

Enforcing Prelitigation Mediation Clauses in State Court

APPELLATE COURT RULING OFFERS INSIGHT INTO AVOIDING PROCEDURAL QUAGMIRE

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When a dispute arises, parties to a contract generally look for ways to stay out of court if they can. Including a clause requiring mediation before litigation is one way to accomplish that goal. This kind of clause can make good business sense: after all, being warned of a dispute and having the chance to try and resolve it in mediation is usually preferable to being served with a summons and a copy of a complaint. Plus, a successful mediation is faster and cheaper than litigation and often more private. But what happens if a party fails to honor a prelawsuit mediation requirement and instead runs directly to court? Most lawyers' instinctive answer



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would be that the court should simply dismiss the lawsuit without question, but getting that dismissal in some circumstances can be more difficult than anticipated.

In both federal and state courts, enforcing a prelitigation mediation requirement that is part of an arbitration clause is simple and straightforward. In federal court, the defendant would file either a petition to compel mediation and arbitration pursuant to Section 4 of the Federal Arbitra-

tion Act (FAA), or a motion to stay the litigation pending mediation and arbitration pursuant to Section 3 of the FAA. Similarly, in state court, the defendant would move to compel mediation and arbitration, or to stay pending mediation and arbitration pursuant to the Connecticut Arbitration Act and the FAA.

If the mediation requirement is not connected to an arbitration clause, then, at least in federal court, the procedural path is still relatively simple.

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Assuming that the contract is referenced in the complaint, the defendant would generally file a Rule 12(b)(6) motion for failure to state a claim because the plaintiff did not satisfy a contractual condition precedent. In addition, because the complaint references the contract, the defendant can attach a copy of the contract as an exhibit. The motion would request dismissal or, in the alternative, a stay pending mediation. Federal courts are generally receptive to these motions: they routinely dismiss or stay cases when the plaintiff has failed to comply with an unambiguous prelitigation mediation requirement.

Until recently, the procedural path in Connecticut state court has been less clear for enforcing a prelitigation mediation requirement that is not part of an arbitration clause. This confusion resulted from defendants' moving to dismiss and arguing that failing to pursue the required mediation deprived the Superior Court of jurisdiction. For years, Connecticut Superior Court judges issued conflicting decisions about whether the failure to mediate was indeed a valid ground for granting a motion to dismiss.

The Connecticut Appellate Court reduced the confusion last year in *Mark v. Neundorff*, 83 A.3d 685 (Conn. App. Ct. 2014), when it was asked to determine whether a Superior Court judge improperly dismissed a breach of contract claim

based on the plaintiff's failure to comply with a contractual presuit mediation requirement. The Superior Court dismissed the complaint without prejudice after concluding that mediation was a condition precedent to suing and that the failure to satisfy this condition deprived the court of subject matter jurisdiction.

The Appellate Court reversed, holding that the court did indeed have subject matter jurisdiction, even when mediation was a condition precedent to litigation. The Appellate Court supported its reasoning by looking to decisions addressing enforcement of agreements to arbitrate. In that related context, the Appellate Court has held that arbitration agreements do not implicate subject matter jurisdiction because the court has the statutory right to act in the case (by issuing a stay pending arbitration), and therefore a motion to dismiss is not the proper way to enforce an arbitration agreement.

If motions to dismiss cannot be used when a plaintiff fails to comply with prelitigation mediation requirements, then how should a defendant proceed in Connecticut state court? Although the Appellate Court in *Mark* did not provide a definitive answer to that question, it did suggest that Superior Courts have the discretionary power to issue stays, and that may be a viable method of enforcing mediation agreements. Considering this guidance, the best way to invoke

and enforce a prelitigation mediation clause post-*Mark* appears to be immediately moving to stay the proceedings when plaintiff files the complaint and accompanying the motion to stay with a motion to extend the Practice Book §10-8 pleading deadlines. That way, the judge can effectively ensure that mediation occurs before the litigation proceeds. This approach also allows the court to consider the parties' contract, even if the plaintiff did not attach it to the complaint.

The other open question is what happens if the court refuses to stay the case. The best course may be to file a request to revise asking that the contract be attached to the complaint. If successful, the defendant could then move to strike for failing to plead that a mediation was conducted before the lawsuit was filed. If an objection to the request to revise is sustained, then the defendant could assert the failure to mediate as a special defense and later move for summary judgment on that ground.

As explained above, although the Appellate Court's opinion in *Mark* did not answer all of the outstanding questions on this issue, it has at least provided a somewhat clearer path for invoking and enforcing a mediation provision by clarifying that a motion to dismiss is not the appropriate procedure to use. ■