

#Getyour\$\$now!: A New Plan for Class Action Notice and Administration

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Amanda M. Rose, *Classaction.gov*, __ **U. Chi. L. Rev.** __ (forthcoming 2020), available at [SSRN](#).

It is easier than ever to notify class members of a proposed settlement and for class members to file claims. So why are participation rates so low in consumer class action settlements? This is one of the most important puzzles in modern complex litigation. With billions of dollars spent on class action litigation, [a 9% participation rate in consumer class actions](#) seems a dismal return on that collective investment, even accounting for the deterrent or quasi-punitive functions that a large settlement represents for the defendants. In her new essay, Amanda Rose offers a solution to this and other related problems of class action administration and transparency—have the federal government develop and administer a website, [classaction.gov](#).

[Classaction.gov](#) is an intriguing proposal that would centralize and standardize certain administrative aspects of class action litigation and settlement (notice, informational websites, claims processing, and claims distribution) that she identifies as barriers to higher class participation rates as well as to the overall transparency of individual actions and class action litigation. Rose's key insight is that broader and cheaper notice are insufficient to induce broader class participation, even when the average class recovery is a non-trivial sum. Rather, consumers must absorb the costs of reading and understanding the notice and assuring themselves that it is not fraudulent. A federally sponsored website would leverage Americans' trust in the federal government. The use of a common government database would further streamline both the notice and claims processes.

Rose acknowledges the advantages of [classaction.gov](#) for improving direct and comprehensible notice to consumers. But her essay suggests that consumer distrust in the notice and claims process is the biggest sticking point in improving class participation rates. She observes that direct notice to class members has become much cheaper with the advent of electronic communication; likewise, new technology makes for more efficient and effective identification of potential class members. She rightly observes that something like [classaction.gov](#) would reduce the number of mismatched contact information and be a vehicle for proactively creating databases of consumers, their likely matches to class actions, and their best contact information.

While I agree that the consumer distrust argument is important and a compelling reason to give serious consideration to the [classaction.gov](#) proposal, Rose underestimates the persistent problems of notice, thus ignoring ways in which [classaction.gov](#) could be further developed to refine class action notice practices. Her approach still places too much faith in direct notice. She implies that [classaction.gov](#) can fix much of what is broken with our current system of direct notice – that it still fails to identify all potential class members, that contact information may be faulty, that the notices are unclear and difficult to parse, and that consumers who receive and read the notices are hesitant to invest the effort needed to assure themselves of the veracity of the notice. In fact, however, many emails and official hard-copy envelopes are simply discarded or deleted by consumers' as they try to sort through the daily avalanche of emails and snail mail. An email may remain unopened or perhaps deleted, not only because of distrust but because it does not rise to the top of personal communications triage. And by the next day or week, it is one of many overlooked or forgotten missives. This follows in the long legal tradition of assuming that direct notice is almost always the best form of notice, tantamount to actual notice. But what if this is no longer true? What if other forms of notice, such as notice by publication, are actually superior as a replacement for or augmentation of direct notice?

Rose is skeptical of this argument. She finds proposals for invigorated programs of targeted advertising and database

searching “impractical” for most consumer class actions and argues that consumers are more likely to respond to direct notices than advertisements.

But allow me to challenge this conventional wisdom with a recent anecdote.

In the summer of 2019, the parties to the Equifax data breach litigation announced a [settlement plan](#). After a provocatively titled article in Slate declared, “[You Have a Moral Obligation to Claim Your \\$125 from Equifax](#),” CNBC columnist Dan Mangan wrote “[I may have banked up to \\$125 by filling out this Equifax claim in seconds — what are you waiting for?](#)” Both articles went viral – especially after influential freshman Representative Alexandria Ocasio-Cortez [retweeted the CNBC column](#) with the message: “Everyone: go get your check from Equifax! \$125 is a nice chunk of change. Get that money and pay off a bill, sock it away, take a day off, treat yourself, whatever you’d like- but cash that check! It takes one minute. Do it here.” Within hours, so many consumers had filed claims that Rep. Ocasio-Cortez hastily added a tweet [advising potential class members to opt for the free credit monitoring option instead](#).

The Equifax story proves that we could be more creative about class action notice than limiting ourselves to improved direct-notice practices and plans. And that the power of Internet amplification of ideas might augment targeted advertising to more efficiently direct the right consumers to relevant class action certification or settlement notices. Rose’s proposal for [classaction.gov](#)—with its potential for growth, standardization, but also creativity—would be the perfect place to incubate and collectively execute innovative notice strategies, while continuing to fortify direct-notice practices. The Equifax example also suggests, however indirectly, that Rose is right about harnessing the power of the federal government to shore up confidence in the veracity of settlement notices and communications. Ocasio-Cortez is a popular figure, but at least some of her authority derives from the fact that she is a member of Congress. Her message that the settlement was real and that participation was important convinced millions to take the time to file a claim. It is time to use the transparency that we would gain from [classaction.gov](#) to allow the government and commentators to learn from isolated notice successes and turn them into comprehensive rules and programs.

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