Commentary

Upholding The Honor And Dignity Of A Promise, California Courts Speak: Stated Terms Of Contracts Relating To Attorneys Fees 'Mean What They Say'

By
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Absent statute or contract in California, prevailing party fees and costs are not a matter of right, so each party pays for their own attorney fees and costs. *California Code of Civil Procedure §1021* As in many other U.S. state and federal jurisdictions, in California attorneys fees are only awarded to the winning party if specifically provided by statute or by the provisions of an agreement between the parties.

Prevailing Party Attorneys Fees / Costs In Residential Real Estate Contracts

Not every residential real estate purchase/sale transaction uses the California Association of Realtors[1] (CAR) standard form contracts, but the overwhelming majority of residential sales will find CAR forms as a basis for the deal. Standard CAR contracts contain a provision for prevailing party attorneys fees/costs in any action arising out of the contract, but also establish an agreement term which bars fees to a party who commences litigation without first attempting to mediate the dispute[2].

The recent case of *Lange v. Schilling* (2008, DCA-3) 163 Cal.App. 4th 1412, 78 Cal.Rptr.3d 356, joins several other California appellate decisions on the issue of enforceability of CAR form provisions in residential purchase/sale contracts which create a mutually agreed condition that one must mediate first before a court award of attorneys fees can issued in litigation[3].

Reversing a trial court attorneys fees/costs award to a plaintiff/homebuyer, where it was undisputed that the plaintiff had not attempted first to mediate the matter before filing litigation, the *Lange* court found: "We agree with other courts that the agreement means what it says: plaintiff's failure to seek mediation precludes an award of attorney fees. *Id.*, at 1414

While plaintiff/homebuyer argued[4], and the lower court ruled, that a "substantial performance exception" to the contract requirement to "mediate first" allowed for the award of attorney fees, the appellate court strongly disagreed, holding plaintiff's feet to the "fire" of a "clear and unambiguous" contract condition. *Id.*, at 1418

California Public Policy Favors Mediation As An Alternative To Litigation

CAR provisions which mandate mediation first as a prerequisite of obtaining attorneys fees/costs have been the subject of much litigation, repeatedly being upheld by California appellate courts. In *Lange v. Schilling,* other California cases were recognized for their statements of strong public policy in favor of mediation as a preferable alternative to judicial proceedings. *Id.*, at 1417. These cited cases[5], plus other rulings of the California Supreme Court which favor the sanctity of the mediation process[6], underpin the importance of the contract promises of parties to

mediate first, ignoring which they forego (by violating their own contract promises) the potential monetary benefits of the attorneys fees/costs clause otherwise contained in their buy/sell agreement.

Courts Believe In The Sanctity Of Contract Even Without Mediation Involvement

In addition to established public policy in favor of mediation as a precursor to litigation, California's courts are strong defenders of the sanctity of contract terms. In a recent decision not involving a residential real estate contract provision or mediation, the California Supreme Court spoke out *unanimous*ly for the dignity of contract. In a highly contested case involving interpretation of a contractual indemnity provision, the Court noted that the contract contained ". . . in unambiguous terms, an immediate and independent duty to defend." Sensitive to policy issues raised, as well as subsequent legislation narrowing the breadth of a duty to defend obligation, the Court refused to create any exceptions to the contract's written duty to defend language, in fact enforcing it on an "immediate basis" when tender was made, rather than at a point post-litigation finding of fault as argued by the indemnitor. *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, 79 Cal.Rptr.3d 721

Parties' Rationale For Contract Enforcement

Echoing pro-mediation decisions by California courts, the history of the provisions of CAR forms reflects strong support for mediation[7]. As early as 1993, CAR inserted "mediation first" terms in its standard residential purchase agreement. This initial insertion required buyers and sellers to mediate first before litigating, failure of which permitted the court to later deny attorneys fees in its discretion.

CAR later modified the attorneys fees condition precedent to remove "discretionary authority" to deny fees, specifically barring prevailing party fees to a party who commenced litigation without first attempting mediation. The most current version of the clause (found in the *Lange* case) expanded the restriction to parties responding to litigation if those parties refused a request to mediation.

Some would argue that CAR's motivation for the condition of "mediate-first" was not all that altruistic. In fact, the *Lange* homebuyer made that very argument in opposition to CAR's Amicus Brief. The *Lange* court ran right over Lange's argument that CAR was disingenuously arguing in favor of the restrictive clause (because the clause was really designed to protect its members, not the homebuying public) by finding that the clause barring attorneys fees "means what it says."

Public Policy Benefit Of Mediation First

In many cases residential buyers and sellers have never met, with all negotiation/communication being filtered through the real estate professionals. Mediation provides an opportunity to have that first meeting, to see and hear the other parties in person, to potentially learn why their position about matters involved in the transaction may differ. Also, at mediation a neutral's opinion of the potential outcome, plus an estimate and discussion of likely expense, can be had under the mediation privilege umbrella before discovery takes on a life of its own and the expense of the case becomes "as a stone gathering moss rolling down the hill" toward a fiscal train wreck for all parties involved.

Mediation provides an opportunity to explore with those both familiar and unfamiliar with the judicial process that their case will not get any less expensive by litigation than by mediating to a compromise resolution[8]. The *Lange* court recognized one aspect of the economic efficiency of mediation, a part of the "risk benefit analysis" mediation can provide: the Lange spent $113,000.000 to obtain a judgment of $13,000.00. Continuing his economic backslide, Lange paid not only his own resulting appeal costs, appellants' appeal expenses, his own attorneys fees for litigation and appeal, *plus* his award of fees was overturned.

Review of other cases leads to the same public policy justification: mediation can be economically beneficial, and litigation will likely be a no-win situation. In the *Frei v. Davey* case, cited in *Lange,* the pre-litigation gap between parties was around $18,540.00 plus expenses. After filing suit one side spent almost $158,000.00, the other contracting party spent over $127,287.00, the realtor paid its counsel $89,075.00. Closing in on $400,000.00 of fees plus costs, no party recovered any damages, sale of the house was not compelled and an ensuing appeal ran up the tab. *Frei v. Davey, supra,* at 1506

An Experienced Neutral May Help Overcome Apparent Obstacles To Early Resolution

While sellers and buyers are required by contract to mediate, real estate professionals (brokers/agents) who are often potentially responsible in the dispute in one way or another, are not so obligated to participate in pre-litigation mediation. It is often the case that brokers/agents (usually at the wise suggestion of company risk managers) will voluntarily join the mediation process, but this is in no way guaranteed.

It can be argued (and was in *Lange*) that the goal of not requiring real estate professionals to participate in mediation or arbitration was, by CAR design, to prevent CAR members being dragged into buyer-seller disputes. Whether true or not, experienced mediators of residential real estate disputes can, either before or at mediation, provide broad assistance to parties required to mediate who, with their counsel, wish to turn a potentially unsuccessful mediation into a negotiated compromise. For example, in some instances listing agreements for property will have mandatory mediation or arbitration clauses that could potentially hook the listing broker into a mediation/arbitration with the seller of the property. Depending on whether the selling real estate professional can also be persuaded to attend, suggesting this document's importance as between the seller who is being required to mediate and the seller's broker may help foster participation by the listing broker and thus provide a full table at mediation, fostering resolution.

If such mediator has entree with the real estate "players" (counsel, risk manager, insurance reps) from prior cases or other trade programs/lectures, contact directly by the mediator encouraging participation can bring to the table discussion of potential issues which would foster full mediation participation.

Court Enforcement And Public Policy Of Contract Sanctity Benefit Commerce

"Since our understanding of one another is conveyed solely by means of the word, he who violates his word betrays society." *Selected Essays*, Michel de Montaigne, (1533-1592, French Renaissance philosopher)

As it seems, the courts in California have and will reach out to strictly enforce contractual promises, the "words" of the parties, to uphold the sanctity of what has been agreed. As did Montaigne, the courts recognize that words of any contract are ". . . the only tool by means of which our wills and thoughts communicate . . . " and if words remain unenforced ". . . it breaks up all our relations and dissolves all the ties of our government." *Id.*, Montaigne

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Endnotes

1. California Association of Realtors is a voluntary trade association of licensed brokers and agents who assist parties in purchasing and selling real estate. CAR participates in the drafting of form documentation to aid its members in facilitating such transactions.

2. Limited and special *contractual* exceptions to the requirement to mediate first exist as specifically listed in CAR forms. These exceptions, *e.g.*, involve small claims actions, seeking injunctive or other court relief which requires filing to obtain extraordinary judicial order such as mechanics lien, probate cases and foreclosure proceedings. Contractual exception provisions will not be discussed in this article.

3. *Frei v. Davey* (2004, DCA-4) 124 Cal.App. 4th 1506, 1508, 22 Cal.Rptr. 3d 429 [CAR condition "means what it says and will be enforced"]; *Van Slyke v. Gibson* (2007, DCA-2) 146 Cal.App.4th 1296, 1299, 53 Cal.Rptr. 3d 491 [must attempt to resolve through mediation first]; *Johnson v. Siegel* (2000, DCA-6) 84 Cal.App.4th 1087, 1101, 101 Cal. Rptr.2d 412 ["(s)eeking mediation is a condition precedent to recovery of attorney fees"].

4. Homebuyer also argued that sellers waived the provision by not responding to a post filing letter offering to mediate. The appellate court rebuffed the waiver argument on appeal, noting that waiver did not form a basis of the lower court ruling.

5. *Frei v. Davey* , *Id.* at 1514 [mediation benefits of compromise solutions to litigation]; *Leamon v. Krajkiewcz* (2003, DCA-5) 107 Cal.App.4th 424, 433, 132 Cal.Rptr. 2d 362 [". . . public policy of

promoting mediation as a preferable alternative to judicial proceedings . . ."].

6. *Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 80 Cal. Rptr.3d 83 is a recent perfect example, and similar to the issue in *Lange* where a judicially created exception (substantial performance) was overturned. In *Simmons* a unanimous Supreme Court found that California's mediation statutes do not permit judicially created exceptions, confidentiality provisions cannot be impliedly waived, and estoppel will not bar enforcement of confidentially protections. The Supreme Court began its strong public stand on no exceptions when it came to the mediation privileges of statute in *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, where it held that any exception to the mediation confidentiality statutes must be created by the Legislature.

7. See Amicus Brief of CAR in *Lange v. Schilling*, *Id*.

8. A recent article in the New York Times references an empirical study by Randall L. Kiser, [co-author and principal analyst at the litigation consulting company DecisionSet] soon to be published in the *Journal of Empirical Legal Studies* which discusses the economic inefficiencies of not settling cases and concludes that both plaintiffs and defendants make wrong decisions by not resolving cases prior to trial. "Study Finds Settling is Better Than Going to Trial," by Jonathan D. Glater, *New York Times* August 8, 2008. ■