



## **R.E.A.C.H.**

### ***Real Estate And Construction Highlights***

***A Newsletter For Real Estate  
and Construction Professionals***

**THOITS, LOVE, HERSHBERGER & MCLEAN**  
***By Kenneth R. Van Vleck***

### **Mandatory Mediation In Residential Purchase Agreements**

**THIS ISSUE:** Are mandatory mediation clauses in residential purchase contracts enforceable? California courts say “yes.”

**FACTUAL SCENARIO:** A buyer and seller of residential property entered into a standard residential purchase agreement. The seller backed out of the deal claiming that the buyer breached the agreement. After informal negotiations, the buyer demanded mediation pursuant to the terms of the contract. But the seller refused, saying that the buyer was so unreasonable, and their positions were so far apart, that mediation would be a waste of time and money. At that time, the parties were \$18,400 apart in their settlement positions. The buyer sued, and the seller cross-complained against his broker.

After several trials (and appeals), the court entered judgment for the seller, who then tried to recover his attorneys’ fees of nearly \$160,000 from the buyer. The court refused, citing the mandatory mediation and loss-of-attorneys’-fees-for-failure-to-mediate provisions of their contract. (*Frei v. Davey.*)

This appears to be the first case interpreting the new mandatory mediation language found in many California residential purchase agreements, and the consequences of a failure to mediate in good faith.

Mediation using a neutral professional is often an effective and efficient way to resolve legal problems. But some parties refuse to mediate on the mistaken belief that mediation shows weakness or because of the perceived intransigence of opposing parties. For example, in the profile case above, the seller said the parties had performed the “equivalent of mediation” by their early and extensive, but unsuccessful, settlement discussions. He asserted that the buyer’s “extreme” position proved that mediation would have been fruitless. The law does not require a “futile act;” on that basis, the seller claimed he had the right to recover his attorneys’ fees.

After several trials and appeals, the seller prevailed over the buyer (but lost on his cross-complaint against the broker). But his refusal to mediate cost him nearly \$160,000 in fees that he would otherwise have been allowed to recover. The buyer, seller, and broker spent over \$500,000 in fees on a matter that could have been resolved for \$18,400. Ironically, the party who was “right” in this litigation lost the most, paying his own fees plus nearly \$100,000 of his broker’s \$130,000 in fees as well. This kind of one-way fees risk creates an enormous imbalance in litigation that will likely affect the outcome even without a trial.

Most residential purchase agreements have mandatory mediation clauses now, and while some purchase agreements have severe penalties for a failure to mediate, others have none at all. It is vitally important to read and understand the provisions of an agreement before signing it – or at the very latest before engaging in litigation. Subtle differences in language can make for significant differences in practice, occasionally leading to disastrous results, as in the *Frei v. Davey* case cited above. Anyone considering (or being threatened with) litigation should consult with an attorney familiar with these contracts and their interpretation.

NEXT ISSUE: Commercial Tenancies: Defending or defeating them based on conditions of the premises.

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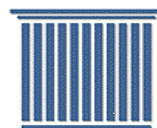
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