage of the new technological tools available, which effectively and efficiently serve to target specific individuals as potential class members.[95]

In Canada, sending class members notices through email has been found to be uncontroversial. Courts have not hesitated to approve email notices in cases against Ticketmaster[96], Walmart[97] or Uber[98]. Generally speaking, these emailed

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Industry Data and Canadian Internet Trends: CIRA Internet Factbook 2016 (Ottawa: CIRA, 2016) at 22, online: *cira.ca/sites/default/files/public/CIRA-Internet-Factbook-2016-EN.pdf?utm_source=Factbook&utm_medium=P>*

86 *Browning v. Yahoo! Inc.*, 2006 WL 3826714 at 8 (ND Cal).

87 *In re Online DVD-Rental Antitrust Litigation*, 779 F (3d) 934 (9th Cir 2015).

88 *In re AT & T Mobility Wireless Data Services Sales Tax Litigation*, 789 F Supp (2d) 935 (ND Ill 2011).

89 *Khoday v. Symantec Corp.*, 2016 WL 1637039 (D Minn).

90 *Morey v. Louis Vuitton North America*, 2014 WL 109194 (SD Cal).

91 *In re Linkedin User Privacy Litigation*, 309 FRD 573 (ND Cal 2015) [*LinkedIn User Privacy Litigation*].

92 *Karvaly v. eBay, Inc,* 245 FRD 71 at 91 (ED NY 2007).

93 *Ibid.*

94 *Reab v. Electronic Arts, Inc.*, 214 FRD 623 (D Colo 2002), cited by Aiken, *supra* note 75 at 987. In my view, informing non-class members—or the general public—could be beneficial to the case, at least indirectly. Indeed, those informed could be incited to transfer the information to class members concerned by the action, especially when these members are mistakenly sent the notice at a wrong address.

95 *Rodkey v. Harry and David, LLC*, 2017 WL 2463392 (SD Ohio); *Vance v. Cuarto LLC*, 2014 WL 12646033 (D Or).

96 *D'Urzo v. Tnow Entertainment Group Inc.*, 2012 QCCS 3820 [*Ticketmaster*].

97 *Drew v. Walmart Canada Inc.*, 2017 ONSC 3308, 10 C.P.C. (8th) 182.

notices are used in conjunction with notices mailed physically.[99] For example, in *D'Urzo v Tnow Entertainment Group Inc.*, the court ordered the settlement administrator to physically mail a notice upon failure of the initial email.[100] In another class action case brought against Toyota, a postcard was sent to the physical address of all class members, while an email was simultaneously sent to their last-known email address.[101] In Quebec, it is common for courts to order class counsel to send an electronic copy of the notice to those members who subscribed to receive electronic updates about the class action.[102] Overall, courts are increasingly ordering class notices to be sent via both traditional mail and email.[103] Indeed, as I will further discuss in Section IV of this paper, four of the twenty-five class action cases reviewed including technological notices provided for email notices. Many more cases in my targeted cases reveal the use of website notices, however, as websites are used in all instances but one.

Canadian courts have also approved notices sent principally by email, in cases related to airplane tickets purchased online[104] or regarding allegations of false profiles on a dating website.[105] While courts have not expressly motivated their decision to strictly use email instead of first-class mail, one may presume that it was best to decide accordingly in this context when members appear more advanced technologically. When interactions between the defendant companies and their clients are already taking place digitally, electronic notices are considered to be appropriate since customers already expect interactions to be conducted over the Internet. As such, email and Facebook notices were recently sent in a Quebec case involving consumers residing in Québec who started a subscription to Netflix, received a free trial, were automatically renewed at the regular price following the end of the free trial period, and subsequently cancelled their subscription to the service within two months.[106] This trend has also been observed in the United States for similar reasons.[107]

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98 *Jean-Paul c. Uber Technologies Inc.*, 2017 QCCS 1043.

99 Also see *Manuge v. Canada*, 2014 FC 640, [2014] F.C.J. No. 1362, [2014] A.C.F. no 1362.

100 See, e.g., *Ticketmaster*, *supra* note 96.

101 *Schachter c. Toyota Canada inc.*, 2014 QCCS 802.

102 *9225-3509 Québec inc. c. Daimler, a.g.*, 2016 QCCS 496; *Ross c. Caisse populaire Desjardins de la Vallée des Pays-d'en-Haut*, 2016 QCCS 4942.

103 *Bergeron c. Société Telus Communications*, 2017 QCCS 734 at para 58, leave to appeal to Quebec CA requested [*Bergeron*]. Also see *Wener v. United Technologies Corp.*, [2008] Q.J. No. 15465, where e-notices were sent in both the U.S. and Canadian class actions; and in other Canadian provinces, digital campaigns were also approved: *Green v. Tecumseh Products of Canada Ltd.*, 2016 BCSC 217, [2016] B.C.J. No. 242; *Quenneville v. Volkswagen Group Canada Inc.*, 2016 ONSC 7959, 6 C.E.L.R. (4th) 109, 2016 CarswellOnt 20027, [2016] O.J. No. 6541; *Bartolome v. Nationwide Payday Advance Inc.*, 2010 BCSC 1433, 2010 CarswellBC 2731, [2010] B.C.J. No. 1994.

104 *Union des consommateurs c. Porter Airlines Inc.* (26 July 2012), Montreal 500-06-000540-100 (C.S. Que.) [*Porter Airlines*].

105 *Robert André Robitaille c. Yahoo! Inc.* (25 November 2011), Montreal 500-06-000325-056 (C.S. Que.).

Nevertheless, courts are sometimes reticent about completely eliminating first-mail notice in favor of digitally sent direct notices.[108] The Federal Judicial Center *Judges Class Action Notice and Claims Process Checklist and Plain LanguageGuide* surprisingly insists that sending a physical piece of paper through the mail is more effective than emailing one.[109] As discussed above, one of the principal disadvantages of first-class mailing is that it relies on address lists that could rapidly become outdated. In all fairness, there are risks to sending email notices too. Many individuals still do not have an email address or internet access, automated spam filters may block e-notices, and email lists can also quickly become outdated. With today's Internet penetration rate, however, the opportunity of relying on digital-only notices should be considered, albeit on a case-by-case approach. The decision to send notices electronically should be made a part of a measured communications plan.

In *Robert André Robitaille* c. *Yahoo! Inc*., a class action brought against Yahoo! involving allegations of "manufactured false profiles" on its *Yahoo!* Personals dating platform was filed in Quebec[110], and eventually settled. A total amount of $109,620 needed to be distributed to the 3,045 identified members[111]. In this context, no significant differences could be drawn as between the different communication methods, and email notices then seemed to be the only viable option. No investigations were conducted to verify if the email list has been updated. After sending an email notice to the last known email address of each member, "undeliverable notices" were received for approximately 43% of the notices initially sent[112]. Even if the majority of members were eventually reached by another email or via supplementary postcards, only 221 visits (7% of the class) were recorded, and of those visits, 21 class members (less than 1% of the class) managed to claim the distribution owed of $36[113].

This case is one of only two cases in my specific technological notices dataset that involved an injury caused by online activity. It is one for which technological notices could presumably have worked wonders in terms of reaching the members and inciting them to participate in the distributions process. Surprisingly, the case did not see a successful outcome overall, with an extremely low distributions rate of less than 1%. Considering that each member

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[106] *Benabu v. Vidéotron*, 2017 QCCS 4996, [2017] Q.J. No. 15132.

[107] Aiken, *supra* note 75 at 986, 990.

[108] Newberg, *supra* note 19 at § 8:30.

[109] FJC Checklist, *supra* note 53 at 3.

[110] *Robert André Robitaille c. Yahoo! Inc.* (13 December 2005), Montreal 500-06-000325-056 (C.S. Que.) (Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative).

[111] *Robert André Robitaille c. Yahoo! Inc*. (6 February 2013), Montreal 500-06-000325-056 (C.S. Que.) (Affidavit, Claims Administrator, at 2).

[112] *Ibid.*

[113] *Ibid.*

was identified, my impression is that sending a check to members whose addresses were featured in the member registry would have been much more efficacious. When the costs associated with individually sending checks to the members are prohibitive, considering the limited amount of the settlement cap, meaningful cy-près distributions should be considered. In my view, in *Robert André Robitaille v. Yahoo! Inc.*, there was no a real "desire to actually inform"[114] class members.[115]

A more optimistic portrait can be drawn from the *In re Linkedin User Privacy Litigation* case.[116] This class action was filed in California against *LinkedIn* regarding a massive password leak that occurred in 2012. At settlement, *LinkedIn* agreed to pay a total amount of 1,250,000$. Given that the case concerned approximately 800,000 members, sending notices through first-class mail would have represented a significant financial portion of the settlement amount. In this context, the court considered that sending a direct email notice complied with Rule 23[117]. *LinkedIn* sent the notice twice to each member with a link that pointed to the settlement website. Approximately 100,000 visits were recorded on the settlement website (13% of the class), but email notice was more effective in this case, reaching 97% of members with the first email, and 96% with the second one. These latter statistics only relate to the transmission of the email and cannot serve to confirm whether each emailed notice was read or whether it was (eventually) (mis)categorized by the email service provider as spam email. Following the visits made on the settlement website, 47,336 class members presented a claim and were compensated, which appears to be a high number but in fact represents merely 6% of all class members.

In this paper's dataset, only four cases involved the use of emails as a form of notice — although not as the *only* form of such notice. Websites, traditional notices, and social media were also used in these instances. Interestingly, these four cases led to distribution rates of 93%, 1%, 71%, and 90%. While a subset of four cases is not sufficient to draw conclusions regarding the effectiveness of emails in reaching class members, it can nonetheless be said that emails were likely helpful, and that they positively helped in reaching members in those instances.

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[114] Hilsee, *Desire to Actually Inform*, *supra* note 44, at 1361.

[115] See *ibid* at 1631ff ("Clearly, satisfying the "desire to inform" standard for class action notice due process cannot be achieved by interpreting "reasonable" as a term that reflects a low standard for notice, as is commonly used to rationalize a weak notice plan, nor should "reasonable" mean crafting reasons why better notice is not necessary to satisfy obligations. Rather, "reasonable" should be interpreted with a focus on the class member: "Is this enough to inform the class member under the circumstances of this case?" at 1362). In *Robert André Robitaille v. Yahoo! Inc.* a paralegal working for the defendant counsel was appointed by the court as claim administrator.

[116] See, e.g., *LinkedIn User Privacy Litigation*, *supra* note 91.

[117] *Ibid* at 586.

In any event, measures may be provided by the parties and the courts to ensure that e-notices proceed successfully. For instance, in a class action involving Quebecers who purchased and/or own a 2011 MacBook Pro Laptop with a 15- or 17-inch screen and have suffered or suffer from a Graphic Defect, Apple identified contact information for purchasers and owners of the 2011 MacBook Pro device and set up a list of such class members, along with their physical addresses and emails. The approved notice provided that spam testing would be conducted, that email addresses would be validated, and that deliverability would be tracked (extract):

> Apple shall provide to RicePoint the complete list of email and physical mailing addresses thus compiled.
>
> Analysis and validation of data by RicePoint
>
> RicePoint will validate the email addresses received from Apple prior to distributing the Email Notices to the potential class members.
>
> Prior to distributing the Email Notices, RicePoint will also undertake spam testing in order to increase the chances of sucsessful delivery to each email address.
>
> Where more than one email address is assigned to the same Laptop, RicePoint will distribute the Email Notice to all listed email addresses.
>
> Electronic distribution of Notices by RicePoint
>
> The Email Notice shall contain the text of the Abbreviated Notice set out at Schedule B, in French and in English.
>
> The Email Notice will contain a hyperlink to the full text of the Notice (Long Form Notice) as set out at Schedule A, in French and in English, on the website of counsel for the Plaintiff.
>
> RicePoint shall distribute the Email Notice no later than October 6, 2017.
>
> RicePoint shall track deliverability, record any bounced emails and shall attempt to re-send the Email Notice three (3) times in such cases, within a period of 48 hours from the original distribution of the Email Notice.[118]

In conclusion, despite its disadvantages, email notices have shown important advantages, such as its speed and low cost of transmission. My view is that e-notices should always be considered, but that they should ideally be used in conjunction with first-class mail, in order to reach members multiple times.[119] Once a specifically-designed e-notice plan is approved, it may further provide

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[118] *Charbonneau v. Apple Canada Inc.*, 2017 QCCS 4500, [2017] Q.J. No. 3111 at paras 16-23.

[119] *Spann v. J.C. Penney Corporation*, 314 FRD 312 (CD Cal 2016) (''Heffler anticipates that the notices will reach 75% of targeted potential class members, on average, 2.3 times'' at 330).

automatic email distribution payments through identified banks, after security questions have been answered, which is tremendously effective for class distributions. Importantly, when e-notice is used, special ICT measures should be provided to ensure that the email was actually sent to — and received! — by class members.[120]

b. Website Notices

With the democratization of technology, the Internet provides new ways to communicate information between individuals. As noted by the *Reuters Institute Digital News Report* of *2017*, 76% of the Canadian population gathers news online.[121] Practices have evolved since the very first Internet class action notice was used in 1997.[122] Nowadays, it is common practice to use not only email and e-notices, but websites in class action notice plans, often along with a combined traditional means of notice.[123]

Websites for notice purposes can be of two types. First, some sites are created specifically and exclusively to provide information about the class action litigation.[124] Second, advertisements may be placed on existing websites to constitute publication notice.[125] In fact, websites are useful not only for notice purposes, but also to ensure enhanced participation rates by class members

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[120] Although actual receipt of the notice is not required. See Debra Lyn Bassett, "Class Action Silence," (2014) 94 Bul Rev 1781 at 1794 (for an American perspective). See also *Lépine*, *supra* note 48 at para 43 (for a Canadian perspective).

[121] Reuters Institute Report, *supra* note 72 at 85 (The American population isn't different with 73%).

[122] Ginsberg, *supra* note 69 at 741, as cited by Elizabeth MC Scheibel, "#Rule23 #ClassAction #Notice: Using Social Media, Text Messaging, and Other New Communications Technology for Class Action Notice and Returning to Rule 23(c)(2)(B)'s "Best Notice Practicable Standard," (2016) 42:4 Mitchell Hamline L Rev 1331 at 1349. Also see Brian Walters, "'Best Notice Practicable' in the Twenty-First Century," (2003) UCLA JL & Tech. 1.

[123] Scheibel, *ibid*., citing Theodore Z Wyman, *Annotation, Sufficiency of Legal Notice Provided by Online Publication or Electronic Mail in Class Action Suits*, 84 A.L.R. Fed. 2d 103 (2014), pt. I §§ 1—2, who has explained that "The creation and implementation of dedicated class action litigation or class settlement websites have become a common and essential part of modern class action notification programs. . . .A large group of decisions have ratified class notification plans. . .that include an element of online publication. . . often part-and-parcel with more traditional publication notice."); *Manual for Complex Litigation*, *supra* note 54 at § 21.311 (2004) ("Many courts include the Internet as a component of class certification and class settlement notice programs.")

[124] See for example: < www.themoneyismine.ca/faq > .

[125] See *Jermyn* v. *Best Buy Stores*, L.P., No. 08 Civ. 00214, 2010 Wl 5187746, at 8* (S.D.N.Y. Dec. 6, 2010) (notice was approved on Best Buy's Website, as it was "similar to publishing notice in a nationwide newspaper"). In that case, the court denied the proposed notice via Twitter, SMS, and email, finding these notices to be forms of individual notice with overbroad and under-inclusive audiences. It did nonetheless approve case website links on Best Buy's Website.

notably through website claims administration. Interestingly, Art. 576(2) C.C.P. provides that the authorization judgment orders the publication of a notice to members and that it may order the representative party, or another party, to make the information on the class action available to the class members, including the setting up of a website for that purpose.[126]

As will be further discussed in Section IV, the most common form of website notices found in the case sample was the use of hyperlinks on existing websites that are featured repeatedly in time. Courts typically order defendants,[127] and sometimes plaintiffs,[128] to create a link on their webpage to direct web users to a court approved class action notice. These links are also occasionally published on other websites related to the case,[129] sometimes also pointing to the plaintiff attorney's website.[130] These websites provide information about prosecuted cases, their chronology, and how class actions basically work.[131] They usually provide digital versions of important court documents such as settlements, court decisions, and distribution protocols. Websites are further used on occasion to recruit potential class members.[132]

Another common way of making class action information available is to create a specific microsite for the class action itself. In Canada, microsites are regularly used in national class actions, as in the Canadian DRAM Class Action,[133] or the Volkswagen and Audi TDI Emission Class Action.[134] In these cases, all related court documents were uploaded on the website, including the distribution protocol, settlement(s), court orders and legal notices. Members are often invited to submit a claim online or are asked to verify whether or not they are a class member.[135] Microsites are usually minimalist, easily adapt to mobile

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[126] Art. 26 C.C.P. also privileges, in court procedures, all appropriate technological means that are available to the court and to the parties.

[127] *Ladouceur c. Société de transport de Montréal*, 2015 QCCS 2377; *Cummings c. Via Rail Canada inc.*, 2013 QCCS 5824; *Cornellier c. Province canadienne de la congrégation de Ste-Croix*, 2011 QCCS 6670.

[128] See, e.g., *Porter Airlines* (Where *Union des consommateurs*, a non-profit organization, acts as plaintiff).

[129] *Pellemans c. Lacroix*, 2006 QCCS 5080 (Notice published on the website of the organization responsible for financial regulation (*Autorité des marchés financiers*) in a class action related to a financial scandal).

[130] *Assoc. pour la défense des droits des défunts et Familles (ADDDF) du cimetière Notre-Dame-des-Neiges c. Fabrique de la paroisse Notre-Dame de Montréal*, 2014 QCCS 2555; *Toure c. Brault & Martineau inc.*, 2014 QCCS 2609 [*Toure*].

[131] See, e.g., online: < www.recourscollectif.info/en/ > .

[132] *Jermyn v. Best Buy Stores, L.P.*, 2010 WL 5187746 (SD NY); *Martin v. Weiner*, 2007 WL 4232791 (WD NY).

[133] Available online: < www.themoneyismine.ca/ > .

[134] Available online: < www.vwcanadasettlement.ca/en > .

[135] Available online at < vin.vwcanadasettlement.ca/en/VIN > . (People can enter their Vehicle Identification Number (VIN) to see if they are a member or not of VW/Audi class action).

devices, and are easy to navigate. They are sometimes coded to provide answers to frequently asked questions (“FAQ’s”), and to give credentials to the class administrator. Information can be efficaciously updated on these sites, which truly is advantageous, especially by way of comparison to traditional means of communication. U.S. class actions similarly commonly feature settlement websites.[136] Court orders will, in these cases, occasionally contain statistics regarding the number of visits or the effectiveness of the website,[137] a feature rarely found in the Quebec court files consulted.

Class action registries may also be used to reference class actions, inform putative class members about case evolution, and afford these members access to court documents. A public registry that “allows lawyers and the general public to obtain information on all the class actions instituted in Québec,” was inaugurated by the Quebec Superior Court in January 2009.[138] The registry, however, is more useful to lawyers than laypeople due to its complexity.[139] Even so, it constitutes an imperfect tool to inform the members due to the fact that it only recently became mandatory for lawyers to report the filing of their class action cases — and case evolution — on the registry’s website.

c. Text Message Notices

Text messaging has become a tremendously popular method of communicating. Eighty-five per cent of American adults possess a cellular phone and 85% of those owners use their phones to send and receive text messages.[140] Canada ranks globally 6th in smartphone penetration (69.8%) while the United States rank 7th (69.3%) in 2017.[141] In fact, 97% of American smartphone owners use text messaging in a week.[142] Despite the popularity of

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[136] *Perez v. Asurion Corp*., 501 F Supp (2d) 1360 (SD Fla 2007); *Schulte v. Fifth Third Bank*, 805 F Supp (2d) 560 (ND Ill).

[137] *Ibid* at para 66 (“Since the Settlement Website was launched on 26 March 2007, it has had 182,489 unique visitors. In other words, 182,489 different computers have accessed the Settlement Website. The Settlement Website has been visited 225,644 times; in other words, some of the unique visitors returned to the website on one or more occasion. Finally, there have been 3,209,998 “hits” or “clicks” on the Settlement Website. This statistic indicates that visitors to the Settlement Website were accessing the various interactive features. On average, visitors made 14 hits per visit.”).

[138] *An Act to reform the Code of Civil Procedure*, SQ 2002, c 7, s 158; art 573 CCP, online: < services.justice.gouv.qc.ca/dgsj/rrc/Accueil/Accueil.aspx > .

[139] Pierre-Claude Lafond, *L’énigmatique article 1045 C.p.c.: un espace de créativité pour le juge gestionnaire d’un recours collectif*, R du B 1 (2014), at 13 (“Regardless of it’s obvious utility, the current electronic registry isn’t useful in regard to this purpose” [translated by author]). Also see Canadian Bar Association Registry, online: < www.cba.org/Publications-Resources/Class-Action-Database?lang = en-CA > or Stanford Law School, *Securities Class Action Clearinghouse*, online: < securities.stanford.edu > .

[140] Scheibel, *supra* note 122 at 1354.

[141] Available online: < newzoo.com/insights/rankings/top-50-countries-by-smartphone-penetration-and-users/ > .

text messaging, courts in the U.S. and Canada have surprisingly rarely used it as class action notice.

In fact, in the sample of cases I reviewed, I found no case involving the use of text message notice, but in my view, many instances could easily have benefitted from these types of notices.[143] In many of these cases, often brought against telecommunications (or cellular phone) providers, one could easily have imagined how easy it could have been to massively send text messages to a large number of known and identified client members. In *Bergeron v. Société Telus Communications*, the court certified a class action against a cellular phone provider that charged roaming fees to clients for receiving text messages ($0.60/message) in a way *prima facie* disproportionate to the cost of providing the service ($0.000603).[144] The Court ordered that a notice be published on the provider's website and on social media feeds, as well as through newspapers and emails.[145] By way of comparison, in *In re AT&T Mobility Wireless Data Services Sales Tax*, the American cellular phone provider spread a text message notice to "more than 32 million Class Members."[146]

Recent decisions in the United States District Courts continue to show reluctance in using text messaging. In *Anderson v. Minacs Group (USA) Inc.*, the court considered notices sent via text messages to be "unnecessary intrusion[s] upon the privacy of these individuals,"[147] but approved the use of electronic and physical mail.[148] The court cautioned that "a significant number of recipients were likely to disregard this notice as "spam."[149] In my opinion, however, email notices are more susceptible to be considered as spam than text messages. In *Williams v. King Bee Delivery, LLC*, the court allowed SMS notices if other means (email and regular mail) failed or were not practicable.[150]

In sum, technological notices such as email, websites or text messaging remain marginal for the North American class action bar, which continues to include traditional components to notice plans. Given the ease and low cost of resorting to text messaging, this method should be preferred in the future, along with heavy internet advertising and email, particularly when the members' cellular telephone numbers are easily accessible and made available.

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[142] Aaron Smith, *U.S. Smartphone Use in 2015* (Washington DC: Pew Research Center, 2015), online: <www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

[143] *Martin c Société Telus Communications*, 2011 QCCS 3544; *Comtois c. Telus Mobilité*, 2010 QCCA 596.

[144] See, e.g., *Bergeron*, *supra* note 103.

[145] *Ibid.*

[146] *In re AT & T Mobility Wireless Data Services Sales Tax Litigation*, 789 F Supp 2d 935 (ND Ill 2011).

[147] *Anderson v. Minacs Group (USA) Inc.*, 2017 WL 1856276 (SD Mich) at 9.

[148] *Ibid.*

[149] *Ibid.*

[150] *Williams v. King Bee Delivery, LLC,* 2017 WL 1536435 (ED Ky).

d. Banner and Internet Advertising Notices

When the case demographics suggest that class members are within a group of people who read the news, search for information, and purchase products online, banner notices become an appealing method of informing putative class members of class proceedings, settlements and distributions. These notices work as follows: Internet users type certain predetermined keywords on an online search instrument, and companies pay to have their company link featured on top of the results.[151] Summary advertisements for class settlements may also be placed onto online magazine websites, and so be made available to be accessed by the target audience at a much lower cost than traditional media outlets. Reach calculations may then be completed by experts for each of these advertisements in order to measure their effectiveness. In addition, keyword search advertisements may be purchased to enhance the reach of online banner advertising campaigns. These advertisements involve identifying keywords and phrases that are most likely to be searched by putative class members, and the keywords are then tagged to the settlement's advertisement. Any putative member who then types the word into a search engine such as Google will immediately see an advertisement appear at or near the top of the search engine home page. A link to the settlement website for notice and claim information is purposely provided to the putative member viewer. Effectiveness of keyword searches may be verified *ex post* on a daily basis, based upon the numbers of clicks made by users.

Targeted banner and Internet advertisements reach larger classes of individuals who share characteristics but are difficult to identify individually.[152] Additionally, they allow for large amounts of information about potential members to be found, including where they are likely to see notice, and how best to post the notice for it to be seen.[153] The best, most effective avenue for disseminating notice is then identified. One concern with these forms of notice, similar to other new media avenues like social media websites, is that it is difficult — and expensive — to measure the reach and frequency of potential class members' exposure and the ultimate adequacy of notice. Furthermore, methods of providing online notice are constantly evolving. Turning to the caselaw has been helpful in that regard, where cases involving banner advertising have led to interesting outcomes.

For instance, in *Pappas v. Naked Juice*, a national class of consumers who purchased Naked Juice products over a six year class period settled the class action and had the settlement approved in 2014 by a California District Court.[154] Importantly, the settlement did not provide for direct notice, with a media plan

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[151] For a visual example, just type "new york lawyer" on any commercial search engine (Google. Bing, etc.).

[152] Aiken, *supra* note 75 at 991.

[153] *Ibid* at 992.

[154] No. 11-cv-08276 (C.D. Cal.).

based primarily on online notice (<www.NakedJuiceClass.com>), supplemented by modest print notices. Moreover, online banner campaigns delivered 185,651,701 impressions and 678,832 clicks to the settlement website. An additional 197,042,861 impressions were generated via earned media. In the end, more than 758,930 claims were filed at the filing deadline, with 99% of them filed online, and a majority of them filed before print publications ran. In that case, since no information was available regarding purchasers of the juice products, or their contact numbers or emails, the alternative forms of publication were ideal and successfully led to higher reach rates and participation rates.

In *Markus c. Reebok Canada inc.*, a banner and keyword advertising plan was approved with a budget of $18,000 CAN.[155] Reebok was being sued for false advertising claims related to a particular line of "toning" shoes and apparel. A banner notice advertisement was set up with the following relevant keywords: "Reebok Settlement," "Reebok Class Action," "toning shoes," "toning clothes," "EasyTone," "RunTone," "TrainTone," "JumpTone," and "SimplyTone" (which in fact were the names of each product).[156] In this case, appreciating the effects of the keyword and banner advertising was complex. Indeed, there was no indication in the file of how much money was actually spent on the search.[157] Even if the maximum amount provided was indeed spent, that amount would still represent approximately 14% of the entire media campaign budget, which mainly included advertising in newsletters and magazines[158]. A total amount of $124,640 was spent on the media campaign, and that campaign only managed to convince 5,798 class members across Canada to come forward and each claim $21.50. Interestingly, while the motion to approve class counsel fees contained detailed information about the media campaign's cost, no statistics were made available about how well this media campaign managed to reach the members.

In another class action case, *Melvin c. Maple Leaf Foods Inc.,* banner and keyword advertising was further resorted to in a successful manner.[159] A communication plan was developed by a class action administration firm providing banner advertising for a two-week period. The advertising was viewed by more than 2.3 million people, in such a way as to generate more than 3,000

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[155] *Markus c. Reebok Canada inc.* [Settlement Agreement at 44], 2012 QCCS 3562.

[156] *Ibid* (French keywords were included as well like *Règlement Reebok* or *Recours collectif Reebok*).

[157] It's common in the Internet advertising world to specify a maximum amount for an ad campaign since advertiser bid for clicks or impressions. Advertiser automatically select the most profitable ad in each circumstance. See online: <support.google.com/adwords/answer/2459326?hl=en>.

[158] *Markus c. Reebok Canada inc.,* 2012 QCCS 3562 (Motion to Approve Class Counsel Fees at 2) [*Reebok Counsel Fees Motion*]. Also see, for a similar case, *Petit v. New Balance Athletic Shoe Inc.*, 2013 QCCS 3569 [*New Balance*].

[159] *Melvin c. Maple Leaf Foods Inc.*, 2009 QCCS 1378 (Claims Administrator Closing Report at 3) [*Maple Leaf Claim Administrator Report*].

clicks to the settlement website.[160] Only a small proportion (0.13%) of those who visualized the advertising actually clicked on it, a percentage in line with Canadian statistics, according to which 23% of web users do not notice or read banner advertisements.[161] In the *Melvin* case, approximately 62,000 visits to the settlement website were recorded, but only a small proportion of those visits could be directly related to the online advertising campaign (4.84%).[162] Even if the case is considered to have been successful, with an estimated 20 million dollars distributed to 80% of the class population, it remains difficult to attribute its success entirely to banner and keyword advertising.

In *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*,[163] a paid medial campaign was approved, which included digital advertising. The campaign included third-party targeting, such as banner advertisements delivered to websites using industry standard third-party data sources, in order to reach the pool of eligible owners and lessees. Further, to reach fleet owners and others interested in the automotive industry, banner advertisements were used, scheduled to appear in the National Association of Fleet Administrators website, the National Automobile Dealers Association, and on websites associated with Automotive Fleet, Automotive News, and Auto Rental News. The campaign further included targeted advertising on social media sites such as Twitter, *LinkedIn*, Facebook, etc.[164]

e. Digital and/or Social Media Notices

In 2015, 2.14 billion social media users were reported worldwide, ,while the number of adepts is expected to grow annually.[165] Social media penetration among the general population is substantial, reaching 78% in the United States and 70% in Canada.[166] Surprisingly, American seniors (65 years and over) are increasingly becoming more connected, seeing that 2% of them accessed social media in 2008, and 34% in 2016.[167] Social networking services have increased

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[160] *Ibid.*

[161] Reuters Institute Report, *supra* note 72 at 80.

[162] *Maple Leaf Claim Administrator Report*, *supra* note 159 at 3.

[163] 2017 WL 672727. For another example see *Cullan and Cullan LLC v. M-Qube, Inc.*, 2016 WL 5394684 (where the notice plan targeted the smartphone market by way of banner notices with a link to the settlement website, use of popular mobile applications, such as Google, Apple, the NYTimes, and CNN, as well as other popular social media platforms)

[164] *Ibid* at paras 26-29.

[165] Available online: < www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ > .

[166] Available online: < www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/ > .

[167] Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults* (Washington DC: Pew Research Center, 2017), online: < www.pewinternet.org/2017/05/17/tech-adoption-climbs-among-older-adults/ > .

with the democratization of the Internet. Tripod.com has permitted Internet users to upload user-generated content since 1995,[168] while MySpace, Facebook's main predecessor, debuted in 2003.[169] Facebook constitutes, as of January 2018, the most famous social network site worldwide, ranked by its number of active users.[170]

A current trend in notice programs is to reach settlement class members through digital and/or social media, as will be further addressed in Section IV. In *Boyer v. Agence métropolitaine de transport*, a Quebec court approved the publication of a class action notice on the Facebook page and the Twitter feed of the defendant, a commuter train operator.[171] These social media notices were added to traditional notices published in newspapers, notices publicly displayed on train platforms and a press release.[172] Two weeks prior to the initial claims filing deadline, merely 981 claims had been received by the claims administrator, which represented approximately 5% of all class members. Following this low distributions or take-up rate, additional notices were physically distributed to members by a marketing firm.[173] The hand-to-hand distribution increased the take-up rate to the more acceptable rate of 31.1%.[174] In another case from the Lab's sample, however, a notice was released on the shoe company New Balance's Twitter feed, leading to a substandard distributions rate of 0.78%.[175]

In *D'Urzo* v. *Tnow Entertainment Group*, class proceedings were brought in four different Canadian jurisdictions by a petitioner who alleged that the respondents conspired to artificially inflate the price to re-sell tickets on the

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[168] Available online: <en.wikipedia.org/wiki/Tripod.com>.

[169] Available online: <en.wikipedia.org/wiki/Myspace>.

[170] See Statistica, the Statistics Portal, available online at <www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>. Facebook was the first social network to surpass 1 billion registered accounts. It currently sits at 2.2 billion monthly active users.

[171] *Boyer c. Agence métropolitaine de transport (AMT)*, 2014 QCCS 5518.

[172] *Ibid.*

[173] *AMT supplementary notice*, *supra* note 45.

[174] *Ibid.*

[175] See, e.g., *New Balance, supra* note 158. For another example of a case using Twitter and Facebook notices, where no take-up rates are yet available, see *Petrella c. Osram Sylvania inc.*, 2016 QCCS 2326 (C.S. Que.) (The Court ordered the claims administrator to publish a 1/3 of a page advertisement in the weekly edition of the news media La Presse+, Le Journal de Montréal, The Montreal Gazette, Le Soleil, Le Journal de Québec, La Tribune de Sherbrooke and Le Nouvelliste de Trois-Rivières; and to post the notice on the Settlement Website; and ordered class counsel to launch paid Google keyword, Facebook and Twitter campaigns; and to post the notice on its website at <www.clg.org>, as well as its Facebook and Twitter pages). Furthermore, in *Liverman v. Deere & Co.*, 2013 QCCS 7131, Facebook, Twitter, LinkedIn, social medial vehicles and consumer product message boards were similarly resorted to in notices, as well as publications on the petitioners' attorneys' websites and on the website <www.lawnmowersettlement.ca>.

secondary market by buying up tickets on the primary market.[176] Once the case settled, a most interesting notice was ordered, combining both traditional and technological means, and emphasizing the use of email addresses of those members who purchased tickets through the TicketsNow Website, which read as follows:

> [. . .] that Class Notice be provided to the Quebec Settlement Class Members in accordance with [. . .]:
>
> a) the Settlement Administrator will deliver a copy of the French and English versions of the Class Notice to each Quebec Settlement Class Member *by email*, using the email address that each Quebec Settlement Class Member used in purchasing his or her most recently purchased Ticket(s) through the TicketsNow Website;
> b) if the Settlement Administrator receives an error message, or other message that otherwise indicates that the Class Notice [. . .] did not reach its intended destination address, then the Settlement Administrator will mail the French and English versions of the Class Notice to the Quebec Settlement Class Member [. . .];
> c) the Respondents will publish the Class Notice once in English on a Saturday in the Review section of the national edition of The Globe and Mail, in a size not smaller than 1/6 of a page;
>
> [. . .]
>
> g) Class Counsel will send a copy of the French and English versions of the Class Notice *by email or regular mail* to all persons purporting to be Quebec Settlement Class Members who contact them in respect of any of the Proposed Class Actions and provided contact information;
> h) Class Counsel will post a copy of the Class Notice in English and French on *the Class Action Website and on their respective firms' websites*, and provide the Court with a copy;
> i) Class Counsel will post a *link to an electronic version of the Class Notice on Facebook and on Twitter in English and French*, and provide the Court with a copy;
> j) Class Counsel will ask that a copy of the Class Notice be posted in English and French with the case information on the *CBA's National Class Action Database*, and provide the Court with a copy;
>
> [. . .]
>
> l) the Settlement Administrator will *post a copy of the Class Notice in English and French on the Settlement Website*, and Class Counsel will provide the Court with a copy; [emphasis added][177]

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[176] *D'Urzo v. Tnow Entertainment Group Inc.*, EYB 2012-210169, 2012 QCCS 3820 (C.S. Que.).

[177] *D'Urzo* v. *Tnow Entertainment Group Inc.,* EYB 2012-210169, 2012 QCCS 3820 (C.S. Que.).

As appears in Section IV's Chart II, distribution outcomes were quite successful in this case, as 90% of the class members who purchased tickets for events were paid out, with a disclosed balance of $72,668.69.[178] Nonetheless, in such a case involving an online ticket booking service for sporting events, concerts, and theater shows, it appeared logical to resort to e-notices, targeted websites and social media to inform customers that were involved in an online activity and whose underlying injury asserted arose from this online activity.

In *Option Consommateurs v. Union Canadienne*,[179] a class action that followed Quebec's historic 1998 ice storm, a media campaign was launched to motivate class members to report their new addresses to the claims administrator, as previously discussed. In that case, checks were automatically sent to the last known addresses of the members,[180] and advertisements ran on newspapers and over the video-sharing website YouTube.com.[181] Statistics regarding the individual successes of these two streams were gathered and made available. Globally, the media initiatives attracted 54,025 visitors to the settlement website, and 40,058 of them (74%) came directly from the YouTube advertising campaign. On the other hand, merely 5,584 individuals (10%) were reached via notices published in newspapers. The remaining visitors (16%) were linked to "free" press relations initiatives. A significant budget was devoted to the YouTube advertising portion, but the Internet campaign succeeded in reaching a much larger number of members with a lower "cost per click." Newspaper advertising costs $9 per person, whereas YouTube promotion costs proportionally six times less ($1.49).[182] The Quebec ice-storm lawsuit will have served to demonstrate that social media advertising leads to a broader reach rate at a much lower cost.

Social media advertising was also used in the *Option Consommateurs c. Infineon Technologies, a.g.* case, the class action lawsuit that followed allegations of price-fixing in computer memory between 1999 and 2002 in Canada.[183] An impressive number of mediums were resorted to for class notice, with a massive 3 million CAN$ budget: 30 seconds' television advertisements were issued over conventional and specialized stations, illustrated and simple print advertising was used,[184] and almost every form of Internet advertising was further mobilized.

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[178] *D'Urzo* v. *Tnow Entertainment Group*, EYB 2014-232965, 2014 QCCS 365 (C.S. Que.) at para 27. In this case, my calculation of the distribution rate is the following: 8400 class members received on average $91.05 for a total of $764,820. Because the leftover amount is $72,668.69, $692,151.31 were, in fact, distributed. Thus, $692,151.31/91.05 = 7601.88 members compensated. Finally, 7601.88/8400 x 100 = 90.50%.

[179] Option Consommateurs (19 June 2015), *supra* note 64.

[180] See, e.g., *Union Canadienne's First Settlement*, *supra* note 66.

[181] Union Canadienne, *supra* note 64 (Advertising agency report at 6) [*Ice storm advertising agency report*].

[182] *Ibid.*

[183] *Infineon Technologies AG v. Option consommateurs,* 2013 SCC 59, [2013] 3 S.C.R. 600.

[184] Television commercials were used, advising settlement class members to "Visit

Interestingly, given mainstream media difficulties in reaching minorities of identified ethnic populations, advertising on social media was used to specifically target this population.[185] The campaign also included various social media aspects, including asking claimants to share with friends on Facebook and Twitter after having filled out a claims form.[186] Native advertising[187] was also mobilized. Bloggers were remunerated for promoting the settlement to their followers.[188] Ultimately, the entire campaign sought, not only to inform, but also to "develop a message that prompts action, beyond the information".[189] The message was well received and the class action was perceived to have been successful overall.

On March 21, 2018, a hearing was held in the Quebec Superior Court, seeking to have the "DRAM Class Action — Final Performance Report" approved judicially. A sworn affidavit from Brett Parker, project manager at RicePoint Administration was filed, confirming that:

1. The first distribution of settlement funds to simplified end consumer claims was completed, all of which were entitled to 20$. 95% of the end consumer claimants negotiated their check, and 880,788 checks were mailed in total in December 2015, amounting to a sum of 17,615,760$.
2. The second distribution was made to remaining consumer claimants, including standard consumer claims, manufacturing claims, and other DRAM purchasers. 34,621 checks were mailed in July 2016, for a total amount of 28,899,804.55$. 93% of the checks were negotiated, thereby representing 99.7% of settlement benefits.
3. The third distribution made to any simplified end consumer claims who had not initially negotiated their check, and were allowed to respond to an email link in order to be provided with a replacement check. 21,070 checks

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TheMoneyisMine.ca to get your money back." In my opinion, one of the greatest achievements of the communication plan developed by the advertising agency is their decision to entirely drop the legalistic notice and replace it with something significantly easier for laypeople to understand and which they would be more susceptible to read. Legalistic notices were made available on the settlement website to comply with the law. (art. 591 CCP). See (Maxime Nasr, "Remettre l'argent aux membres — Le défi de la distribution dans le contexte d'une action collective — Guide pratique inspiré de l'expérience DRAM" in *Développements récents au Québec, au Canada et aux États-Unis* (Cowansville, Qc: Éditions Yvon-Blais, 2016) 151.

[185] *Option Consommateurs c. Infineon Technologies, a.g*, 2015 QCCS 1184 (Communications Plan at 13) [*Infineon Communications Plan*].

[186] *Ibid.*

[187] "Native advertising is a type of advertising, mostly online, that matches the form and function of the platform upon which it appears" (online: <en.wikipedia.org/wiki/Native_advertising>).

[188] *Infineon Communications Plan*, *supra* note 185 at 13.

[189] *Ibid* at 6.

> were issued for a total of 421,400$. Only 4,609 check were left uncashed at that stage.[190]

Interestingly, this report, while it appears to be exhaustive, does not contain information relevant to calculating distribution rates. Considering that every Canadian family (presumably of four people) bought a piece of equipment containing a DRAM during the period of eligibility, and that during that same period the Canadian population was approximately 30 million citizens, the distribution rate amounts to a mere, albeit approximate percentage of 12.48%.

In the United States, by way of comparison, courts are becoming increasingly more receptive to social media websites to assist with class action notice. Notice pursuant to Rule 23 was considered sufficient because one of the methods of sharing information was a display on a "Facebook page, which delivered individual e-mail notifications" to Facebook "fans" of its posts.[191] In another recent case, Facebook was found to be a "generally acceptable" means of notice when it is one of "myriad methods for providing notice, such as notice by U.S. mail, setting up a toll-free interactive voice response telephone number, and establishing a dedicated website."[192]

In *Mark, et al. v. Gawker Media LLC, et al.*, a Southern District of New York judge granted the request of former Gawker interns to notify potential class members whose mailing addresses or email addresses were unknown through limited social media platforms.[193] In that case, two former interns had filed a collective (non-class, opt-in) action against the news and gossip blog under the *Fair Labor Standards Act* for failure to pay them during their internships. To notify putative members of their right to opt in, the named plaintiffs asked that the Court permit them to use Facebook, *LinkedIn*, and *Twitter*, in addition to traditional notification platforms such as direct mailings and publications. Interestingly, the Court refused the proposed use of Facebook, stating that plaintiffs are not permitted to "friend" potential class members to notify them of the lawsuit and of their right to opt in. It instead allowed plaintiffs to "follow" potential class members on *Twitter*, and send private messages relating to the lawsuit, or send "InMail" via *LinkedIn*. The Court added that should individuals who plaintiffs followed on Twitter fail to opt into the action before the deadline, plaintiffs needed to "un-follow" them. This case emphasises the need for defendants to retain client information, and in this case, for employers to retain adequate records of employees' and interns' traditional contact information. In fact, it helps emphasise the duties of defendants in anticipation of, and during the distributions stage. These duties have not, to my knowledge, been properly addressed by the courts. The competence and diligence exercised throughout by the defendants has shown to be critical to higher distributions rates.

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[190] See, e.g., Sworn Affidavit of Brett Parker, dated 24 January 2018, on file with author.

[191] *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 569 (S.D. Iowa 2011).

[192] *Baez v. LTD Financial Services*, L.P., 2016 WL 3189133 (M.D. Fla. 8 June 2016).

[193] *Mark v. Gawker Media LLC*, 2015 WL 2330079 (S.D.N.Y. 5 March 2015).

III. THE CLASS ACTIONS LAB'S CLASS MEMBER COMPENSATION PROJECT

a. Research Method

i. Phase I — Summer 2015

The Compensation Project began in the summer of 2015, as the Lab's team completed a complete bibliographical review of the doctrine and caselaw addressing class action distribution processes. A two-week long research visit was organized at the public financing fund, the *Fonds d'Aide aux Actions collectives,*[194] in order to inspect more than 400 non-archived closed cases with the assistance of two students-at-law. The team took on an investigatory role and reviewed each of these individual case files, initially searching for indicia of compensation, but also of deterrence. Several distributions reports filed by claims administrators and law firms were found, as well as many judgments approving class distributions and thereby detailing the process followed for filing claims and allocating the money. The team also came across correspondence that helped connect the dots and draw a list of propositions and hypotheses about compensation levels.

At the end of this first summer, the Lab's team was able to gather data relevant to the project in less than 40 files. Preliminary conclusions were directed toward expressing a frustration regarding the uttermost lack of transparency about outcomes, thereby leaving the courts and the users of the system uninformed about this crucial issue. Interestingly, several factors directly contributing to enhanced distributions were identified, such as prior knowledge of the identity of the class members, ascertainability of the class, clear, direct and accessible class action notices, the involvement of the judges throughout the distributions process, the presence of consumer groups in the litigation, the competence and diligence of defendants, etc. No definitive report was issued during this first phase. The preliminary results were nonetheless presented orally in different fora, including to judges at judicial training seminars. I was delighted to learn in early 2016 that the Lab's efforts to promote the need for greater transparency in class action distributions had led to a new rule being enacted in Quebec, providing that distributions be reported back to the court at the conclusion of every class action case.[195]

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[194] The *Fond d'aide aux Actions Collectives* is an organization whose mission is to contribute to the financing of class actions during first instance and in appeal, as well as to distribute information relating to the exercise of the class action. More information, available online: < www4.gouv.qc.ca/fr/Portail/citoyens/programme-service/Pages/Info.aspx?sqctype = mo&sqcid = 211 > .

[195] Règlement de la Cour supérieure du Québec en matière civile [Rules of the Superior Court of Quebec in Civil Matters], r. 0.2.1, c C-25.01 (Can. Que.),

Rule 59 (translated by the author) (emphasis added):
In the case of a judgment ordering collective recovery of the claims with individual liquidation, the special clerk or the third party appointed by the court (i.e., the claims administrator, for

ii. Phase II — Summer 2016

In the Project's second phase, the Lab's team sought to confirm the data necessary to provide a cost-benefit analysis of class action activity in Quebec. The team carefully identified, from a list of all class action cases filed in the past 20 years (at least), the case files to review and each file's electronic case dockets, searching for class action reports, accountings and closing judgments (following class distributions). A list of potentially relevant case files was drawn, but it was unclear whether the information on the dockets was reliable, and whether additional files needed to be analyzed. Wanting to err on the side of caution, the Lab's team decided to consult the files physically at the courthouse. All closed class action files from the past thirteen years (from 2004 until 2016) were reviewed, and raw data was found relevant for the project's purposes in twenty additional files.

For each of these files, the team created individual charts with contextual data including information relevant to group definition, the cost and duration of procedures, the parties and litigation questions, the involvement of the judge and the parties, the distribution processes, the identity of the administrator, any correspondence available, the class notices, the use of technologies, and, importantly, all required information regarding monetary distributions. This information regarding distributions included the total amount paid directly to all class members, the actual or estimated total number of class members, the number of class members who received payments, the average amount paid directly to all class members, and the amounts paid to class counsel and claims administrators. At the end of the second summer, I presented our team's results at conferences and seminars, especially to judges of the superior courts in Quebec and the rest of Canada.

iii. Phase III — Summer 2017

In the third phase of the Project, I decided as project leader to complete the dataset and finish reviewing each and every relevant closed class action case filed in Quebec, in the District of Montreal, over the past 20 years. Accordingly, a new team worked for a few weeks directly at the courthouse, in order to review approximately 220 case files dated between 2004 and 1996. From these 220 case files, we selected an additional 80 cases with relevant numbers for consideration in order to build individual charts and databases based on the model used previously. The team obtained data relevant to calculate distributions (or take-up) and compensation rates, fees paid to lawyers and case administrators, delays

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example, or a representative of the defendant) shall file in the court a detailed report of its administration, after the expiry of the deadline given to the members to present claims, and shall give notice of this report to the parties and to the Public Fund (the *Fonds d'aide aux actions collectives*). This report shall list the members who produced a claim, the amount paid to each, the amount of the balance and the amount deducted pursuant to . . . .

There is no such requirement in U.S. Fed. R. Civ. P. 23, although scholars have recommended to the Rule 23 Advisory Committee that the rule be amended to require such a disclosure. See Fitzpatrick & Gilbert, *supra* note 7 at 779.

and procedures filed (including interlocutory), and to describe the types of files and distribution processes, and note the presence of cy-près distributions.

The final analysis of the cases forming the dataset is still ongoing and will not be addressed herein.[196] It is worth emphasizing that the team is working with a dataset relevant to the issue of class compensation (the "Compensation Dataset") of 854 cases and has completed 108 individual case studies detailing the distributions made to the members. The team has also sought in parallel to examine the issue of delays in greater detail, and has reviewed, for this purpose, a larger dataset of 1306 case files from the whole province of Quebec for the years 1993 until 2017. Those results will not be discussed herein.

iv. Some Challenges

For this specific paper's purposes, I chose to consider a subset of all the files analyzed in the Class Member Compensation Project: precisely, I isolated 54 cases worth analyzing for this paper's purposes. I then carefully selected 25 cases featuring technological notices and compared these cases and their outcomes to those of a set of cases involving no use of technologies in class notice, for which distributions rates were available. Additional case law from the United States and Canada was further analyzed using keyword searches in Westlaw to complete the analysis. The results of my study of the 54-case subset are presented in detail below, in Section IV.

The Class Member Compensation Project has primarily sought to calculate the actual monetary benefit of class actions to its members. The incidental question, subject of this paper, is the measured correlation — if any — between the use of technologies in class notice, and class action distributions and member compensation. Measuring class action value, as well as the procedure's economic utility and its general effectiveness is inherently challenging. Access to the required information is difficult, if not impossible. There is a lack of transparency about class action outcomes in the court dockets and files in Quebec,[197] which suggests a lack of interest or incentives to collect this information. In addition, measuring the data is and has been complex, not only

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[196] The final results of this Project will be published in 2018 at Editions Thémis.

[197] Quebec court docket entries remain unclear and unsystematic such that it is difficult to determine whether any accounting was rendered in the class action, or whether a report was filed or a closing judgment was issued. In fact, it is impossible to draw definite conclusions from the docket about which cases may be closed or whether cases they are still ongoing. To be prudent, I identified cases that are potentially relevant, and reviewed the actual files in person. I was surprised to find reports and distributions data in files that were in fact closed (and for which distributions were completed), however, it did not seem to be the case upon a mere consultation of the docket. It was also astonishing when I came across largely generic and imprecise reports and accountings that did not provide distribution numbers, the progress made in distributions, and/or the details of the claims recovery process. In addition to the lack of transparency of the distributions data, I have found that judges are regularly presented with a distributions plan at a settlement approval that they choose not to question, and that they approve wholeheartedly.

due to the lack of/or difficulty in obtaining the data, but also due to the confusion in interpreting the data actually made available.

Nicholas Pace and William Rubenstein have rightly written that it is difficult for class members and government officials to decide how to respond to proposed notices and claims programs without knowing the likely distributional outcomes.[198] They have asked whether different forms of notices and types of distributional programs can improve claiming rates.[199] Until now, information about compensation rates has largely been anecdotal. Consequently, lawyers have modified notices and claim forms based upon estimates and conjectures as to the changes' positive or negative impacts on compensation.

In this Project, I aimed to calculate the actual economic benefit to the members of the class deriving from the class action procedure. The *distribution (or take-up) rate*, calculated for each relevant file, is defined as the portion of class members who file a claim for recovery and receive a distribution pursuant to a class action settlement or judgment, divided by the total number of class members, confirmed (or estimated). This rate reflects the number of members who ultimately received a compensation.[200] It reflects the actual benefit to the class and aptly measures the results achieved.

These rates have historically been complex to collect, mainly due to the extreme lack of transparency and substantial variations in rates. Identifying the exact scope of the original class — the so-called "*universe* of claimants"— is complex, as these numbers are often inflated to be more conducive to certifications. In addition to take-up rates, a *participation rate* was calculated which compares the number of claims to the number of claims accepted, thereby attesting to the difficulty and the general effectiveness of the claims process, as well as the access to a system of compensation. *Counsel and claims administrator fees* were calculated, the *costs of notice* and the *extrajudicial costs*. The extent of cy-près distributions was explored as well.

To complete the analysis, a *compensation rate* was calculated for each file, which requires dividing the total amount paid for the benefit of the class (the settlement fund made available to the members — the pay-out) by the total amount of damages suffered. The compensation rate helps measure whether the amounts awarded to the members were significant considering how much money they lost at the outset, thereby indicating the actual direct economic benefit to the members. Unfortunately, very few cases disclosed the amount of damages initially suffered by the plaintiffs, either individually or collectively, thereby leading us to essentially give up on the hopes of calculating this rate.

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[198] Nicholas M Pace and William B Rubenstein, *How Transparent are Class Action Outcomes? Empirical Research on the Availability of Class Action Claims Data,* (RAND Institute for Civil Justice, 2008), online: <www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf>.

[199] *Ibid.*

[200] Piché, *Class Action Value*, *supra* note 8 at 290.

b. Initial Hypothesis

My initial hypothesis for this paper has been that exploiting the capacities of information and communication technologies (ICT) has increased distribution numbers, or so-called distribution rates or "take-up rates."[201] As explained above, I have considered the distribution (or take-up) rate as the numbers of class members who file a claim for recovery and are compensated pursuant to the class action settlement or through judgment, divided by the total number of class members (i.e., the "universe" of potential claimants), as estimated or confirmed.[202] This rate also helps speculate about the number of members who ultimately receive a compensation and benefit from the action. Take-up rates, accordingly, reflect the "actual benefit" to the class, and provide a good measure of compensation.[203] Furthermore, I have wondered whether social media networks are a more efficacious vehicle to provide notice in class actions, and one that may lead to enhanced distributions rates.

Since reaching a larger group of members allows greater numbers of people to act upon the notice and claim the moneys made available through the class action, my initial proposition also suggests that technologies should steadily be used in the class action context — in the form of social media platform notices or other forms of electronic notices — in order to reach class members more broadly in time and space through electronic notices and claim forms. In fact, "reach rates" are increasingly being required by U.S. judges, thereby helping them assess whether members can reasonably be expected to become aware of the notice.[204] For the Federal Judicial Center, the "reasonable reach" expected for a given notice is between 70 and 95%.[205] In this paper, based upon the Lab's data, I argue that even if several variables appear to influence distributions rates, there is a clear correlation between technological class action notices and higher distributions rates. In fact, the coming change in class action notices will be dramatic especially because the low costs involved in e-notice do not impact reach rates negatively.

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[201] I consider the take-up rate as the proportion of class members that are ultimately compensated because of a particular class action lawsuit. *Contra* Warren K Winkler et al, *The Law of Class Actions in Canada*, (Toronto: Thomson Reuters, 2014) at 198 (Where the *take-up rate* is defined as "the proportion of class members who make a claim" while the *compensation rate* rather equals "the proportion of class members who receive a benefit").

[202] See, e.g., Piché, Class Action Value, *supra* note 8 at 290.

[203] *Ibid.*

[204] Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010)*, online: < www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf > .

[205] *Ibid.*

IV. IMPACT OF TECHNOLOGICAL NOTICES ON CLASS ACTION COMPENSATION BASED UPON THE LAB'S EMPIRICAL DATA

Given the widespread popularity of Internet and social media networks, combined with the relatively limited reach rates associated with traditional forms of notices such as newspapers, my initial hypothesis that information technology initiatives should boost notice distribution and enhance take-up rates initially seemed promising. Of course, as noted previously, reaching class members is only a part of what is considered to be a successful outcome in class actions.[206] Reaching the members does not mean that they will necessarily seek out a distribution, and obtain one and be compensated. Some may not respond to correspondence or notices sent to them for lack of understanding, lack of interest, or simply because they feel that there is no added-value to participating.

In any event, I consider success in class actions to involve a form of benefit or compensation provided to the members.[207] A successful class action is one that will serve to provide monies to a substantial majority of the so-called "universe" of claimants.[208] Indeed, access to justice in class actions law is access to a form of compensation.[209] As I have written elsewhere:

> [. . .] a novel framework for analyzing the success of class action outcomes is mandated. Determining the value and success of class actions requires focusing on what the optimal class action might be, in light of its underlying objectives. This optimal class action provides access to justice, deterrence and compensation, or alternatively, access and deterrence and/or compensation. On the assumption that we are focusing on compensation and access to justice as access to a form of compensation, [. . .], this goal will be reached when a substantial majority of the class members receive monetary relief, even if minimal. I recognize that these small-value (or negative value) class actions with minimal payouts make compensation a secondary goal to the action and deterrence then becomes the primary objective. Nonetheless, in these instances, class actions are justified as market regulators, existing through the actions of entrepreneurial "private attorney generals."[210]

My first impression, while analyzing case files during the Lab's Project, was that technological notices did not lead to conclusively positive outcomes regarding distributions. In fact, several of the cases studied involved technological notices with rather low take-up rates. In addition, some of the cases reviewed resorted to Internet or social media advertising for notice

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[206] Hilsee, *Desire to Actually Inform*, *supra* note 44.

[207] See Catherine Piché, "The Fourth Dimension to Class Actions: Access to a Meaningful Benefit," Canadian Class Actions Review, to be published Fall 2018.

[208] Piché, *Class Action Value*, *supra* note 8, at 285.

[209] Also see: Michael Legg, "Class Action Settlement Distribution in Australia: Compensation on the Merits or Rough Justice?" (2016) 16 Macqu L J 89.

[210] Piché, *Class Action Value*, *supra* note 8, at 285.

distribution purposes, but did not provide for electronic or technological claiming processes, thereby leading to substandard take-up rates. In many instances, the higher take-up rates could be linked to the absence of positive action required to reach compensation, and to automatic monetary distributions systems. In the majority of the cases, information technology initiatives represented a small portion of the total efforts allocated to the notice plan. Thus, it appeared, at least at the outset, difficult to draw definitive conclusions regarding a potential correlation between technologies and positive class action outcomes.

In order to determine the plausibility of my initial hypothesis, I decided to separate the cases studied at the Lab in two categories, thereby opposing cases that did not use technologies in class notices to those that did. I built summary charts that might help draw more definite conclusions. In my first chart, entitled "Cases involving no use of technologies", I present the results of 29 closed class action cases in Quebec involving monetary distributions and calculable take-up rates, where no technologies were used in class notice. In those cases, traditional notices were instead used, such as newspaper notices or traditional mail notices. Distribution rates are provided, as well as the total award distributed and the total costs incurred (including merely the attorney fees in parenthesis when available). A simple description of the type of case and case name is further provided. In my second chart, entitled "Cases involving the use of technologies in class notices", I similarly present the data arising from 25 cases involving technological notices such as websites with or without email links, emails, banners and social media. The diagram, entitled "Correlation between the average distribution rate and the use of technologies" is a diagram crossing the data found in charts I and II and drawing the correlation found between technologies and enhanced distribution rates.

From these summary charts — reproduced below — I conclude that technological notices correlate to enhanced distributions to class members.

a. Results

Chart I: Cases Involving No Use of Technology in Notices

Case Name	Distribution (take-up) Rate	Total Award Distributed	Total Costs (incl. attorney fees & third party administrators)	Type of Case
Selwyn House	93%	4,000,000	750,000 +	Sexual abuse
Vincent v. Transat	84%	84,000 (in $ or travel credits)	unknown	Contractual Liability
Brunet v. Tours Nvelle Vision	35%	5,000	N/A	Contractual Liability
London Found. v. Molson Coors	68%	6,000,000	N/A	State Liability
Roy v. Manuvie	91%	75,000	25,000	Contractual Liability
Elvidge v. Assante	86%	10,000,000	447,000	Securities Lit.
Myette v. Régime de Retraite	76%	569 K plus	439 K (395K)	Retirement Law
Gagné v. Household Finance	44%	4,400,000	1,700,000	Consumer Protection
Options Cons. v. Brick Warehouse	26%	1,400,000	N/A	Consumer Protection
Girard v. Vidéotron	0%	550,000	190,000	Contractual Liability
Union des consommateurs v. Banque Nationale du Canada	54%	5,000,000	1,300,000	Consumer Protection
Dorion v. Centre de Santé	26%	302,500	103,000	Medical Liability
Daviault v. Climatisation	16%	350,000	N/A	Consumer Protection
Union des cons. v. Bell	70%	10,300,000	2,500,000 (att.)	Consumer Protection
Bergeron v. Télébec	2%	6,281	N/A	Consumer Protection
Price v. Mattel	9%	23,324	N/A (approx. 117,000)	Consumer Protection
Vaughan v. NY Life Ins. Co.	16%	1,000,000	200,000 (att.)	Contractual Liability

Case Name	**Distribution (take-up) Rate**	**Total Award Distributed**	**Total Costs (incl. attorney fees & third party administrators)**	**Type of Case**
Brochu v. Soc. Loteries	1%	4,200,000	2,800,000 (att.)	State Liability
Stieber v. Élie	93%	3,118,544	Ø	Contractual Liability
Tremblay v. Great-West	23%	N/A	N/A	Securities
AJIQ-CSN v. Médias	11%	245,000	60,000	Copyright
Petit Train du Nord	100%	10,000,000 (approx.)	N/A	Nuisance
Doyer v. Dow Corning Corp	34%	43,452,500	10,700,000	Medical Liability
Demers v. Johnson	8%	8,750,000 (for Ont. + Qc.)	367,000 (Qc att.)	Pharmaceutical
Dallaire v. Eli Lilly Can.	76%	2,000,000	5,000,000 (Can. Att.)	Pharmaceutical
Laferrière v. Commission scolaire	98%	793,775	228,940	State Liability
Assoc. Accès Avortement v. Québec	12%	13,500,000	7,800,000	State Liability
Tardif v. Hyundai Motors America	7%	6,900,000	1,250,000 (att.)	Consumer Protection
Goodall v. NSB	20%	60,000	14,000 (att.)	Other
Total Number of cases: 29				
Average Distribution (Take-Up) Rate:	**44%**			

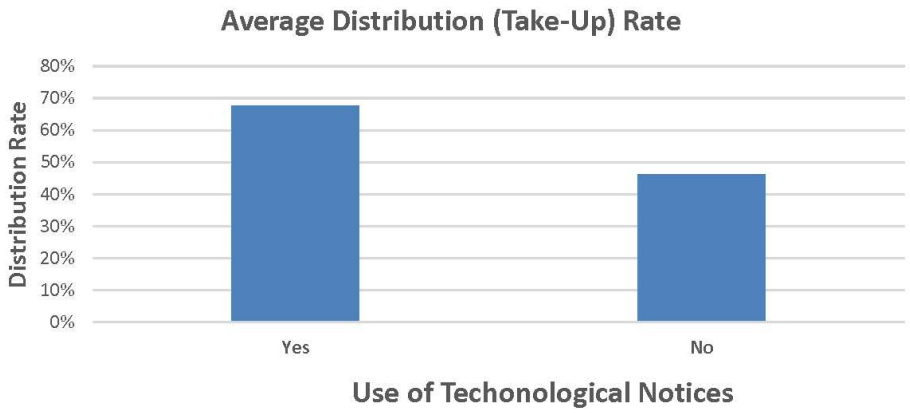
Chart II: Cases Involving the Use of Technologies in Class Notice

Case Name	Distribution (take-up) Rate	Total Award Distributed	Total Costs (incl. attorney fees & third party administrators)	Type of Case	Type of Notice
Regroupement des comités de logement	80%	1,200,000	571,000	State Liability	Traditional and Website
U.T.C. v. Bishop	93%	1,150,000	278,000	Sexual Abuse	Traditional, Website, Email
Ladouceur v. STM	112%	1,000,000	269,000	Contractual Liability	Traditional and Website
Cornellier v. Congégation Ste-Croix	69%	12,200,000	5,400,000	Sexual Abuse	Traditional and Website
Lavoie v. Régie Ass-Mal.	67%	4,100,000	381,000	State Liability	Traditional and Website
Lépine v. Boehringer Ingelheim	149%	2,950,000	643,000	Pharmaceutical Liability	Traditional and Website
Fournier/Corbin v. Bque Nvelle-Écosse	58%	500,000	141,000 (att.)	Consumer Protection	Traditional and Website
Robitaille v. Yahoo	1%	109,620	71,000	Consumer Protection	Website and Email
Carpentier v. Apple	100%	345,000	40,000 (att.)	Consumer Protection	Traditional and Website
Videla v. Canjet Airlines	98%	B/w 17,200-60,200	900,000	Contractual Liab (Airline)	Traditional and Website
Gosselin v. Montréal	4%	B/w 67,500-382,500	80,000 (att.)	State Liability	Traditional and Website
Guay v. Pfizer	74%	12,000,000	N/A	Pharmaceutical	Traditional and Website
Pellemans v. Lacroix	98%	55,000,000	11,600,000 (att.)	Securities	Traditional and Website
McColl v. Grand-Prix	100%	80,65	59,596	Consumer Protection	Traditional and Website

Case Name	Distribution (take-up) Rate	Total Award Distributed	Total Costs (incl. attorney fees & third party administrators)	Type of Case	Type of Notice
Boyer v. AMT	31%	977,000	363,000	State Liability	Traditional and Website and Facebook and/or Twitter
Melvin v. Maple Leaf Foods	80%	27,000,000	4,700,000	Contractual Liability	Traditional and Website and Keywords and Internet Advertising (Google)
Comtois v. Telus	73%	280,000	208,000	Consumer Protection	Traditional and Website
Riendeau v. Brault & Martineau	72%	2,400,000	701,000	Consumer Protection	Traditional and Website
Assoc. protect. Autom. V v. Toyota	71%	360,000	124,000	Consumer Protection	Traditional and Website and Email
Bibaud v. Banque Nat. Can.	73%	6,100,000	1,100,000	Consumer Protection	Traditional and Website
Racine v. Banque Nat. Can.	54%	5,000,000	1,300,000 (att.)	Consumer Protection	Traditional and Website
New Balance	1%	250,000	95,000 (att.)	Consumer Protection	Traditional, Facebook and/or Twitter and Keywords & Internet Ads.
Markus v. Reebok	29%	. . .	. . .	Consumer Protection	Traditional and Website & Keywords and Internet Ads.
Ice Storm	40%	52,500,000	4,000,000 (approx.)	State Liability	Traditional and Website & Social Media Ads.

Case Name	Distribution (take-up) Rate	Total Award Distributed	Total Costs (incl. attorney fees & third party administrators)	Type of Case	Type of Notice
D'Urzo v. Tnow	90%	692,151	–	Contractual Liability	Traditional, Email, Website, Facebook & Twitter
Number of cases: 25					
Average Distribution rate:	**68,68%**				

Diagram I: Correlation between the Average Distribution Rate and the Use of Technologies



b. Conclusions Drawn from the Data

Charts I and II, as well as Diagram I, serve to demonstrate that a more significant proportion of cases utilizing technological notice serve to appropriately and fairly compensate class members, with an average take-up rate of 68.68%. I have previously considered that in the class actions context, when a "substantial majority" of class members have participated in the

settlement and received a form of monetary relief, the class action may largely be considered as "successful."[211] In this case, a 69% average distributions rate most certainly serves to demonstrate that a majority of the class members are compensated, and I will assert here that the principal reason for the high rate is the use of ICTs. It could instead be argued that the reason for the higher rates is that direct notice was resorted to within the instances involving technological notice, and that it is the direct notice that serves to better reach and compensate members, as I have indeed previously demonstrated.[212] It could also be argued that distributions were more important because the claims process was simpler, or required less effort (or evidence), or because the type of file itself tended to lead to enhanced distributions (consumer protection cases, notably, have shown to compensate members better).

To be more specific here, my view is that direct notice is beneficial of course in reaching the members directly and ensuring that they participate in the action, i.e., choose not to opt-out and later "register" to participate. However, technological notice has the undeniable advantage of reaching the members not only more directly, but also over a greater geographical scope and time, given that the notice will not have an immediate end and may remain available on the Web for a much longer period of time. It is of interest to note here that a majority of cases resorted to using websites to provide notice, and that they did so in conjunction with traditional means of notice.

As for the isolated group of cases involving no use of technologies, I have found an average take-up rate of 44%, which I understand as meaning that on average, less than 50% of all class members are being compensated in those class action cases where no technologies are used in affording class notice.

Interestingly, some propositions can be made about the relation between the types of notices and distributions or take-up rates. In Chart III, below, entitled "Correlation between Type of Class Notice and Average Take-Up Rates", those notices where the take-up rates were highest were those involving a notice posted on the website of the plaintiff, and/or the defendant, and/or the claims administrator. In these cases, distributions rates, on average, reach an impressive 78%. Settlement websites also led to high take-up rates of 63% on average. Email notice was only used in 4 of the cases reviewed in my dataset, and while 3 of the 4 cases show enhanced take-up rates, no definite conclusions can be drawn in my view due to the small sample. Social media and other forms of new technologies have largely been unpopular in Quebec to date, and with the very few examples of social media alone, or examples combining traditional means to social media means, it is hard at this stage to draw conclusions in terms of enhanced compensations. The same conclusion can be drawn for google and keyword searches, due to the small number of cases concerned.

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[211] See, e.g., Piché, *Class Action Value*, *supra* note 8, Subsection III B.

[212] *Ibid.*

Chart III: Correlation between Type of Class Notice and Average Take-Up Rates

CATEGORY OF CLASS NOTICE	PRECISE TYPE OF NOTICE	AVERAGE TAKE-UP RATE FOR EACH TYPE OF NOTICE
Technological Notices (Use of ICT)	Notice Posted on Website of Plaintiff and/or Defendant and/or Claims Administrator	78%
	Use of Settlement Website	62,95%
	Email Message	54,76%
	Social Media Advertising	40%
	Keywords and Internet Advertising (Google)	36,59%
	Notice Posted on a Facebook/Twitter Page	15,94%
Direct Notices	Members (or Potential Members) Contacted Individually	69,65%
Direct & Automatic Distributions without Additional Effort Warranted	Automatic Compensation Involved	74,95%

In the sample cases, those cases in which a specialized communication firm worked the notice plan and used the Internet for notice purposes were globally more satisfactory than the others. In the Quebec Ice Storm Class Action settlement, for instance, specific details were provided regarding the overall results of the campaign and demographic statistics about the members reached.[213] In the *Infineon* case, the communications plan explained that the proposed emphasis should be on men aged 35 to 54 years, which account for nearly 25% of the Canadian population, because these men have purchase influence on electronics in the household, they are excited by the development of new technologies and like to buy the latest tech, they are spenders more than savers, they tend to have at least three computers in household, and they usually have both a smartphone and a tablet.[214]

Notice plans should always be elaborated following a calculated approach[215]. When direct notice is not possible, designing an effective indirect

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[213] See *Options consommateurs*, *supra* note 60.

[214] *Infineon*, *supra* note 183.

[215] See Hilsee, *Desire to Actually Inform*, *supra* note 44, at 1363.

notice plan is a complex multi-step process. Combining different types of technological notices for a greater reach is beneficial, and may lead to enhanced take-up rates, as demonstrated in Chart IV, below, entitled "Numbers of Combined Notices Correlated to Take-Up Rates", although this proposition will need to be further researched. Member characteristics must be identified to ensure more targeted advertising.[216]

Chart IV: Numbers of Combined Notices Correlated to Take-Up Rates

Number of ways technology is used	Take-up rate
1	76,95% (16)
2	28,78% (6)
3	86,25% (2)

After deciding which platforms to run the advertising campaign onto and when to make them available, appealing advertising material (banner, videos, etc.) should be generated. Outsourcing the entire notice plan to communications agencies is often the better solution, but could be too costly in certain cases. Settlement with thin margins for notice expenses should at least consider running native advertising on social media since these reach more people at a lesser cost except in clearly unsuited cases. Illustrative and clear messages should be favoured and forged by graphic designers.

In the end, as stated in the *Infineon* case, effective class action notice is crucial since "public credibility about the class action judicial process is concerned."[217] In choosing the most adequate means of class notice in a technological world, judges and lawyers must consider the type of case, and whether the underlying injury occurred online, or the defendant is a telecommunications company or one involved with technologies, which renders the choice of technological notice logical. In addition, when class members are from a generation more closely involved with technologies, technological notice is best. In consumer cases, where potential class members are hard to identify, the class is diffuse or unknown, technologies may once more be ideal to reach potential claimants with greater ease and scope. Lastly, when large amounts of money are at stake in the action, an even wider notice plan may be envisaged, which will of course include the use of technologies.

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[216] See, e.g., *Kennedy c. Colacem Canada inc.*, EYB 2015-247502, 2015 QCCS 222 (where court estimates the members to be several hundreds of homes at least in the given zone. It also considered that the majority of members were older, and that emails, Facebook and Twitter were not the most adapted means of notice for that reason. It preferred traditional newspaper advertising.)

[217] *Option Consommateurs c. Infineon Technologies, a.g*, 2014 QCCS 4949 at para 114 [translated by author].

In this paper's first few pages, I referred to reach rates that are being increasingly required by U.S. judges to help evaluate whether members can reasonably be expected to become aware of the notice. As noted above, according to the Federal Judicial Center, the "reasonable reach" expected for a given notice is between 70 and 95%. I have not been able to determine whether enhanced reach rates are correlative to greater member compensation and higher take-up rates because reach rates were rarely made available in the case files I examined. I have however been able to draw a correlation between more direct notices to class members and higher rates, and more importantly, between technological notices and more significant take-up rates.

There has been an ambition, deriving in part from the U.S. *Fairness in Class Action Litigation Act of 2017*[218], to require class counsel to submit data on the amount actually paid by the defendant company, the number of class members who were paid, the average and median payment per class member, and any money paid to non-class members. In other jurisdictions, like Quebec for instance, distribution reports are required since 2016, as I have mentioned above.[219] Disclosure of the distributions data will likely encourage the lawyers to place greater efforts to reach the members and ensure adequate distribution numbers.

Technologies will serve to enhance distributions and provide more significant monetary outcomes through a greater assurance of geographical, direct and timely reach of the members. They will act as communicative tools to the class members. Machine learning systems are a modern technology able to identify patterns and complex relationships in significant amounts of data,[220] which should be envisaged as a way of the future in class action notices. Indeed, these may help identify unknown class members, and send individual noticed or tailor notice plans to a specific class.[221] The same may be said of text messaging, which can help deliver a notice to members in mere seconds. Technology is changing rapidly every day, and this change requires the parties and courts to look to modern forms of communication. The best way to reach and inform the members should be chosen. It is through these technological means that the magic will work, in my view, and that so-called "absent" members will be magically transformed into knowledgeable, participating and compensated members. And if I may send one last message — response rates from claims administrators are needed to confirm response rates, and to substantiate that the magic actually has happened.

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[218] See *supra* note 10.

[219] See *supra* note 194.

[220] Aiken, *supra* note 75, at 997-1010.

[221] *Ibid.*