

Attempt Mediation Before Litigation, or Lose Attorney's Fees Right

The plaintiff in the case of Jay Lange v. Roxanne Schilling, et al. (2008) 78 Cal.Rptr.3d 356, ultimately spent over \$113,000 in attorney fees to recover a \$13,000 judgment, but failed to recover his attorney's fees because he did not attempt to mediate his dispute before commencing litigation.

Paragraph 22 of the California Association of REALTORS (CAR) form purchase and sale agreement, used in this and the majority of California residential real estate transactions, provides the following attorney's fees language:

“In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 17A.”

17A, however, is the critical paragraph of the CAR Agreement for the purposes of Mr. Lange and this case. 17A states, in pertinent part, that:

“Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action.... If, for any dispute or claim to which this paragraph applies, 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.”

(See Lange at 357-358, emphasis added.)

The California Third District Court of Appeal, citing Frei v. Davey (2004) 124 Cal.App.4th 1506, 22 Cal.Rptr.3d 429, and other California cases held, bluntly, that “the agreement means what it says: plaintiff's failure to seek mediation precludes an award of attorney fees.” (Lange at 357.)

(The Lange v. Schilling decision was recently certified for publication, thanks to the efforts of the California Association of REALTORS, and is available [here](#).)

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