Notice and Claim: The New Arbitration*

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I. Introduction

For the past decade, hundreds of companies that sell goods and services to consumers have turned to arbitration as a way to manage their class action exposure. No wonder. Consumer class actions nowadays have little to do with whether the product is truly defective or the advertising false. Even the adjective ***class*** action is a misnomer. Instead, the modern-day consumer class action pays obedience to the "Rule of One": The object is to find just ***one*** person willing to say under oath that the product is defective or the advertising false. From there, all it takes is an accommodating judge willing

to certify such a class and it's easy to see why consumer class actions have moved up the list of litigation risks that general counsel lie awake at night worrying most about.[1]

So, how does a company manage class action risk? A firm that does business nationally needs a national solution. Enter arbitration and the "class action waiver" clause, a provision by which a consumer renounces his participation in a class action and instead agrees to settle all disputes exclusively through arbitration. Such clauses are commonly used by thousands of companies in scores of industries, by almost any company that sells products or services directly to consumers. Common users include banks, credit card companies, cable television providers, retailers, manufacturers, and cellular telephone providers.

But arbitration is under attack. Ending consumer arbitration is the prime legislative priority for the American Association of Justice (formerly the Association of Trial Lawyers of America). Almost a dozen bills introduced this congressional term would accomplish that.[2] Even without congressional action, the ability of arbitration to control class action exposure has been diminished. More than a dozen states and at least three federal circuits have invalidated "class action waivers" as unconscionable.[3] But if only one state in fifty refused to recognize class action waivers, that would still be problematic for firms doing business nationally. Class counsel would simply sue in whatever state refuses to enforce consumer arbitration. Given this climate, some companies have abandoned consumer arbitration altogether.

Is there is an alternative? We think so. It is called Notice-and-Claim. Notice-and-Claim is non-binding mandatory mediation, made an express condition precedent to litigation or arbitration. Whereas arbitration has been viewed with suspicion by some courts, Notice-and-Claim is favored by a lopsided margin. But until now, however, no one has viewed Notice-and-Claim as a risk management tool with the potential for moderating class action exposure. Companies may want to rethink that.

This article discusses the theory behind the Notice-and-Claim and explains how companies who sell products or services directly to consumers might want to consider incorporating a Notice-and-Claim process into their risk management strategy. For some firms, or in some states, Notice-and-Claim may prove viable even in employment agreements.

II. What Is Notice-and-Claim?

Notice-and-Claim is a contractual provision requiring that a consumer dissatisfied with a product or service first notify the firm and give the company an opportunity to resolve the problem. Although the process is non-binding, the obligation to negotiate before suing is a "condition precedent" to further action.

What happens after that? For purposes of this article, it does not matter. Assume the dispute is not resolved through Notice-and-Claim. Some companies already have an alternative dispute resolution process in place, such as binding arbitration. For those firms, that can remain, in which case they will have a two-stage process in which binding arbitration will take place once Notice-and-Claim is exhausted. For other firms, they may default to litigation as the second-stage process. We are concerned here only with Notice-and-Claim, the first-stage obligation to mediate.

Think of Notice-and-Claim as part of the consumer complaint process, which most firms already have. This is just a further escalation, after all other direct negotiations have failed.

Here is an example of a Notice-and-Claim provision:

> Mindful of the high cost of litigation, not only in dollars but also in time and energy, the parties intend to and do hereby establish a procedure to be followed in the event any controversy should arise out of or related to any aspect of this Agreement. In the event of any controversy, claim, or dispute arising out of related to this Agreement, the complaining party shall give written notice to the other party of the controversy, claim or dispute. The non-complaining party shall attempt to resolve the controversy, claim, or dispute by responding in writing within 30 days. Completion of this complaint-resolution process is a condition precedent to initiating or participating in litigation related to or arising from the controversy, claim, or dispute.

III. Notice-and-Claim Is Overwhelmingly Favored

Why Notice-and-Claim? The answer is that it is overwhelmingly favored.

Notice-and-Claim regimes are pervasive throughout our economy. They reflect the common sense notion that if someone has a grievance, he or she should first try to work out it out before burdening the courts with a lawsuit. That is why it is so favored.

Notice-and-Claim is the antithesis of the "Rule of One." By that rule, courts hosting class action lawsuits are, in effect, asked to presume from the vast majority of absent class members' silence that all members of the class were harmed in the same way by the defendant's practice. But why should a company, or a court, accept that fiction? Under Notice-and-Claim, someone who believes he has been harmed is given a process to be heard and for redress. But if he should fail to avail himself of that process, perhaps his claim to harm is not genuine. Understand that, and you understand how Notice-and-Claim works.

If Notice-and-Claim sounds familiar, it should. It is similar to the "grievance" procedures that have been a defining characteristic of American labor relations for decades.[4] It is no coincidence either that employment class actions in unionized industries are virtually non-existent. Yet, labor grievance procedures are favored ***despite*** the fact that they may reduce the number of employment class actions in unionized industries.[5] Can that lesson be transferred to other industries or other types of transactions beyond just collective bargaining agreements?

Notice-and-Claim has already achieved broad acceptance as a condition precedent to litigation. The U.C.C. requires a buyer to notify a seller of any breach and bars a remedy to the extent the seller is prejudiced by any failure to give notice.[6] Likewise, in enacting the Magnuson-Moss Warranty Act (MMWA)[7] Congress recognized the value of such procedures by providing that no individual ***or class claim*** can proceed "unless the person obligated under the warranty . . . is afforded "a reasonable opportunity to cure such failure to comply."[8] Under the MMWA, if the complaint-resolution process has been approved by the Federal Trade Commission, courts will dismiss actions or grant summary judgment for the defendant if the plaintiff did not give the requisite notice and opportunity to cure.[9]

Courts routinely dismiss claims due to the plaintiff's failure to exhaust a mandatory but non-binding dispute resolution process like Notice-and-Claim. In *Wolsey, Ltd. v. Foodmaker, Inc.*,[10] for example, the plaintiff entered into a franchise agreement to develop Jack in the Box®

restaurants in Hong Kong and Macau. The agreement required that prior to litigation any disputes be submitted to a non-binding dispute resolution procedure. The first step of that procedure was a "senior executive officer meeting." Plaintiff skipped the conciliation process and sued directly. The Ninth Circuit held that the plaintiffs' claims must first be submitted to the contractual conciliation process.[11]

The Ninth Circuit is not alone. Other circuits and district courts have endorsed the principle that one's failure to comply with mandatory non-binding dispute resolution procedures bar a party from pursuing arbitration or litigation until the mediation is complete.[12] *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.* is illustrative.[13] There, the Seventh Circuit enforced a clause requiring that a dealership submit disputes with a manufacturer to a Dealer Policy Board before litigation could be initiated.[14] The Seventh Circuit affirmed summary judgment against the dealership for failure to comply with mandatory non-binding mediation.[15]

The Notice-and-Claim process contains features that are now so deeply ingrained in our judicial system that we often fail to recognize them as such. For example, most federal and many state courts have long-established mediation programs that call for early non-binding mediation, just like Notice-and-Claim. So do most appellate courts. Why is it less fair for the parties to agree privately to the same thing?

Notice-and-Claim is unobjectionable precisely because it is non-binding and because it advances important public policy interests. That is why even those states that view arbitration with suspicion recognize the benefit in having consumers provide a company with early notice of their claim. The California Supreme Court, which is not overly solicitous to arbitration and class action waivers, has noted the important public policy reasons advanced by Notice-and-Claim procedures. Addressing the U.C.C. requirement to give notice prior to bringing common-law warranty claims, that state's highest court has reasoned that "[t]he requirement of notice of breach is based on a sound commercial rule designed to allow the defendant opportunity for repairing the defective item, reducing damages, avoiding defective products in the future, and negotiating settlements. The notice requirement also protects against stale claims."[16]

Nothing quite sums up how overwhelmingly favored are contractual agreements to mediate than a recent Harvard law journal article. There,

the authors canvassed 279 published opinions involving agreements to mediate and concluded: "Collectively, the 279 opinions support a simple principle: courts are inclined to order mediation on their own initiative, and will generally enforce a pre-existing obligation to participate in mediation, whether the obligation was judicially created, mandated by statute or stipulated in the parties' pre-dispute contract."[17]

With such broad endorsement from so many quarters, one wonders why businesses have not utilized Notice-and-Claim more broadly.

IV. Notice-and-Claim and the Intersection with Consumer Class Actions

How does Notice-and-Claim work? If a consumer files suit against a firm without first exhausting the condition precedent, the defendant can move to dismiss the claim for failure to satisfy a condition precedent.[18] Plaintiffs' lawyers and some consumer groups will object. They will contend that this will inhibit the "right" of consumers to bring class actions, just as they have in the arbitration context. They will attempt to draw parallels to "class action waiver" cases, some of which (as noted above) have found class action waivers unenforceable and unconscionable.[19] Those arguments should fail.[20]

A Notice-and-Claim process should be fair and reasonably calculated to expeditiously resolve claims.[21] If it is, and if the company that document that, a court is unlikely to excuse exhaustion of a Notice-and-Claim procedure simply because it may incidentally inhibit class actions.

In this Section, we come to the core reason why Notice-and-Claim ought to be enforced: It enables a company to reclaim the moral high ground by advancing a public policy argument—encouraging parties resolve disputes privately without recourse to the courts—whose force trumps even the nostrum that in its most extreme form says that consumers may have a ***right*** to bring a class action.[22] "Not so fast," counters a defendant with a Notice-and-Claim procedure, "you (and others like you) must first negotiate with me."

A. A Notice-and-Claim Provision Is Not a Class Action Waiver

The principal objection that a firm with a Notice-and-Claim process will encounter is the argument that Notice-and-Claim is a *de facto* class

action waiver and should be treated with suspicion. Not so. No consumer is being asked to waive anything; all they are being asked to do is tell the company they have a claim and give the firm an opportunity to propose a satisfactory resolution. That should be unobjectionable.

From the standpoint of the business, there is a tactical advantage in forcing class counsel to admit in litigation that the basis for objection is that Notice-and-Claim inhibits class actions. Doing so exposes the real subtext, *i.e.*, that the lawsuit is not about seeking the best way to redress consumer complaints, for any consumers who have been harmed have the opportunity to be heard and made whole through the Notice-and-Claim process. Instead, the objection is really asking the court to regard the class action mechanism as the only permissible form of consumer redress.

Therein lies the fallacy. Class action procedure says no such thing. To the contrary, class action procedure places the burden on the class representative to prove that "a class action is ***superior*** to other available methods for the fair and efficient adjudication of the controversy."[23] Thus, Notice-and-Claim not only furthers public policy, it is also true to the goals of Rule 23 of the Federal Rules of Civil Procedure. Indeed, the presence of a viable and fair Notice-and-Claim process may even render a class action not "superior," thereby warranting denial of class certification.

B. Courts Have Enforced Notice-and-Claim Procedures Even If the Process May Incidentally Inhibit Class Actions

Only a few courts to date have addressed whether a mandatory mediation process is unenforceable on the ground that it inhibits class actions. But though the precedent is scanty, a principle emerges: If the Notice-and-Claim process is fair, it should be enforced even if it may have the incidental effect of impeding class actions.

The closest case on this point is the unpublished decision in *Allen v. Apollo Group, Inc*.[24] That was a class action brought by employees of the University of Phoenix seeking overtime pay. The defendant had a three-stage mediation process: Plaintiff had to first submit her claim to her supervisor, then submit a written grievance to the company's president, and finally take her appeal to "the chief executive officer" of the company.[25] The *Allen* court enforced the agreement because it did not deprive employees of the ability to present their claims to a neutral decisionmaker."[26]

Other courts have upheld "stage one" conciliations before party-affiliated or party-appointed mediators.[27] None of these is a class action, however. Nevertheless, these courts uphold the agreement precisely because the mediation process is non-binding. Thus, there is no reason to think that an otherwise fair Notice-and-Claim process would not be upheld just because the neutral is party-affiliated.

If anything, the few cases that decline to enforce such clauses only underscore that a fair clause ought to be enforced. In *Nyulassy v. Lockheed Martin Corp.*,[28] the mediation agreement the court declined to enforce suffered from other unrelated defects—it was non-mutual, and it contained a substantially shortened statute of limitations (six months) without any associated tolling provision.[29]

C. The "Claim Filtering" Feature of Notice-and-Claim Furthers Important Public Policy Interests

Conceptually, there should be nothing wrong about a clause whose only claimed sin is that it may have the tendency to make class actions harder to bring. After all, the same criticism could be leveled at other Notice-and-Claim regimes, yet they are widely upheld.

Consider the grievance procedures found in many labor/management collective bargaining agreements. One can easily imagine an individual employee bringing an individual discrimination claim that, if proven, would affect more than just that single employee. Still, he or she must take it to grievance, which could have the effect of stifling a nascent class action. No one would think to jettison decades of reliance on labor/management grievance procedures just because that process may have the incidental effect of inhibiting class actions.

The better question ought to be: Why should a court certify a class of customers if the vast majority cared so little about the supposed wrong that they failed to take advantage of the available Notice-and-Claim process? If the process is fair, transparent, and easy to pursue, the proper inference to draw from the majority who "voted with their feet" is that they have not been injured. As noted at the outset, this is the opposite of the "Rule of One" presumption that animates far too many consumer class actions filed today.

Notice-and-Claim therefore serves an important filtering function. It addresses the problem of the "overbroad class" by identifying and "filtering" those class members who have been injured from those who have not been.[30] This result is consistent with Federal Rule of Civil Procedure 23, which requires that courts ensure that all class members are similarly situated[31] and that their claimed injuries are real and not just imagined or speculative.[32]

V. Notice-and-Claim Procedures May Be Particularly Useful in Rooting Out No-Injury or Latent Injury Class Action Lawsuits

A number of class action lawsuits filed today are bought on behalf of people who suffered no injury, either because they did not read or rely on the allegedly false advertising or because only a small percentage of the product exhibits the claimed defect. Yet, class counsel will seek to certify a class of everyone who bought the good or service and demand compensation for all, *e.g.*, a refund of everyone's purchase price. Such lawsuits are particularly abusive and can be expensive to defend, for they often leave the defendant with having to "prove a negative."

It is hard to understand why the justice system should entertain a lawsuit brought on behalf of a collection of unharmed class members. Yet it does. It means that courts and the parties have to expend resources figuring out how to separate the harmed group (those deserving recompense) from the unharmed group. Class action claims administrators get rich on such things.

It is for precisely this type of case that Notice-and-Claim can serve its most beneficial risk-management function. Imagine a consumer product having a 2 percent chance of failure. A company that draws a class action will face the claim that everyone should get his or her money back. But if there were a Notice-and-Claim process, a consumer who is among the 98 percent of buyers who has not yet experienced a failure has no claim, and is without a grievance. In short, a no-injury claimant, by definition, will not be able to avail himself of the Notice-and-Claim process and, therefore, cannot satisfy the condition precedent to litigation.

Class counsel and consumer groups will criticize as unfair the notion of forcing a "no-injury" claimant to mediate. Instead, they will say, let him bring his class action unimpeded. Really? Isn't the better rule that someone who is uninjured has no business being part of a class action at all, either

as the named representative or as someone who shares in the recovery as an absent class member?[33] If fairness is the touchstone, why is it "fair" that such an individual, unharmed, should be demanding compensation? In a rational world, the critics of Notice-and-Claim should have to do the explaining. This argument is a canard.

VI. What Should a Notice-and-Claim Provision Include?

Companies considering a notice-and-claim provision should try to stay true to the following features:

- ***Mutuality:*** The procedure should be mutual and apply equally to complaints by the business and by the consumer, although it is far less likely that a company will have a dispute against a customer. Mutuality likely reflects most companies' existing practices to try to resolve disputes informally before filing suit.
- ***Limitations Period Tolled:*** The provision should provide that any applicable statute of limitations is tolled during the pendency of the notice and claim procedure. And it should not cut short the applicable statute of limitations, for example, by requiring the parties to report any complaint within thirty days of purchase.
- ***Inexpensive:*** The notice procedure should be simple and virtually cost-free for the consumer. If the complaining party need only send a letter or email to notify the other party, the complainant loses any argument that the possible economic benefit does not exceed the cost of complying, stated either in terms of time required or actual money investment.
- ***Easy to Find:*** The provision itself should be simple, straightforward, and most importantly, easy to find. As is the case with most current arbitration agreements, the notice and claim provision should receive some emphasis. It should not appear in small font buried on page 10 of a customer agreement.
- ***Optional:*** If possible, the consumer should learn of the Notice-and-Claim procedure before becoming obligated under the customer agreement. While this may not be feasible for retailers, service providers and financial institutions may be able to ensure that consumers

have received the agreement and had the opportunity to reject it before becoming obligated.

VII. Who Can Benefit from Notice-and-Claim?

Notice-and-Claim will not work for every company and perhaps not even for every type of dispute. And even companies that utilize it may decide for strategic reasons to forego a legal challenge in a given case if the legal test to their program would better await a different or later set of circumstances. Here are some guidelines for firms interested in exploring Notice-and-Claim:

- Notice-and-Claim will be most effective for those businesses willing to take proactive steps toward resolving disputes.

  Firms considering a Notice-and-Claim process need to be realistic about what they are undertaking. They cannot expect to obtain the benefits from this procedure simply by adding a clause in their consumer agreements and then forgetting about it. They need to carefully think through, and perhaps make changes to, their existing consumer complaint process. Designing a workable process should not be too difficult for most companies, however, and for many it can be engrafted onto a company's already-existing customer service and complaint-escalation protocol.

- Notice-and-Claim will be most effective in resolving disputes in which circumstances will differ from customer to customer, as opposed to a circumstance that reflect a uniform defect or a problem that will not vary from one person to the next.

  A court will be more inclined to require each consumer to submit to a Notice-and-Claim process if the circumstances differ, for example, a claimed defect in which not every product will fail, or a claim of false advertising in which not everyone will have read the supposedly false advertisement or understand it the same way. On the other hand, to the extent a particular consumer's complaint will be unvaryingly similar to every other consumer's, a court might decide that it would be futile to require everyone to submit to the process, or may decide that it is sufficient for only the class representative (or a small subset of the entire class) to undergo the process.

- Notice-and-Claim may not be available to companies that sell products governed by the Magnuson-Moss Warranty Act

  As noted above, the MMWA sets forth a special process by which the FTC must approve the Notice-and-Claim process.[34] Nevertheless, even for those firms, if they also sell a service the Notice-and-Claim process could apply to the service portion of the consumer contract even if it does not apply to disputes arising from the MMWA-covered product. Or, they might decide to institute Notice-and-Claim for their employee disputes, even if not for their MMWA-covered product disputes.

- Companies who institute a Notice-and-Claim program, either for their consumer products or services or for their employees, should design a process that is fair, transparent, and easy to use.

  A court will be suspicious if it thinks that the Notice-and-Claim process is just a "class action waiver" by another name. The process should be consumer-friendly. Companies should record the results, because the results are likely to be sought in discovery.

- Companies with Notice-and-Claim should pick their fights.

  Arbitration drew unnecessary criticism because a few companies included in their arbitration agreements clauses that curtailed remedies, limited damages, shortened statutes of limitation, or otherwise contained multiple consumer-unfriendly provisions. Moreover, companies did not always think strategically in picking which cases they would select to test their clauses. Companies that decide to utilize Notice-and-Claim should be mindful of the adage "Bad Facts Make Bad Law." In this environment, it means that until there is a more well-developed body of law, firms will want to think strategically about the kind of case they choose to test their program's efficacy. In short, courts need not, and should not, view Notice-and-Claim with suspicion. Done right, these programs should be favored and even upheld as demonstrably pro-consumer. Done wrong, a few firms could spoil this solution for all.

VIII. Conclusion

Notice-and-Claim may be a much-needed mechanism that could allow companies to take control of administering consumer redress when faced with consumer complaints, instead of abdicating control to the class action bar, as happens too often now. Properly conceived and administered, Notice-and-Claim not only provides companies with a mechanism for managing class action exposure, it actually benefits consumers. Finally, it advances important public policy goals by filtering out no-injury cases. Submitting to class actions does not have to be the only answer.

ENDNOTES

1. Sixty percent of companies report having to defend at least one class action case. Among billion-dollar firms, the rate is 69 percent, including 19 percent with more than 20 class action lawsuits. Indeed, 45 percent of smaller firms are facing them, including 13 percent with more than six. Retailers lead the list, followed by manufacturers, engineering firms, insurers and financial service providers. (*See* Fulbright & Jaworsky's 4th Annual Litigation Survey, October 15, 2007, http://www.fulbright.com/index.cfm?fuseaction=news. detail&article_id=6761&site_id=286 (July 12, 2008).)
2. The 110th Congress has seen "The Arbitration Fairness Act of 2007" (S. 1782/H.R. 3010), which would prohibit arbitration clauses in all consumer, employment, brokerage, and franchise contracts. Other bills would ban arbitration in employment agreements (S. 2245/H.R. 5129), automobile sale and lease contracts (H.R. 5312), home building contracts (H.R 1519), and consumer contracts (H. R. 1443 ["The Consumer Fairness Act of 2007"]), and others.
3. *See Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007); *Discover Bank v. Superior Ct.* (Boehr), 36 Cal. 4th 148, 113 P.3d 1100 (Cal. 2005); *Kinkel v. Cingular Wireless, LLC,* 223 Ill. 2d 1, 857 N.E.2d 250 (Ill. 2006); *Muhammed v. County Bank of Rehoboth Beach,* 912 A.2d 88 (N.J. 2006); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1003 (Wash. 2007); *Fiser v. Dell Computer Corp.*, No. 30, #424, slip op. (N.M. June 27, 2008) (available at www.supremecourt.nm.org/cgi-bin/dnloadit.cgi/slipopinions/SC30,424.html).
4. *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).
5. *See, e.g., General Motors Corp. v. Mendicki*, 367 F.2d 66, 70 (10th Cir. 1966) ("The declared policy of the national legislation on labor relations is to encourage, facilitate and effectuate the settlement of issues between employers and employees 'through the processes of conference and collective bargaining between employers and representatives of their employees,' in order to promote and preserve industrial peace.") (citation omitted).
6. U.C.C. § 2-607(3)(a). However, many states have adopted a modified version of this provision to eliminate the prejudice requirement. *E.g.,* 810 Ill. Comp. Stat. 5/2-607(3)

(a) (LexisNexis 2008); 13 Pa. Cons. Stat. 2607(c)(1) (LexisNexis 2008); Ohio Rev. Code Ann. § 1302.65(C)(1) (LexisNexis 2008). In these states, failure to give notice and an opportunity to cure bars recovery. *E.g., Connick v. Suzuki Motor Co*., 174 Ill. 2d 482, 675 N.E.2d 584 (Ill. 1997) (affirming dismissal with prejudice of claim for breach of warranty under the U.C.C. for failure to provide notice).

7. 15 U.S.C.A. §§ 2301 *et seq*.
8. 15 U.S.C.A. § 2310(e) (emphasis added).
9. *See Wolf v. Ford Motor Co*., 829 F.2d 1277, 1279 (4th Cir. 1987).
10. 144 F.3d 1205 (9th Cir. 1998).
11. 144 F.3d at 1213 (9th Cir. 1998).
12. *See HIM Portland, LLC v. DeVito Builders, Inc*., 317 F.3d 41, 44 (1st Cir. 2003) (holding that mediation was a condition precedent to arbitration); *Kemiron Atl., Inc. v. Aguakem Int'l, Inc*., 290 F.3d 1287, 1291 (11th Cir. 2002) (same); *Bill Call Ford, Inc. v. Ford Motor Co*., 48 F.3d 201, 208 (6th Cir. 1995) (enforcing requirement to present claim to Dealer Policy Board as condition precedent barring suit); *Ponce Roofing, Inc. v. Roumel Corp*., 190 F. Supp. 2d 264, 267 (D.P.R. 2002) (dismissing action where the plaintiff failed to submit to multi-tiered alternative dispute resolution process); *AMF Inc. v. Brunswick Corp*., 621 F. Supp. 456, 463 (S.D.N.Y. 1985) (enforcing clause for submission of disputes to expert panel for "advisory opinion"); *Allen v. Apollo Group, Inc*., No. Civ. AH-04-3041, 2004 WL 3119918, at *9-10 (S.D. Tex. Nov. 9, 2004) (dismissing action by multiple employees who failed to submit their claims to grievance process involving notice-and-claim procedure and dispute resolution before a sub-committee of uninvolved employees); *Ziarno v. Gardner Carton & Douglas, LLP*, Civ. A. 03-3880, 2004 WL 838131, at *3 (E.D. Pa. Apr. 8, 2004) (dismissing action where the plaintiff failed to comply with agreement to proceed before a "mediator-arbitrator who has special expertise"); *Mortimer v. First Mount Vernon Indus. Loan Ass'n*, Civ. AMD 03-1051, 2003 WL 23305155, at *3 (D. Md. May 19, 2003) (dismissing action for failure to submit to dispute resolution before the Maryland Association of Realtors, Inc.); *Fisher v. G.E. Med. Sys*., 276 F. Supp. 2d 891, 893-94 (M.D. Tenn. 2003) (staying action where the plaintiffs failed to comply with multi-tier dispute resolution system requiring mediation).
13. 811 F.2d 326 (7th Cir. 1987).
14. 811 F.2d at 335.
15. In the case of consumer warranties covered by the Magnusson-Moss Warranty Act, courts routinely enforce such agreements. *Abela v. General Motors Corp*., 669 N.W.2d 271 (Mich. Ct. App. 2003) (warranty claim must go through that procedure before warrantee can file suit); *see also Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470 (5th Cir. 2002); *Cunningham v. Fleetwood Homes of Ga*., 253 F.3d 611 (11th Cir. 2001).
16. *Pollard v. Saxe & Yolles Dev. Co*., 12 Cal. 3d 374, 380, 525 P.2d 88, 92 (Cal. 1980) (citation omitted); *see also Lange v. Schilling*, 78 Cal. Rptr. 3d 356 (Cal. Ct. App. 2008) (public policy supports enforcement of agreement requiring party commencing litigation to seek mediation as a condition precedent to the recovery of attorneys' fees because the dispute could have been resolved in a much less expensive and time-consuming manner).
17. James R. Coben & Peter N. Thompson, Disputing Irony: "A Systematic Look at Litigation About Mediation," 11 *Harv. Negot. L. Rev.* 43, 105 (2006); *see also id*.

at 108 ("Courts routinely enforce contractual obligations to mediate as a condition precedent to litigation").

18. A plaintiffs' failure to satisfy the condition precedent can be fatal whether viewed under contract law or under the Federal Arbitration Act, 9 U.S.C.A. § 2 (FAA). If the circuit is one that views non-binding mediation as falling within the FAA, then the defendant would move to compel under Section 2 of the FAA. *See, e.g., Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) (non-binding arbitration enforceable under the FAA). Some courts construe nonbinding mediation as falling outside the FAA, but no matter; in those circuits, the defendant would move to dismiss the complaint for failure to satisfy a contractual condition precedent. *See Kemiron Atl., Inc.*, 290 F.3d at 1287 (before parties could arbitrate under terms of a multi-tiered dispute resolution process, they must first satisfy the mediation requirement under the parties' agreement); *HIM Portland, LLC*, 317 F.3d at 41 (same).
19. *See* fn. 3.
20. *See Fisher*, 276 F. Supp. 2d 891 (granting motion to compel mediation and staying action where the plaintiffs failed to comply with multi-tier dispute resolution procedures that was a contractual precondition to filing suit); *Bill Call Ford, Inc.*, 48 F.3d at 208 (affirming dismissal of claim where plaintiff failed to appeal that claim to a Dealer Policy Board, which was contractually required as a condition precedent to filing suit); *AMF Inc.*, 621 F. Supp. at 462-63 (granting motion to compel compliance with contractual provision that disputes would be submitted to an advisory third party that would issue a non-binding opinion); *Mortimer*, 2003 U.S. Dist. LEXIS 24698 (court dismissed an action brought by a buyer of residential property against the seller because the buyer failed to comply with his contractual obligation to submit all disputes to mediation prior to commencing a lawsuit).
21. We offer some tips in Section VI, below.
22. *See, e.g., Discover Bank v. Superior Court,* 36 Cal. 4th 148, 113 P.3d 1100 (Cal. 2005).
23. Fed. R. Civ. Proc. 23(b)(3).
24. 2004 WL 3119918 at *1.
25. 2004 WL 3119918 at *9.
26. 2004 WL 3119918 at *10. *Allen v. Apollo* was an employment case. This suggests that Notice-and-Claim may have application to employment class actions, but readers should take caution because this may raise state-specific employment law issues that are beyond the scope of this article.
27. In *HIM Portland, LLC,* 317 F.3d at 42, a contactor was required to "refer[] initially to the Architect" any disputes with the owner, and in *Kemiron Atl.*, 290 F.3d at 1291, the parties were required to first submit their claims to the other before commencing mediation. Both of these were valid and enforced.
28. 120 Cal. App. 4th 267, 16 Cal. Rptr. 3d 296 (Cal. Ct. App. 2004).
29. 120 Cal. App. 4th 267 at 1284. The other cases refusing to enforce a mediation provision are few and, like *Nyulassy,* involve claims of unfairness or lack of mutuality unrelated to the Notice-and-Claim process. *See Dunham v. Environmental Chem. Corp.,* No. 06-03389, 2006 U.S. Dist. LEXIS 61068 (N.D. Cal. Aug. 16, 2006); *Pokorny v. Quixtar, Inc.,* N. 07-00201 SC, 2008 U.S. Dist. LEXIS 28439 (N.D. Cal. Mar. 31, 2008), appeal pending.
30. The recent "Diet Coke" case from the Missouri Supreme Court illustrates this

principle. There, a class action was filed contending that the Coca Cola Company misled consumers into believing that fountain Diet Coke was sweetened just with aspartame, the same as bottled Diet Coke, when in fact the fountain variety was a mixture of aspartame and saccharine. The trial court certified a class, but the Missouri Supreme Court reversed on the ground that the class was "overbroad." Plaintiff could not show that everyone in the class had been deceived or injured, let alone cared. *State ex rel. The Coca-Cola Co.*, 249 S.W.3d 855 (Mo. 2008).

31. *See, e.g., Grovatt v. St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008) (determining that a class consisting of all persons that had been implanted with a Silzone prosthetic heart valve had not been properly certified because not all class members had received any purported misrepresentations about the heart valve and not all class members needed the requested relief of medical monitoring).
32. *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008) (determining that a complaint brought on behalf of a nationwide class of individuals who had ingested Vioxx had been properly dismissed where class consisted of those persons who may suffer from silent or latent injury).
33. In some latent injury cases, a defect if manifested could pose a safety risk. This is seemingly the Notice-and-Claim critic's strongest case for avoiding the process. But on closer examination, it is not at all. The right thing to do for someone who suspects a design defect or systemic flaw is to notify the company. Other avenues may also follow, such as a product recall or private litigation, but there is no reason not to inform the company.
34. 15 U.S.C.A. § 2310(a)(2).