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Respect The Clause, Avoid The Scratch

People buying and selling real estate in California usually use a form agreement created by the California Association of Realtors. Those agreements contain a mediation clause, with language designed to encourage the parties to participate in mediation before filing an action in court:

"If … any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action."

This mediation clause was recently interpreted by the Second District Court of Appeal in an unpublished case,[1] which held that mediation is a condition precedent to the recovery of attorney fees for both parties, regardless of which party initiates litigation.

In that case, defendants sold a residence to plaintiff, using a CAR form contract containing the standard attorney fee clause and mediation clause. After closing escrow, plaintiff sued for mold infestation. Although defendants won at trial, their motion for attorney fees as a prevailing party was denied, because they refused plaintiff's request to mediate.

On appeal, defendants sought their attorney fees, asserting that only the party initiating the action (the plaintiff), is required to attempt mediation as a condition precedent to obtaining attorney fees. The appellate court disagreed, stating: "This argument ignores the plain language of the contract which requires either party to mediate if requested to do so by the other party or forfeit its entitlement to attorney fees."

Respect the mediation clause, and the court won't scratch your claim for attorney fees.

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[1] Yaghobyan v. Tran, 2010 WL 1174611 (Cal. App. 2 Dist., 2010)