



# Sotomayor Law

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Mediation & Arbitration Services

## Federal Case Dismissed for Failing to Comply with Contractual Pre-Filing ADR Requirement

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In a case involving an insurer's dispute of coverage to pay the settlement of a data breach class action, *Columbia Casualty Co. v. Cottage Health System*, cv 15-03432 DDP (AGRx) (C.D. Cal. 2015), Judge Dean D. Pregerson of the U.S. District Court for the Central District of California granted a Rule 12(b)(6) motion to dismiss for the plaintiff insurer's failure to comply with the insurance policy's pre-filing ADR requirement.

At issue was the provision that stated "[a]ll disputes and differences between the Insured and the Insurer which may arise under or in connection with this policy . . . shall be submitted to the alternative dispute resolution ("ADR") process." If mediation were the selected process, "no . . . judicial proceeding shall be commenced until the mediation shall have been terminated and at least 60 days shall have elapsed from the date of the termination."

The July 17, 2015 Order it clear that despite the parties' intentions to mediate, dismissal is appropriate as opposed to a stay of the action. The Court reasoned that where the "failure to exhaust non-judicial remedies" is clear on the face of the complaint, a Rule 12(b)(6) motion for failure to state a claim is appropriate. Even if the pre-filing mediation or other ADR provision is not referred to in the complaint, the policy can be incorporated into the complaint by reference if "the complaint fundamentally relies on the policy."

If for some reason, the failure to exhaust the contractual ADR requirement is not clear on the face of the complaint, then a motion for summary judgment is appropriate. If that is denied, then related disputed factual issues will be decided by the judge, as with questions relevant to jurisdiction and venue.

There was no argument that the provision is unconscionable or otherwise unenforceable, and the plaintiff was not prevented from bringing a lawsuit if the mediation did not resolve the dispute. The failure to exhaust the pre-filing mediation requirement was apparent from the face of the complaint because the complaint did not allege that plaintiff complied with it prior to filing the action. Therefore, the Court held the plaintiff was bound by the agreement and dismissed the case without prejudice.

The message here is that the courts will enforce contractual provisions requiring mediation, arbitration or other forms of ADR before filing lawsuits. Drafting your complaint and informally sending it to your opponent is often a valuable early step in settlement negotiations. However, commencing an action without actually participating in a contractually required pre-filing mediation process will delay resolution of the case, and certainly cost a lot more money when the pleading is attacked and dismissed.

Contact us for your ADR needs today.

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