The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2012

PHILADELPHIA, MONDAY, AUGUST 20, 2012 VOL 245 • NO. 7 An ALM Publication

LITIGATION

Mandatory Mediation: Avoiding Pitfalls by Complying With the Agreement

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Special to the Legal

Discussion concerning whether to provide for mandatory mediation in commercial contracts generally results in a debate about its usefulness.

Those who oppose inclusion contend that it is ineffective. From their perspective, the parties are always in a position to negotiate, whether directly or through mediation. If they are unwilling to mediate after a dispute has arisen, compelling attendance at a mediation session simply delays resolution while adding additional expense.

Those who favor inclusion, however, insist that it is beneficial precisely because it is mandatory. They contend that it forces parties to begin a process they might otherwise defer simply because of inertia often resulting from a concern that suggesting mediation may convey a lack of confidence in one's case.

Increasingly, nonetheless, mandatory mediation is being included in commercial contracts as a prerequisite to commencing litigation. This trend apparently reflects recognition that it is often successful and allows the initiation of negotiation without any concession having been made by either side.

Even when such mandatory provisions have been included in the agreement, however, parties are often reluctant or simply refuse to honor their duty to mediate. Rather, the obdurate party ignores the demand for mediation and commences litigation without acknowledging the contractual obligation.

When this occurs, the party seeking mediation must often seek a court order barring further proceedings until the mediation is conducted.

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Historically, courts were loath to enforce agreements to mediate on the ground that their powers should not be employed to coerce what some characterized as a futile exercise. In recent years, however, judicial enforcement has become routine as experience has reflected that even compelled mediation often leads to a successful resolution.

Resorting to the courts to enforce mandatory mediation provisions, however, does entail additional expense and unnecessary delay. To overcome potential future resistance, therefore, parties have begun to insert specific sanctions for failure to comply; these have included dismissal of the claim and the imposition of attorney fees and costs to cover the expenditure for enforcement.

With the proliferation of such mandatory mediation agreements and the sanctions attendant upon failure to comply with them, counsel are well advised to pay closer attention to their terms, as noncompliance may result in the loss of a valuable right.

A recent case from the California Court of Appeal, *Cullen v. Corwin*, filed June 7, demonstrates the care that a party must exercise when confronted with a mandatory mediation provision.

The court reported that the California Association of Realtors' standard residential purchase agreement (the full text of the relevant provisions of the agreement can be found in an earlier case from the California Court of Appeal, *Frei v. Davey*, (2004) 124 Cal. App 4th 1506) provided for the prevailing party in any dispute arising under the agreement to recover legal fees and costs. The court noted, however, that the agreement further provided that "this right was subject to a condition precedent that reads, 'If, for any dispute ... to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after [the making of] a request ... then that party shall not be entitled to recover attorney fees.'"

The case involved a suit brought by the plaintiffs in 2009 against the defendants for failing to disclose the defective condition in a garage when they sold a vacation home to the plaintiffs.

Eventually, the defendants prevailed on a motion for summary judgment. Thereafter, pursuant to the standard purchase agreement, the trial court granted the defendants' motion to recover $16,500 in legal fees as the prevailing party.

In awarding legal fees to the defendants, the trial court apparently concluded that because the plaintiffs had commenced the litigation without first seeking mediation, the defendants had no continuing obligation to respond to any subsequent requests by the plaintiffs for mediation during the course of the litigation.

The California appellate court rejected this conclusion. It noted that although the plaintiffs had commenced the litigation in

2009 without first seeking mediation, one year later, in 2010, they twice requested mediation. The defendants, however, had refused those requests on two grounds, both of which were found to be unacceptable by the court:

1. There was no longer any obligation upon the defendants to respond to any subsequent mediation requests because the plaintiffs had commenced the litigation without first requesting mediation. In disagreeing, the appellate court noted that the language of the agreement is in the disjunctive. It obliged parties not to commence litigation before seeking mediation or to refuse to mediate after the making of a request. As the court stated, "The parallel structure of this language simply is not susceptible of a reasonable interpretation that the mediation request must precede the initiation of the litigation." This was true even though the plaintiffs, who were then seeking mediation, had initiated litigation without first seeking mediation and, thereby, had forfeited their own right to seek attorney fees had they prevailed in the litigation.

2. There was no duty to mediate because the plaintiffs had failed to respond to the defendants' discovery requests. Although the defendants stated that they were willing to eventually participate in mediation, they were preliminarily seeking the discovery responses so that they might first file the motion for summary judgment and thus "avoid mediation, settlement and trial." In addition, defendants asserted that mediation without discovery would be a waste of time.

In rejecting this second argument, the appellate court acknowledged that the defendants were "entitled to demand discovery requests first because they wished to pursue their motion for summary judgment to make mediation more 'meaningful,' and because mediation without discovery responses was a 'waste of time.'"

However, the court concluded that the contractual language does not allow these as justifications for refusing to submit to the mediation. In the opinion of the court, the requirement in the standard agreement is designed to encourage mediation at the earliest possible time; parties "are not entitled to postpone the mediation until they feel that they have marshaled the strongest possible support for their positions in litigation and mediation." The court further emphasized that one of the purposes of mediation is to provide "a less expensive and more expeditious forum. The costly and time-consuming procedures connected with discovery are thus not a necessary adjunct to mediation that a party can demand before participating."

By reason of the rejection of these arguments, the defendants were denied legal fees and costs contemplated under the agreement even though the plaintiffs had commenced the litigation without first seeking mediation and defendants had prevailed by reason of the grant of their motion for summary judgment.

The holding in the California case was, of course, bottomed on the specific language contained in the standard agreement. Nonetheless, this case highlights that whenever counsel is considering the inclusion of an obligation to mediate in an agreement, several issues should be addressed:

Increasingly, mandatory mediation is being included in commercial contracts as a prerequisite to commencing litigation.

1. Is it advisable to bind a party to a mandatory mediation provision before the subject of the dispute is known?

2. What sanctions, if any, should be imposed for failure to comply with the mandatory mediation requirement?

3. Should the demand for mandatory mediation by either party be required only at the initial stages of the litigation, or should parties be entitled to demand mediation at later times during the litigation?

4. Should the provisions requiring mandatory mediation provide certain guidelines, such as allowing a modicum of discovery before the mediation commences?

In addition, after the dispute has arisen, other procedural safeguards should not be overlooked by counsel:

1. Has counsel made clear that the demand for mediation is being made pursuant to the contractual requirement by citing the section and language of the agreement itself rather than referring only generally to a desire for mediation?

2. Has counsel's demand made clear that it is being made separate and apart from any prior negotiations or settlement conferences that may not have satisfied the contractual requirement to engage in mediation?

3. If a party has the right to file a preliminary court document, such as a mechanic's lien or lis pendens, would it be advisable to send a request for mediation in conjunction with this filing so that there is no possibility of a counterargument that the right to mandatory mediation has been waived?

4. Is it possible that a communication from the opposing party may be construed as a demand for mediation to which the party must respond promptly or possibly, as did the defendants in the California case, face a contention that a substantive right has been waived?

In summary, with the proliferation of mandatory mediation agreements, counsel may not adopt a casual approach with respect to either their drafting or actions that must be taken to comply with them. Otherwise, what was originally contemplated as a relatively tangential aspect of the agreement may result in unanticipated and possibly damaging consequences. •