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Can You Hear Me Now? The Reasonableness of Sending Notice Through Text Messages and its Potential Impact on Impoverished Communities

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I. Introduction

A class action is a legal action in which a group of people facing a similar legal issue combine their cases and thus form a "class."[1] The class action allows the group of people with similar interests to combine their claims in order "to conserve the resources of both the courts and the parties," while at the same time efficiently litigating the issues.[2] Class actions allow individuals to bring cases

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1. ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 1.1, at 2 (4th ed. 2002).

2. *See* Myron S. Greenberg & Megan A. Blazina**,** *What Mediators Need to Know About Class Actions: A Basic Primer*, 27 HAMLINE L. REV. 191, 193 (2004)

that are not valuable enough to have been brought on their own.[3] In some class actions, one or more persons will seek to bring a suit on behalf of a much larger class, and the other members of this potential class need to be notified of their involvement in the class.[4] When a class action is formed, named class members are appointed as representatives of the entire class.[5] They must decide what ways they will send notice by creating a notice plan, which must be approved by the court.[6]

There are several ways to notify people that they may be eligible to be in the class.[7] With the growth of population and technology, parties may seek to send a text message to individuals as a way to notify that individual that he or she is potentially able to join the class.[8] When named class representatives decide to give notice to potential class members, one of the multiple ways in which they may choose to send notice is to send a text message to the individual potential class members.[9] The factors that make a text message a reasonable form of notice vary, and the Federal Judicial Center has proposed changes to the rules that govern notice to potential class members.[10]

II. History and Purpose of Class Actions

In the year 1199, in Medieval England, a man named Martin was the rector of a local parish.[11] The members of his parish were

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(describing the nature of class actions and how to resolve them).

3. *Id.*

4. FED. R. CIV. P. 23(b)(3).

5. *Id.*

6. *Id.*

7. *See* Theodore Z. Wyman, *Sufficiency of Legal Notice Provided by Online Publication or Electronic Mail in Class Action Suits,* 84 A.L.R. Fed. 2d 103, *5 (2014) (explaining what notice courts have found proper, including email and texts).

8. *Id.*

9. *Id.*

10. FEDERAL JUDICIAL CENTER, ADVISORY COMMITTEE ON CIVIL RULES, RULE 23 SUBCOMMITTEE REPORT 87 [hereinafter SUBCOMMITTEE REPORT] (Nov. 5–6, 2015), www.uscourts.gov/file/18536/download (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

11. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 38 (1987).

upset with Martin; because of his management of the parish, the local parishioners had to carry their dead three miles to the "mother church" in a nearby town while still paying Martin for the burial.[12] The parishioners and Martin could not resolve their dispute. Martin then sued the parishioners to collect the offerings he felt entitled to and to dispute whether the parishioners were entitled to a daily mass.[13] The court heard the case, but the outcome has been lost to time.[14]

What time has not erased, however, is that the court was willing to hear the case of *Master Martin, Rector of Berkway v. Parishioners of Nuthamstead*.[15] From that fact alone, it is evident that the medieval English court recognized that a lawsuit was not always between two individuals. The court recognized that the parishioners were being represented as a group, and class action litigation was able to evolve.

In a separate incident in 1255, King Henry III wrote a writ to the archbishop of Canterbury commanding him to recognize three or four men of the village as representative of the whole.[16] The practice of allowing representative litigation had become "the law and condition of the realm."[17] In the writ, King Henry wrote "according to the law and custom of the realm . . . villages and communities of villeins[18] . . . ought to be able to prosecute their pleas and complaints in our courts and in those of others through three of four of their number."[19]

Class representation carried into the eighteenth century, when English courts heard cases brought on behalf of represented groups.[20] These historical courts understood the equitable purpose

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12. *Id.* at 48.

13. *Id.* at 38.

14. *Id.* at 48.

15. *Id.* at 47.

16. *Id.* at 97–98.

17. *Id.* at 98.

18. A villein is a "person entirely subject to a lord or attached to a manor, but free in relation to all others; a serf." *Villein*, BLACK'S LAW DICTIONARY (10th ed. 2014).

19. YEAZELL, *supra* note 11, at 98 (quoting THE COMMUNITY OF THE VILL, IN MEDIEVAL STUDIES PRESENTED TO ROSE GRAHAM 1 (V. Ruffer & A.J. Taylor eds., Oxford 1950)).

20. *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:12 (5th ed. 2015) (describing the historical origins of the class action); 7A CHARLES ALAN

of allowing classes to bring their case; "[t]he class action was an invention of equity . . . mothered by the practical necessity of providing a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs."[21]

A. Early Class Action Jurisprudence in the United States

In 1853, the Supreme Court approved of class actions in *Smith v. Swormstedt*,[22] in which it allowed a representative suit to be brought on behalf of all the preachers in the Methodist Episcopal Church South; the preachers sought a declaration of the respective rights of each sectional group of the Methodist Episcopal Church of the United States to funds originally belonging to the entire church.[23] United States law has evolved to govern the procedural aspects of creating and maintaining a class action suit.

III. Federal Rule of Civil Procedure 23

Federal Rule of Civil Procedure 23 (Rule 23) governs when and how notice should be provided to potential class members.[24] Rule 23 defines and explains three different types of class actions, and how notice requirements differ for each type.[25] This note will address the Federal Rule, but most States have adopted versions of this rule.[26]

WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1751 (3d ed. 2015) (explaining the history and purpose of the class action).

21. WRIGHT, *supra* note 20 (quoting Montgomery Ward & Co. v. Langer, C.C.A., 168 F.2d 182, 187 (1948)).

22. 57 U.S. 288 (1853). *Smith* addresses a different type of class action than the type explored in this note, but the example is offered to explore the policy behind class actions in the United States. *Id.*

23. *Id.*

24. FED. R. CIV. P. 23.

25. *Id.*

26. *See* NICHOLAS M. PACE, CLASS ACTIONS IN THE UNITED STATES: AN OVERVIEW OF THE PROCESS AND THE EMPIRICAL LITERATURE 2, http://globalclassactions.stanford.edu/sites/default/files/documents/USA__National_Report.pdf (last visited Nov. 2, 2016) (describing the evolution of Rule 23).

In 1912, Rule 23 read only "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."[27] In the decades following, Rule 23 was revised in order to define the different categories of class actions.[28]

In 1966, the Civil Committee amended Rule 23, and created the subcategory of Rule 23(b)(3).[29] The (b)(1) and (b)(2) categories require that classes be established when the individual claims must be combined in the interest of fairness and/or practicality, because they are all a result of the same wrongful conduct.[30] The class members in (b)(1) and (b)(2) class actions cannot opt out of the class.[31] The new (b)(3) category covered classes so large and numerous that individual notice may not be reasonable under the circumstances, and explained the ability for potential class members to "opt-out" of the class after receiving notice.[32] Most significantly, it was the first time Rule 23 allowed a class to be formed based on individual claims that did not need to be adjudicated together; it allowed a binding class action to be formed where named class representatives were simply seeking money damages for similar conduct. [33] Prior to the 1966 amendments, a class action would not have a preclusive effect on similar claims.[34]

The purpose of the notice requirement was to justify extending the class action judgment to the whole class, while allowing them an opportunity to escape the binding judgment.[35] Critics of the amendment complained that this would encourage a class action where notice is not broad enough to actually reach potential class

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27. *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i)*, 81 HARV. L. REV. 356, 376 (1967) (analyzing the problems with and the effect of the 1966 amendments to Rule 23).

28. *See id. at* 375–90 (analyzing the categories of class actions).

29. *See id.* at 389–90 (explaining subdivision (b)(3)).

30. *See id.* at 387–92 (explaining subdivisions (b)(1) and (b)(2)).

31. *Id.*

32. *Id.*

33. *See id.*

34. *Id.*

35. *See id.* at 392 (explaining the purpose of notice required by (c)(2)).

members.[36] Supporters of the rule pointed out that individual notice is not practicable in some circumstances, and that the Constitution is there to back up Rule 23 in assuring that notice is fair.[37]

Under the current Rule 23, all types of class actions must first meet the requirements of 23(a), which reads:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[38]

Rule 23(b)(1) and Rule 23(b)(2) usually do not require notice to all potential class members to satisfy due process, but it is in the discretion of the trial judge to determine what notice is required under (b)(1) and (b)(2).[39] Rule 23(b)(3), however, does require adequate notice to potential class members.[40] A class may be formed under Rule 23(b)(3) if "the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[41]

The guidelines for providing notice in a case where the class is certified under Rule 23(b)(3) are outlined in Rule 23(c)(2).[42] In any class action maintained under subdivision Rule 23(b)(3), the court must order that the members of the class are afforded *the best notice practicable* under the circumstances, including individual

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36. *See id.* at 395–96 (explaining that the rule faced criticism because it did not afford sufficiently intelligible standards and it would not be possible to reach all of the class members in all of the cases).

37. *Id.*

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

39. *See* Rodman Ward Jr. & Wayne N. Elliott, *The Contents and Mechanics of Rule 23 Notice*, 10 B.C.L. REV. 557, 558 (1969) (discussing the difficulties of fair and effective notice and the court's role in monitoring class actions).

40. *Id.*

41. FED. R. CIV. P. 23(b).

42. FED. R. CIV. P. 23.

notice to all members who can be identified through *reasonable effort*.[43] The notice is required to inform class members on the nature of the case, the definition of the certified class, the issues and claims at stake, that the court will exclude the potential class member from the class if she requests so from the judge within the specified time frame, and that the judgment will be binding on class members.[44]

A. How Potential Class Members Join A Class

There are two ways in which potential class members become part of a class. [45] These two methods are known as "opt-out" and "opt-in".[46]

An opt-in class requires each potential class member to take affirmative action to join the suit.[47] Unlike class actions under Rule 23, opt-in classes are statutory and do not concern the same due process analysis as opt-out classes. This is because a potential class member in an opt-in action does not lose any legal right or ability by defecting from the class.[48] A potential class member in an opt-in case may lose an opportunity to be a part of the class action without notice, but they may still bring a suit of their own.[49]

In an opt-out class, by contrast, "every member of the class is included in the class suit unless they [ask] to be excluded from the class."[50] Therefore, when a person is part of a class action, he or she is bound by the outcome.[51] He or she will lose the right to bring

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43. *Id.* (emphasis added).

44. *Id.*

45. *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 298–304 (2010) (comparing European and United States class actions and noting the issues with the system in the United States).

46. *Id.*

47. *Id.* at 301.

48. ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 9:48 (5th ed. 2015).

49. *Id.*

50. Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 556 (2003).

51. *See* Coffee, *supra* note 45 (detailing the legal consequences of joining a class action).

a new suit on their own behalf.[52] This is why, in an opt-out case, it is a constitutional and legislative requirement that persons who are a part of the class are afforded notice of their involvement.[53]

The opt-in model is less popular than the opt-out, as it is only allowed by statute.[54] The opt-in model is still in use, but no court has ever certified an opt-in class action under Rule 23(b)(3).[55]

IV. Class Action Basics

A class action usually begins when one or more persons assert that they, and others in a similar situation, are or will be damaged.[56] The people making the assertion must also explain that they represent a larger group of people in a similar situation, and therefore become the named class representatives.[57] The type of damage asserted can vary widely, but includes "product liability, medical liability, consumer fraud, breach of fiduciary duty, antitrust, securities, insurance, employment, and human rights violations."[58] The new class may seek damages, injunctive or equitable relief.[59] The named class representatives who represent the absent members of the class must have standing to bring the claim.[60] The named class representatives must also be able to

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52. *See id.* at 298 (explaining the ideology behind class action and that the judgment is binding on class members).

53. *Infra* Sections VI, VII.

54. Erichson, *supra* note 50, at 556.

55. *See* Doe v. United States, 44 Fed. App'x 499, 500 (Fed. Cir. 2002) (discussing a class certified by the Court of Federal Claims as an opt-in class action); Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1112 (10th Cir. 2001) (reversing a decertification of an opt-in class action); Katlin v. Tremoglie, 43 Pa. D. & C.4th 373, 374 (Pa. C.P. Philadelphia County 1999) (certifying an opt-in class action); *see also* CONTE & NEWBERG, § 9:48, *supra* note 48 (outlining the fundamentals of class actions).

56. *See* Greenberg & Blazina, *supra* note 2 (describing how a class action lawsuit begins). In rare circumstances, a defendant may be the certified class. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21 (2004).

57. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 56 (explaining the process for getting a class certified).

58. *Id.*

59. *Id.*

60. *See* 59 Am. Jur. 2d *Parties* § 61 (detailing burden on named plaintiffs of certified classes).

fairly represent the class as a whole, rather than putting their own interests above those of the entire class.[61] The rights of the absent class members are protected as a matter of due process, as this note will address.[62]

In order to proceed as a class action, the persons seeking to create a class must have the class approved and certified by the court.[63] The judge must determine that a precisely defined class exists, and that the class representatives are a part of the class.[64] This must be done early in the case.[65] In order for the class to be approved, the party seeking class certification must meet the requirements of Rule 23.[66] If the court determines that a class action is maintainable under section b(3) of Rule 23, the accepted practice is that one or both of the parties prepare a notice plan for the court to approve.[67] In the notice plan the plaintiff class representatives[68] will explain what methods they intend to use to inform potential class members of their interest in the suit.[69]

V. Defining the Parameters of Notice

Rule 23 is not the only guideline that determines when notice is due. In establishing the foundation for notice requirements, this note will explore three highly relevant cases from the Supreme Court. The first case discussed is *Mullane v. Central Hanover Bank and Trust Co.*[70] *Mullane* does not discuss Rule 23, and does not

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61. 1 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 1.13, 42 (4th ed. 2002).

62. *Id.* at 45.

63. *See* Greenberg & Blazina, *supra* note 2 (describing the initial steps needed for a class action to proceed).

64. *Id.* at 194.

65. *Id.* at 193.

66. FED. R. CIV. P. 23.

67. AM. BAR ASS'N, SECTION OF LITIG., 1 CLASS ACTIONS: IN THE WAKE OF *EISEN III* AND *IV* 39–40 (1976).

68. Occasionally, this may be the defendant. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 56 (explaining the process of certifying a class action).

69. *See* 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, §1797.6 (3d ed. 2012) (describing the methods by which notice may be ordered).

70. 339 U.S. 306 (1950).

involve a class action.[71] However, the case creates the standard for what notice is required under the due process clause of the constitution.[72] The next case is *Phillips Petroleum Company v. Shutts*,[73] which addresses when notice must be sent to potential class members under due process.[74] The last major Supreme Court case this note will analyze is *Eisen v. Carlisle and Jacquelin*.[75] *Eisen* explains how to read the notice requirements of Rule 23, and clarifies that the notice requirements of Rule 23 are more rigid than *Mullane* and, therefore, more rigid than the constitution.[76]

VI. Constitutional Requirements of Due Process in Notice

The Fifth and Fourteenth Amendments of the Constitution dictate that United States Citizens may not have their life, liberty or property taken from them without due process.[77] These amendments require that a citizen must have a fair trial before the government may deprive them of their life, liberty, or property.[78]

A. Mullane

The Supreme Court in *Mullane* explained: "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by *notice* and opportunity for hearing."[79]

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71. *See generally id.*

72. *See id.* at 315 (requiring that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

73. 472 U.S. 797 (1985).

74. *Id.* at 803.

75. 417 U.S. 156 (1974).

76. *See id.* (concluding that Rule 23 requires more of notice than the Constitution).

77. U.S. CONST. amend. V; U.S. CONST. amend. VIV.

78. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

79. *Id.* (emphasis added).

In *Mullane*, 113 private small trusts were pooled into a common trust fund at Central Hanover Bank in New York.[80] There was testimony at the trial that there were about 350 current beneficiaries, and up to 2,000 persons with relevant interests.[81] This case was not brought under a class action theory, however the case still addressed what notice was proper to satisfy due process.[82] A New York statute required banks to follow a specific plan of notice by publication when deciding to settle the accounts in the common fund.[83] The statute required one type of notice, and only one type of notice, regardless of whether the beneficiaries were identifiable.[84] The bank was required to publish notice in a newspaper at least once a week for four weeks, and there was no requirement for individual notice.[85] The bank complied, and the only notice that it gave was "by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds."[86] The appellant[87] then objected to the statutory notice requirements, and the actual notice given, on the grounds that the notice was insufficient and therefore it violated the due process clause of the Fourteenth Amendment.[88]

The landmark *Mullane* decision explained that the fundamental constitutional requirements of notice are satisfied when "notice [is] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[89] The court explained that notice must reasonably "convey the required information, and it must afford a reasonable

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80. *Id.* at 309.

81. John Leubsdorf, *Unmasking* Mullane*: Due Process, Common Trust Funds, and the Class Action Wars*, 66 HASTINGS L.J. 1963, 1698 n.17 (2015).

82. *Mullane*, 339 U.S. at 309.

83. *Id.*

84. *Id.*

85. *Id.* at 310.

86. *Id.*

87. The appellant in this case was a statutorily appointed guardian ad litem who was responsible for representing the interests of all of the trust beneficiaries. *Id.*

88. *Id.* at 311.

89. *Id.* at 314 (citations omitted).

time for those interested to make their appearance. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied."[90]

The court also emphasized that notice could not be a "mere gesture".[91] It reasoned that due process requires that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."[92] The court explained that when it is not reasonable to send notice under these conditions, the chosen method of notice must not be substantially less likely to give notice than any other "feasible and customary" method.[93] The court in *Mullane* ultimately decided that, in this case, publication by newspaper was insufficient to accord due process.[94] The court explained:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.[95]

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90. *Id.* at 314–15.
91. *Id.* at 315.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*

However, the court did not intend to say that the bank had to ascertain the names and addresses of all beneficiaries involved. The bank was only required to provide notice to current trust beneficiaries of known place and residence.[96] The court explained that, as to those beneficiaries whose information could not be ascertained with "due diligence," the New York Statute's required notice was sufficient.[97] The court also explained that, even if the beneficiaries could be ascertained with "due diligence" the bank wasn't required to do any investigating to discover the information for beneficiaries.[98] The bank was not required to obtain information outside of its normal course of business because requiring the bank to stay informed of this information would impose a severe burden.[99] The New York statutory notice was ruled "inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand."[100]

B. Phillips Petroleum

A class action is a unique situation in which the named representatives in the class are representing the interests of third parties who are not present.[101] *Phillips* addressed the personal jurisdiction issues in a class action where potential class members are not present.[102] *Phillips* involved a multi-state class action suit brought by royalty owners against Phillips Petroleum Company for withholding interest payments on royalties.[103] This suit was brought in Kansas state court and the defendant opposed class certification on the ground that the Kansas court could not constitutionally exercise personal jurisdiction over the vast

96. *Id.* at 317.
97. *Id.*
98. *Id*
99. *Id.* at 317–18.
100. *Id.* at 319.
101. *Id.*
102. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803 (1985).
103. *Id.* at 799.

majority of the absent class members who lacked minimum contacts with Kansas.[104] The Supreme Court explained:

> Petitioner claims that failure to execute and return the "request for exclusion" provided with the class notice cannot constitute consent of the out-of-state plaintiffs; thus Kansas courts may exercise jurisdiction over these plaintiffs only if the plaintiffs possess the sufficient "minimum contacts" with Kansas as that term is used regarding out-of-state defendants in personal jurisdiction cases.[105]

Although the *Phillips* court "recognized that class plaintiffs were in danger of losing the property interests represented by their claims, it reasoned that they were unlikely to be subjected to judgments against them, or to other significant burdens such as discovery, costs, or attorneys' fees." [106]

The court rejected both a "minimum contacts" test in class actions and a requirement that a person "opt-in" in order to join the class.[107] It explained that the jurisdictional issues are satisfied if procedural due process protections are provided.[108] The *Phillips* court explained that the function of notice is to allow potential class members a *fair* chance of excusing themselves from the class.[109] It explained: "[T]he interests of the absent plaintiffs are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court."[110] In general, the Court emphasized that an opt-out opportunity is an important component of due process in damage class actions.[111]

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104. *Id.* at 806.

105. *Id.*

106. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 11–12 (1986).

107. *See Phillips*, 472 U.S. at 808, 812 ("We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively 'opt-in' to the class, rather than be deemed members of the class if they do not 'opt-out.'").

108. *Id.* at 803.

109. *Id.* (emphasis added).

110. *Id.* at 814.

111. Erichson, *supra* note 50, at 555.

C. Eisen

The petitioner in *Eisen* originally brought his suit on behalf of all buyers and sellers of "odd lots" on the stock market exchange, alleging that the respondent brokerage firms had violated the Sherman Act when they monopolized the trade and set the differential too high and that the exchange itself violated the Securities Exchange Act of 1934 when it failed to protect the investors.[112] The petitioner's class was later limited to investors who had traded in odd lots between May 1, 1962 and June 30, 1966.[113] The case was juggled between the district and appellate courts in New York three times, and the third time the District Court heard the case it ruled on the issue of notice.[114] The District Court found that the prospective class included six million individuals and institutions, and "with reasonable effort some two million of these odd-lot investors could be identified by name and address; and that the names and addresses of an additional 250,000 persons who had participated in special investment programs . . . could also be identified with reasonable effort."[115] The court explained that using the first-class rate of postage, it would cost $225,000 to provide individual notice to all identifiable class members, plus additional expenses for notice by publication to reach the other four million potential class members.[116]

In the appellate case preceding the third District Court case, petitioner had argued that that mailing notice to each identifiable plaintiff would be so expensive he would have to drop his case, and asked for permission to provide notice by publication instead.[117] Petitioner's monetary interest in the suit was only seventy dollars, so the suit had to be a class action or no lawyer would pursue the case.[118] The Supreme Court heard the case after it was reviewed by the Court of Appeals a third time.[119] The Supreme Court emphasized that under Rule 23(c) individual notice must be

112. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 160 (1974).
113. *Id.*
114. *Id.* at 166–67.
115. *Id.*
116. *Id.*
117. *Id.* at 165.
118. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 161 (1974).
119. *Id.* at 169.

provided to class members who are identifiable through reasonable effort.[120] The Supreme Court explained that in the *Eisen* case, the names and addresses of 2,250,000 class members were easily ascertainable, and there was no showing that individual notice could not be mailed to every identifiable class member.[121] It also emphasized that individual notice, when possible through reasonable effort, is not something to be discretionarily waived; it is an unambiguous requirement under Rule 23(c).[122] It explained that individual notice requirements *may not be tailored to fit the "pocketbooks of particular plaintiffs,"* and that petitioner must bear the cost of providing notice.[123]

VII. Best Notice Practicable and Reasonable Effort Under Rule 23

Mullane helped clarify what is proper notice under the due process clause, but courts have not had rigid guidelines when deciding what constitutes the best notice practicable under Rule 23.[124] Court decisions evaluating notice plans depend on various elements in the factual situation, including the size of the class and "whether the class members can be identified easily (for example, by stockholder lists, computer printouts of customers, or any other form of record accessible to the class representative), and the probability that publication notice, if used, would or would not reach its intended audience"[125]

Some courts have found a combination of individual notice and publication notice to be the best notice practicable under the circumstances.[126] "This alternative has often been ordered by courts where some members of the class could be identified by a reasonable method, such as customer or stockholder lists, but other

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120. *Id.* at 175.

121. *Id.*

122. *Id.*

123. *Id.* (emphasis added).

124. *See* Marcia G. Robeson, Annotation, *What Constitutes "Best Notice Practicable," Required by Rule 23(c)(2) of Federal Rules of Civil Procedure, in Class Actions Brought Under Rule 23(b)(3)*, 32 A.L.R. FED. 102 § 2 (1977) (explaining the different approaches taken to provide notice and how courts have addressed them).

125. *See id.* (collecting cases).

126. *See id.* (analyzing the approach taken by different courts).

class members could not be identified, for example, transferees of stock where no transfer lists were kept ."[127] "Some courts have ruled that Rule 23 allows the use of publication notice when used in combination with individual notice, "when the notice can be published where it is likely to be seen and read by the unidentifiable class members. Under certain circumstances, however, it has been held that individual notice combined with publication notice for unidentifiable class members was not the best practicable method of notice."[128]

There is no defined way to make a "reasonable effort" to provide notice under Rule 23.[129] Individual notice to all class members has been required in cases where parties have access to lists of class members available from corporations, transfer agents, or broker firms.[130] In some class actions brought under Rule 23(b) the notice plan has requested to have notice sent in the defendant's monthly statement, billing, or similar mailing, in order to save costs.[131] Courts have sometimes rejected this approach, because these lists can be over or under inclusive depending on when the lists were created and updated.[132]

Courts have sometimes allowed publication notice, through mediums including newspapers and media outlets, to be sufficient on its own when class members could not be reasonably identified and contacted, or could not be identified at all.[133] However, publication notice alone has been held not sufficient where members of the class were readily identifiable.[134] It is not entirely clear when publication notice is sufficient alone, but the Supreme Court in *Eisen* explained that when a reasonable effort under Rule

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127. *Id.*

128. *Id.*

129. *See id.* (demonstrating multiple methods of notice).

130. *See* Robeson, *supra* note 124, at § 2 (providing examples of when individual notice to potential class members has been required).

131. *See id.* (detailing notice plan requests).

132. *See id.* (describing the approach courts have taken to some notice plan requests).

133. *Id.*

134. *See id.* (explaining the standard of notice when class members are readily identifiable).

23(c) makes individual notice possible, there is no substitute for individual notice.[135]

A. Reasonable Notice Plans in Class Actions

When a plaintiff is seeking a class action, they must, among other things, present a plan to the court detailing how they intend to provide notice to potential class members.[136] There is no one right way to create a notice plan.[137] Notice plans may indicate an intention to provide notice to potential class members through a variety of mediums, including cell phones.[138]

The Federal Judicial Center created a Notice Plan checklist in 2010 for judges to use as they evaluate notice plans.[139] The checklist provides questions for the judges to consider, including "Is the notice plan conducive to reaching the demographics of the class?", "Is the coverage broad and fair? Does the plan account for mobility?", and "Does the plan include individual notice?"[140] Although this checklist provides some direction to judges, the process of approving a notice plan is still largely in the discretion of each individual judge.[141]

B. Courts Differ on Appropriate Methods of Notice

District Courts have not had much occasion to discuss whether text messages are an appropriate form of notice in particular circumstances. The small number of District Courts that have

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135. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175–76 (1974) (emphasizing the importance of individual notice to identifiable class members).

136. AM. BAR ASS'N, SECTION OF LITIG., *supra* note 67.

137. *See* WRIGHT, *supra* note 69 (demonstrating that there are multiple effective ways to create a notice plan).

138. *See generally* Wyman, *supra* note 7 (explaining that courts have broad discretion in determining what kinds of notice are acceptable).

139. *See generally Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide,* FED. JUDICIAL CTR. (2010) [hereinafter *Judges' Class Action Checklist*], http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

140. *Id.* at 2.

141. *See* Wyman, *supra* note 7 (explaining that notice plans vary and it is ultimately up to the judge's discretion to approve or disapprove).

expressed an opinion in the matter have not consistently approved or disapproved of notice through text messages; their reactions have been mixed.[142]

1. Disapproval of Text Messages

In *Jermyn v. Best Buy Stores,*[143] Jermyn successfully created a class action to sue Best Buy for failing to meet their price match guarantee.[144] His class consisted of

> All New York citizens and residents who, from January 10, 2002 until the present, made a purchase at Best Buy and within 30 days (14 days for computers, monitors, notebook computers, printers, camcorders, digital cameras and radar detectors) after the purchase found a lower price from an entity qualifying under Best Buy's published price match guarantee on an available product of the same brand and model, provided verification of the lower price to Best Buy and were denied the benefit of Best Buy's price match guarantee.[145]

Jermyn's notice plan sought to alert individuals to their class eligibility through, among other mediums, a post on twitter, individual [text] messages, and email.[146] Best Buy objected to the use of all three of these methods.[147] The court agreed with Best Buy, explaining that "[I]ndividual notice is impossible because neither Best Buy nor Jermyn has any way of identifying customers who unsuccessfully sought a price match under Best Buy's price-

142. *Compare* Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214 (CM), 2010 WL 5187746, at *9 (S.D.N.Y. Dec. 6, 2010) (concluding that the notice plan was denied as to the Twitter, text message, and email elements), *with In re* AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 941 (N.D. Ill. 2011) (finding that class notice was adequate where the defendant sent notice by text message, along with other methods), *and In re* Penthouse Exec. Club Comp. Litig., No. 10 Civ. 1145 KMW, 2014 WL 185628, at *7 (S.D.N.Y. Jan. 14, 2014) (ruling that the notice complied with all constitutional requirements, including those of due process, when notices were distributed via mail, text message and website), *and* Bhumithanarn v. 22 Noodle Mkt. Corp., No. 14-CV-2625 RJS, 2015 WL 4240985, at *6 (S.D.N.Y. July 13, 2015) (finding that Plaintiffs may provide notice to potential opt-in Plaintiffs via a text message).

143. No. 08 Civ. 00214 (CM), 2010 WL 5187746 (S.D.N.Y. Dec. 6, 2010)

144. *Id.* at *1.

145. *Id.*

146. *Id.* at *2.

147. *Id.* at *5.

match guarantee; Best Buy does not maintain a list of such customers."[148] The court explained that there is an alternative, "[I]n situations . . . where class members cannot be identified for purposes of sending individual notice, notice by publication is sufficient."[149] The court explained that a twitter post was not appropriate because it reached a group of people much larger than the potential class, and research suggested that most of the visitors to the twitter page went there for technical support.[150] The court explained that there were two major downsides to posting on twitter, "first, notice cannot be limited to Best Buy customers in New York, and the class here is comprised solely of New York residents. Second, there is no way to assure that notice via Twitter will result in notice to even a single class member, let alone a substantial number of class members."[151] The court then explained that [text] messages were inappropriate for similar reasons as a twitter post; the list of telephone numbers held by Best Buy included members who were excluded from the class (Best Buy Employees and members of Best Buy's Loyalty Program).[152] The court explained "Although Best Buy may be able to restrict its text messages to New York customers, there is no link between the list of mobile telephone numbers (which includes individuals excluded from the class definition) and class members."[153] The court also reasoned that the list of mobile telephone numbers was even more flawed than a twitter post, because the list was under-inclusive as it contained only a select group of possible customers.[154]

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148. *Id.* at *4.

149. *Id.* (citing Mullane v. Cent.Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950)).

150. *Id.* at *5–6.

151. *Id.* at *6; *but see* Macarz v. Transworld Sys., Inc., 201 F.R.D. 54, 61 (D. Conn. Jan. 8, 2001) (allowing individual notice to an over-inclusive list of class member when the list contained the entire universe of class members, although 25% of the list was not part of the class).

152. *Id.* at *7.

153. *Id.*

154. *Id.*

2. Approval of Text Messages

A District Court in Illinois approved a notice plan allowing notice by text message.[155] In the case of *In re AT& T Mobility Wireless Data*,[156] the plaintiffs and AT&T agreed on a settlement after the plaintiffs accused AT&T of breaking the law by charging internet taxes.[157] Fifty-seven plaintiffs and AT&T filed a joint motion to certify the class for settlement purposes, and it was granted. The court also approved the notice plan and said it satisfied Rule 23.[158] The notice plan indicated that AT&T would send both a message with each customer's monthly bill and a text message to its current customers. Former customers would receive notice via email, if they had provided an email address to AT&T, or by U.S. Mail otherwise.[159] Several class members objected to the settlement, and many of the objectors complained that the notice was inadequate.[160] Dr. Florence had served as the interim settlement administrator, held a P.H.D. in research and statistics, and testified at the hearing about the notice plan.[161] He explained how he examined AT&T's data with them in order to devise a notice plan.[162] The notice plan that the parties had created provided multiple types of notice, including inserts into current customers' bills, text messages, publication, and email.[163] AT&T sent notice by text message to more than 32-million class members who were customers as of September 14, 2010.[164] Several of the objecting class members complained that the text messages were under-inclusive, but the court explained "[t]hese objections are

155. *See In re* AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 941 (N.D. Ill. 2011) (evaluating whether a text message is an appropriate form of individual notice given the circumstances).

156. *Id.*

157. *Id.* at 940.

158. *Id.*

159. *Id.*

160. *Id.* at 944–49.

161. *Id.* at 952.

162. *Id.*

163. *Id.* at 953.

164. *Id.* at 968.

misplaced. Due process does not require that every class member receive notice."[165]

Another case in which a court reviewed a part of a notice plan was *In re Penthouse Executive Club*.[166] The matter was originally brought to court when entertainers/dancers from the Penthouse Executive Club sued, alleging that they were wrongfully classified as private contractors and the Club used that as an excuse to extort fees and tips from them.[167] The settlement class consisted of "all individuals who perform or performed at the Penthouse Executive Club as entertainers from on or about January 1, 2004 through June 12, 2012, including any individual who has signed an 'Entertainer License Agreement' or any other agreement containing a class or collective action waiver."[168] The notice plan included notice "sent by first-class mail to each respective Class Member at his or her last known address . . . . provided on www.stripperweb.com . . . and two text messages [were sent] to Class Members on August 9, 2013 and September 10, 2013," and a settlement website was created.[169] The court did not analyze why text messages were appropriate, nor did the court describe how the phone numbers of approximately 1,230 class members were obtained, but the court allowed the notice.[170] It is evident from this that the parties were able to reasonably obtain these numbers and the class action was still financially viable.

Another case in which the court approved of text messages as a form of notice was *Bhumithanarn v. 22 Noodle Mkt. Corp*.[171] This case addressed whether the class could be certified as a collective action under the Fair Labor Standards Act.[172] The plaintiffs

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165. *See id.* (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950)).

166. No. 10 Civ. 1145 (KMW), 2014 WL 185628 (S.D.N.Y. Jan. 14, 2014) (approving notice plan that included text messages to potential class members).

167. *Id.* at *1.

168. *Id.* at *2.

169. *Id.* at *7.

170. *Id.* at *2.

171. No. 14-CV-2625 RJS, 2015 WL 4240985 (S.D.N.Y. July 13, 2015) (finding that Plaintiffs may provide notice to potential opt-in Plaintiffs via a text message).

172. *Id.* at *1. The class was not certified under Rule 23, and therefore this case analyzed notice by text message outside of Rule 23 requirements. *Id.* However, the case is still a useful example of whether a court considers text messages an appropriate and viable form of notice.

alleged that, working under the defendants in fast food restaurants in New York, they were denied minimum wage, overtime, and uniforms, and the deducted unauthorized tips from their employees.[173] The plaintiffs' notice plan included direct mail, a workplace posting at the offending restaurant's location, and a text message. The parties agreed that the notice should be distributed in both Thai and English, but the restaurant did not agree that a workplace posting and text messages were appropriate forms of notice.[174] The plaintiffs argued that text messages were appropriate because many of the restaurant employees were transient and potential class members had changed residences since beginning work at the restaurant.[175] The restaurant opposed the text messages, alleging that the plaintiffs could not demonstrate that notification via text message was appropriate "in light of individuals' privacy interests in their cellular phone numbers and the ease with which individuals may distort electronic data."[176] The court found that, "given the high turnover in the restaurant industry," notice by text message was appropriate.[177] The court also noted that the restaurant primarily communicated with their employees through text messages, and therefore their objection to text messages based on privacy interests held very little weight.[178]

VIII. When is a Text Message a Reasonable Form of Notice?

A. It is Likely to Reach the Potential Class Members

As the relevant cases above illustrate, determining whether text messages are an appropriate form of notice is a very fact-intensive process.[179] It is safe to say, however, that when providing notice to potential class action plaintiffs, the best notice is

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173. *Id.*

174. *Id.* at *4.

175. *Id.* at *5.

176. *Id.*

177. Bhumithanarn v. 22 Noodle Mkt. Corp., No. 14-CV-2625 RJS, 2015 WL 4240985 (S.D.N.Y. July 13, 2015).

178. *Id.*

179. *See supra* text accompanying footnotes 142–178.

individual notice.[180] The Supreme Court has explained "*individual notice* to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23 . . . . Accordingly, each class member who can be identified through reasonable effort must be notified . . . . "[181] If most individuals in the United States own a cell phone that they use regularly, it follows that text messages sent to cell phones may be one of the best ways to provide individual notice.

1. Likelihood of an Individual Owning a Cell Phone in the United States

The amount of United States citizens with cell phones could have a large impact on a fact-based analysis of a notice plan. A survey conducted by the Pew Research Center in 2013 found that over ninety percent of American adults own a cell phone.[182] This percentage remained steady through July of 2015.[183] Additionally, sixty-four percent of adults own a smart phone.[184] Americans are downloading smart phone applications *en masse*; "Apple reported earlier this year that twenty five billion applications had been downloaded on its iOS platform to date; Google estimated twenty billion had been downloaded on the Android platform."[185] If the named class representatives can reasonably access data collected by cell phone companies, or application databases, it would be reasonable to require that the named class representatives acquire

180. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974) (explaining that individual notice is required when potential class members are identifiable).

181. *Id.* (emphasis added).

182. Lee Rainie, *Cell Phone Ownership Hits 91% of Adults*, PEW RESEARCH CTR. (June 6, 2013), http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/ (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

183. *Device Ownership Over Time*, PEW RESEARCH CTR. (2015), http://www.pewinternet.org/data-trend/mobile/device-ownership/ (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

184. *Id.*

185. Somini Sengupta, *Mobile App Developers Scoop up Vast Amounts of Data*, N.Y. TIMES: BITS (July 12, 2012), http://bits.blogs.nytimes.com/2012/07/12/mobile-app-developers-scoop-up-vast-amounts-of-data-reports-say/?_r=0. (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

the phone numbers of potential class members in order to provide individual notice to them. While smart phones have multiple capabilities, such as receiving email and checking the internet, text messages may be the most likely way to provide individual notice. A 2013 Pew Research Study showed that eighty-one percent of people use their cell phones to check their messages, while only sixty percent use them to access the internet and only fifty-two percent use their phones to check their email.[186]

2. It is an Efficient Method of Communicating with Potential Class Members

One of the factors that courts consider when evaluating whether a notice plan is reasonable is its efficiency.[187] When the current version of Rule 23 was created in 1966, the Advisory Committee explained that Rule 23(b)(3) class actions were meant to include "cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated."[188] The *Mullane* case explained that some methods of notice may increase in efficiency as time progresses, specifically explaining that notice by mail is considered efficient.[189] Therefore, as new methods become more efficient, they are more reasonable. Another Supreme Court case, *Mennonite Board of Missions v. Adams*,[190] explained that the use of "less reliable forms of notice is not reasonable where, as here, 'an inexpensive and efficient mechanism such as mail service is available.'"[191] In some cases, potential class members' cell phone

186. Maeve Duggan, *Cell Phone Activities 2013*, PEW RESEARCH CTR. (Sept. 19, 2013), http://www.pewinternet.org/2013/09/19/cell-phone-activities-2013/ (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

187. *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 455 (1982) ("[C]ontinued exclusive reliance on an ineffective means of service is not notice 'reasonably calculated to reach those who could easily be informed by other means at hand.'").

188. D. Rhett Brandon, *Notice Cost Problems Under Rule 23(b)(3) and (c)(2) After* Oppenheimer Fund, Inc. v. Sanders, 1979 DUKE L.J. 882, 883 (1979).

189. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950) ("However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication.").

190. 462 U.S. 791 (1983).

191. *Id.* at 799 (quoting *Greene*, 456 U.S. at 455).

numbers may be easy to acquire.[192] Depending on the individual circumstances, text messages can be much cheaper than spending millions on mass publication campaigns.[193] It may also be the best method of providing individual notice. The cost of obtaining the data necessary for sending notice through a text message will vary widely depending on the case. The exact cost of sending a text message to each potential class member is less important than the ratio of what the notice costs are as compared to the amount each class member stands to gain in a money damages case.[194]

IX. When is a Text Message an Unreasonable Form of Notice?

A. Phone Number Data is Available but too Broad to be Reasonable

In some cases, it will not be easy to collect data of potential class action members. For example, in *Jermyn v. Best Buy Stores* the proposed potential notice plan required Best Buy to inform its New York customers of the ongoing suit.[195] However, Best Buy was unable to restrict the customer phone number list to include only the potential class members.[196] The list of phone numbers included employees of the store, and they were not eligible to be a part of the class.[197] The court found that texting all of the customers without restricting the texts to only class members violated Rule

192. *See In re* AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 941 (N.D. Ill. 2011) (allowing notice by text message where AT&T was able to inform its own cellular phone customers of the class action through text messages).

193. *See* Zachary W. Biesanz & Thomas H. Burt, *Everything That Requires Discovery Must Converge: A Counterintuitive Solution to A Class Action Paradox*, 47 U.S.F. L. REV. 55, 84 (2012) (discussing the disadvantages of class actions, including the potential costs involved).

194. *See generally* Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States,* Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland (July 2000), https://law.duke.edu/grouplit/papers/classactionalexander.pdf.

195. *See* Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214 (CM), 2010 WL 5187746, at *2 (S.D.N.Y. Dec. 6, 2010) (explaining the proposed notice plan and objections to it).

196. *Id.* at *7.

197. *Id.*

23 of the Federal Rules of Civil Procedure, and that notice plans should not be over inclusive.[198]

The argument against over-inclusiveness does not carry very much weight, however. Notice by publication is necessarily overbroad. Any person reading the newspaper may come across a notice publication. Additionally, it seems to be an argument arising outside of law. The primary concern of providing notice is to ensure people are not deprived of their rights; the fact that some people may be notified unnecessarily does not seem important enough to risk depriving a person of their rights.[199]

B. Class Members are Likely to Be Impoverished

It may also be unreasonable to send text messages to potential class members when potential class members are likely to be impoverished and therefore without cellphones.[200] There is a large gap in living standards between the poor and the severely poor.[201] Although twenty-five percent of technically poor households in the United States own a cell phone, ten percent of poor families have no telephone access at all.[202] If a potential class is likely to be significantly composed of the poorest of America's poor, it is probably not wise to attempt to reach them by text message.

C. A Text Message is too Unofficial as a Form of Notice

In the Federal Judicial Center checklist for notice plans, the form asks "Will e-mailed notice be used instead of postal mailings?"[203] The checklist provides a paragraph of explanation

198. *See id.* at *9 (denying the proposed notice plan in part, to the extent that it sought to provide notice through Twitter, text message, and e-mail messages).

199. U.S. CONST. amends. V, XIV.

200. *See* Robert E. Rector & Kirk A. Johnson, *Understanding Poverty in America*, HERITAGE FOUND. BACKGROUNDER No. 1713 (2004), http://www.heritage.org/research/reports/2004/01/understanding-poverty-in-america ("[A]pproximately one-tenth [of poor households] have no phone at all) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

201. *See id.* (giving statistics comparing the means of poor families to severely poor families).

202. *Id.*

203. *Judges' Class Action Checklist*, *supra* note 139.

under each question, and under that particular question it cautions:

> If available, parties should use postal mailing addresses, which are generally more effective than e-mail in reaching class members: mail-forwarding services reach movers, and the influx of "SPAM" e-mail messages can cause valid e-mails to go unread. If e-mail will be used—e.g., to active e-mail addresses the defendant currently uses to communicate with class members—be careful to require sophisticated design of the subject line, the sender, and the body of the message, to overcome SPAM filters and ensure readership.[204]

Unfamiliar text messages can give rise to some of the same fears.[205] People receiving text messages about class actions may think they are the victim of a phone scam.[206] This fear is not unfounded. Spam text messages are on the rise.[207] However, efforts are being made to restrict mobile text messaging scams. The 2003 Can Spam Act and the Telephone Consumer Protection Act made mobile spam illegal.[208] Smartphone users can report mobile spam to the Federal Communications Commission through the government website.[209] The major wireless carriers, AT&T, Sprint, T-Mobile, Verizon Wireless and Bell Mobility all offer ways to report spam phone numbers.[210]

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204. *Id.*

205. *See Text Message Spam*, FED. TRADE COMM'N, (Mar. 2013), http://www.consumer.ftc.gov/articles/0350-text-message-spam ("Text message spam is to your cell phone what email spam is to your personal computer. Both may try to get you to reveal personal information") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

206. *See Signs of a Scam*, FED. TRADE COMM'N (Feb. 2014), http://www.consumer.ftc.gov/articles/0076-phone-scams#Signs (explaining that scams may try to get your personal information by offering some sort of cash or reward) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

207. Nicole Perloth, *Spam Invades a Last Refuge, the Cellphone*, N.Y. TIMES (Apr. 7, 2012), http://www.nytimes.com/2012/04/08/technology/text-message-spam-difficult-to-stop-is-a-growing-menace.html?_r=0 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

208. *Id.*

209. *Id.*

210. *Id.*

The technology for combatting spam text messages has been in place since 2012.[211] Cell phone providers collect phone numbers associated with the spam and report them to a shared database.[212] Additionally, spam e-mail is at a twelve-year low[213], and this trend may continue with cell phones as consumers report more spam text messages.

X. Text Messages May Become a More Reasonable Form of Notice

A. Cell Phones Will Grow in Popularity

Cell phones are growing in popularity, and are considered to be necessities rather than luxuries.[214] As we move forward with technology and more people gain access to cell phones, this could be a very affordable, practical and effective way to reach potential plaintiffs in a class action. Poor families are starting to rely on cell phones for internet access.[215] As internet becomes more crucial to everyday life, we can expect to see more families with cell phones.

B. Text Messages May Be an Improvement to Postal Mail

The *Mullane* case explained that notice should be provided by the best means possible; "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to

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211. *See* Amy Gahran, *Getting text spam? New service helps you report it*, CNN (Mar. 19, 2012), http://www.cnn.com/2012/03/19/tech/mobile/text-spam-gahran/ (describing a system used to report spam text messages) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

212. *Id.*

213. *Spam email levels at 12-year low*, BBC, July 27, 2015, http://www.bbc.com/news/technology-33564016 (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

214. *See* Catherine Rampell, *Luxury, or Necessity?*, N.Y. TIMES: ECONOMIX (Feb. 9, 2009, 6:02 PM), http://economix.blogs.nytimes.com/2009/02/09/luxury-or-necessity/?_r=0 (debating whether cell phones are considered a necessity in the United States); *see also Device Ownership Over Time*, *supra* note 183.

215. *See* Aaron Smith, *U.S. Smart Phone Use in 2015*, PEW RESEARCH CTR. (Apr. 1, 2015), http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/ (describing how many adults in the United States own smart phones) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

apprise them of its pendency."[216] The central motivation behind the court's ruling in *Mullane* was to make parties in a class action case use the method of notice that was most likely to reach the class members; Mullane explained:

> The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[217]

Comparing the levels of homelessness and persons without addresses to the levels of people without cell phones today shows an inverse trend.[218] The principle behind *Mullane*'s reasoning is that the notice should be able to reach the intended persons by method most likely to reach a person. In cases where potential class members are likely to be homeless, it follows that text messages may become more likely to reach potential class members than the traditional method of paper mail.

XI. Proposed Rule 23 Changes

The Rule 23 subcommittee has been actively discussing changes to the rule since late 2014.[219] The subcommittee has recommended changes to Rule 23 (b)(3) as follows:

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

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216. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 318 (1950).

217. *Id.* at 315.

218. *Compare* NAT'L ALL. TO END HOMELESSNESS, THE STATE OF HOMELESSNESS IN AMERICA 2016 9 (2016), http://www.endhomelessness.org/page/-/files/Chapter_1_online.pdf (depicting the year-to-year change in the overall homeless population in the U.S. from 2007 to 2015), *with* Smith, *supra* note 215 ("64% of American adults now own a smartphone of some kind, up from 35% in the spring of 2011.").

219. *See* SUBCOMMITTEE REPORT, *supra* note 10.

means} to all members who can be identified through reasonable effort.[220]

The notes to the proposed change explain that paper mail is no longer the "gold standard."[221] The committee explains that, following *Eisen*'s interpretation of individual notice requirements for Rule 23(b)(3) class actions, many courts have determined that first class mail is necessary in every case.[222] They go on to explain that technological changes have provided methods of communication that are more commonly used by many people.[223] The committee explains:

> As that technological change has evolved, courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly. Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. No longer should courts assume that first class mail is the 'gold standard' for notice in Rule 23(b)(3) class actions. As amended, the rule calls for giving notice 'by the most appropriate means.' It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet.[224]

The proposed rule change alludes that there are other means for potential class members to receive notice, rather than the traditional method of paper mail. The committee's notes on the proposed rule change do not specifically suggest text messages as a form of notice, but they certainly open the door for the discussion.

XII. Conclusion

In every situation involving a notice plan, the reasonableness of sending a text message as a form of notice is very fact specific.[225]

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220. *Id*. at 87.

221. *Id*.

222. *Id*.

223. *Id*.

224. *Id*.

225. *See supra* text accompanying footnotes 142–178 (describing the facts of various cases in which notice through text messages was approved or not approved).

With the ever-growing popularity of cell phones, it seems that text messages are more and more likely to be the best way to provide individual notice.[226] Potential class members may have moved, or their address is simply too costly to obtain. If it is efficient and reasonable to obtain the phone numbers of potential class members, it is the best way to provide individual notice.

I recommend that the subcommittee adopts the revised Rule 23. The Rule 23 Committee notes that sometimes electronic notification can be more efficient.[227] Text messages may be, in some cases, the most efficient and most reliable way to provide individual notice to people. The small amount of applicable case law leans in favor of accepting text messages as part of a notice plan,[228]and the trend in cell phone use in the United States suggests that most people have, or will soon have, access to text messages.[229] The proposed rule will encourage judges to accept text messages as part of a notice plan more readily, and the rule will provide clarity to parties when they are creating a notice plan. The proposed rule is a reflection of the law adapting to modern technology, and it is a necessary adaption.

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226. *See* Smith, *supra* note 215 (providing the statistics for increased cell phone ownership in the United States).

227. *See* SUBCOMMITTEE REPORT, *supra* note 10, at 87 (explaining how notice should adapt to technological advances).

228. *Supra* text accompanying footnotes 142–178.

229. *Supra* text accompanying footnotes 214, 215, 218.