

## E-Notice and Comment on Due Process

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Christine P. Bartholomew, [E-Notice](#), 68 **Duke L.J.** 217 (2018).

As I have [mentioned in previous jots](#), I am a big fan of scholarship that focuses on “[on-the-ground-practice with a sensitivity to finding solutions](#).” Christine Bartholomew’s [E-Notice](#) fits that mold. Bartholomew reviews more than 2,700 federal district court decisions on notice in class actions to examine the openness of these courts to electronic methods of notice that take advantage of newer technologies, big data, and social media.

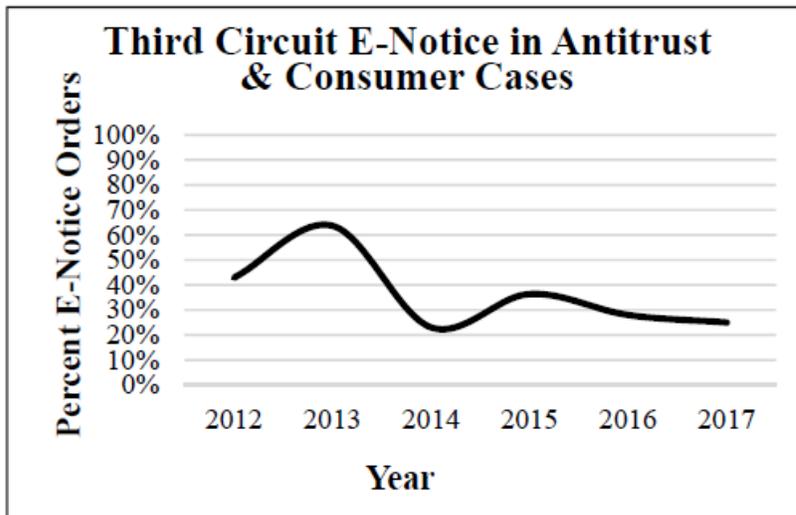
But the article is much more than that. It is one of those rare articles that uses on-the-ground practice to provide insights into one of the thorniest areas of the law—the law of due process.

The empirical project is impressive. Bartholomew searched legal databases to find every decision from 2005 (the year that the [Class Action Fairness Act](#) was enacted) to 2017 concerning notice in class actions, focusing on the notice provided to class members of pending class actions and class-action settlements pursuant to Rules 23(c)(2), Rule 23(d), and 23(e). She read each decision to determine whether the court addressed the use of what she calls “e-notice,” which she defines as “emails, text messages, website advertisements, banner ads, keyword ad campaigns, social media posts, and other digital-electronic communication.” Bartholomew analyzes the data to show a general reluctance by district courts to use such methods of notice, categorizing their concerns under three categories—fear of changing traditional notice, fear of new technologies, and fear of imprecision.

Bartholomew does a great job of toggling between the forest and the trees. She presents data and charts to support her claims, but always illustrates her claims with carefully selected examples. For example, she shows “the fear of imprecision” by singling out the Third Circuit’s use of e-notice for antitrust and consumer cases. The choice is apt—the Third Circuit has been one of the leading circuits in adopting an “ascertainability” requirement for class certification, requiring proof that the class members can be specifically ascertained or identified. It stands to reason that a preference for ascertainability goes hand in hand with an aversion to “constructive” methods of notice such as e-notice, which tends to not target specific class members but to use more indirect methods.

The data bears this out. Bartholomew focuses on antitrust and consumer cases because proof of ascertainability tends to be difficult given the lack of records of specific purchases, making e-notice a valuable means of “constructively” informing class members. Use of e-notice declines for antitrust and consumer cases in the Third Circuit after 2013 and 2014, when the court issued important opinions “doubling down” on the ascertainability requirement. There is even a bump up in 2015 when a new decision eased up a bit on that requirement.

Figure H. Third Circuit E-Notice in Antitrust & Consumer Cases



Source: P. 254.

Bartholomew brings life to this data by quoting specific cases—for example, where a court was troubled with constructive notice being both “overinclusive and underinclusive,” one of the concerns that undergirds the ascertainability requirement.

But what I really like “lots” about the article is the subtle but persuasive argument it makes about due process. Rather modestly, Bartholomew includes an “intentionally abbreviated” discussion of the statutory and constitutional requirements surrounding class-action notice. The centerpiece of her discussion is [Mullane v. Central Hanover Bank and Trust Co.](#), a case I have analyzed in [my own writings](#). *Mullane* is a masterpiece, containing a coherent theory of due process that focuses less on fixed procedural rights and more on using procedure functionally and flexibly to achieve important social objectives. Bartholomew does not discuss the implications of *Mullane* to the law of due process writ large, but observes, correctly, that *Mullane* is the law on the due process of class-action notice. Therefore, [Rule 23](#) and cases interpreting it (particularly [Eisen v. Carlisle & Jacqueline](#)) must embody *Mullane*’s flexible approach. I found this very persuasive, particularly her focus on the terms of [Rule 23\(c\)\(2\)\(B\)](#), which expresses a preference for “individual notice” when possible, but only requires the “best notice that is practicable under the circumstances.”

Bartholomew’s main argument for a flexible, *Mullane* conception of due process arises from the courts’ misgivings about e-notice. The arguments against e-notice given by courts are especially unpersuasive, such as courts’ concerns that too much notice may (supposedly) harm defendants’ reputations. This is due, in part, to the reality that many district court judges do not spend much time critically examining notice plans, understandably so. There is so much to do, and sometimes it is easier to do what is tried and true than to venture into new territory. But the reader is left with a picture of due process as a cage, forever enshrining a preference for mailed notice, which was state-of-the-art when *Mullane* was decided in 1950. Courts repeat that “[t]he Supreme Court has consistently endorsed notice by first-class mail.” But the “spirit of *Mullane*” and significant due process precedent contemplate “changing modes of notice over time.” The contrast between what *Mullane* and e-notice can offer and what we actually have provides a powerful argument that we should rethink how we achieve due process.

It is a small and impressive miracle that Bartholomew achieves such great heights from digging into the earthy practice of class-action notice plans. And it is done with crisp, sparkling writing. Needless to say, I really like this article lots and I highly recommend it!

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