Traditional Litigation versus Alternative Dispute Resolution (ADR): Which Way to Go?

An important decision must be made, assuming you feel you have a strong case for your client: should you go forward with traditional lawsuit that is tried in a court or opt for a more informal process called alternative dispute resolution?

The popularity of ADR has grown steadily over the years with almost 90% of all cases resolved through some form of ADR before trial. Typically, advantages of ADR over trial includes such things as:

- Less formal and therefore less intimidating.
- Quicker resolution.
- Less expensive.
- Heard by an arbitrator or mediator.
- At the end, you get an opinion.
- After binding ADR, the opinion can usually be filed with a court and turned into a judgment.

Trial, by comparison, provides for:

- A more formal process.
- Slower process (rules of evidence must be followed, jury trials can slow the process significantly, etc.)
- More expensive (the longer the trial the more the attorney fees).
- Heard before a judge (often times my clients insist that the cases be heard and decided by a judge, someone who wears a robe).
- At the end you get a judgment, in a collection case, this is significant. You need to be able to enforce it once it's over.
- Judgments are enforceable through the court system.

Possible advantages of a lawsuit over ADR

- Simple forms of ADR usually provide a cost savings over litigation. Remember, you pay your decision maker by the hour however. Even if the cost of ADR is split with the other side, that cost can add up quickly. For more formal ADR, you might still end up engaged in a protractive discovery and depositions that make litigation costly. For a larger case, arbitration by the American Arbitration Association rules may cost the same or even exceed the cost of standard litigation.
- Mediators and arbitrators are usually free to decide cases without regard to case precedence, making the outcome of your case somewhat unpredictable. Even when they are wrong, you may not be able to appeal.
- In litigation, the rules of discovery allow you to get certain documents, testimony and other evidence out of an unwilling opponent. Those rules may or may not apply in ADR, so you may be giving up an opportunity to find out what's hidden in your opponent's files, and you may not know what your opponent is going to offer as evidence until you actually get to the hearing.
- If the debtor has a counterclaim, it may be possible for the debtor to force you to litigate that counterclaim in court even if you have a binding contractual provision for arbitration of your own claims against the debtor. If you're going to end up in court anyway, it is usually cheaper to resolve all claims in a single lawsuit.
- If you chose non binding ADR, the final award is not enforceable as a judgment, and both sides may find the process is an expensive waste of time.
- If your debtor has not agreed to ADR by contract, and won't agree to submit your dispute to ADR, you must proceed with a lawsuit and a form of ADR may result as a result of the litigation process.

Collection Cases – If you have an adequate remedy through the court system, the debtor may have assets you can take as part of the judgment enforcement process through a sheriff or through garnishment. A claim and delivery is a situation where you would want to go to court with a standard litigation process and not through ADR. Part of claim and delivery allows you to gain possession of the secured property pending the final outcome of the case.

- Where the chances of winning the case are good, it's a clear cut promissory note or other simple collection matter, where the documentation is adequate and you have good witnesses or where you anticipate getting a quick default judgment, litigation is the way to go. You can't mediate or arbitrate with someone who is not going to show up for the ADR hearing.
- Costs of litigation can be cheaper than arbitration. If your contract with the debtor mandates that you resolve disputes through ADR, your debtor may refuse to participate. If that happens, you will need to file a lawsuit. The law suit may either ask the court to order the matter be resolved through ADR or; you may give up your rights under ADR and proceed with the lawsuit itself.

Using an Arbitrator or Mediator

Assuming the matter is going to some form of ADR, a big step in getting a good outcome from ADR is your choice of the decision maker. You have a lot of people to choose from. Plenty of lawyers and other professionals are available for hire as well as active and retired judges who you can arbitrate or mediate your disputes.

The manner of selecting the arbitrator or mediator may be defined in your contract, or in rules adopted through your contract. For example, you may require an arbitrator be selected according to the rules of the American Arbitration Association. If you haven't defined rules for selecting an arbitrator, you and the other parties must find a way to agree to that selection. If you can't agree, you have to choose the path of a lawsuit. If ADR is under court order, the judge may make the appointment.

To improve the chance of finding a good arbitrator or mediator, seek referrals from professionals you trust. Lawyers may be able to recommend mediators, as many other credit professionals in your industry or professional collection services you use. If another party suggests someone, investigate the suggested

person before you agree. You don't want to hastily agree to someone who you later discover has a reputation for finding in favor of debtors.

Once the selection is made, it's crucial that the mediator or arbitrator be neutral, not have a stake in the claim, and not be overly friendly to one party or the other. You want someone who is going to be fair to both sides, has sufficient knowledge to understand your industry and has technical and scientific knowledge of your area. Someone who is familiar with the construction industry, for example, would be very helpful in a construction related case.

Parties and Theories to Include

Suing all the parties involved – Whether you file a lawsuit or start an arbitration proceeding, it's best to add all potential defendants right at the beginning. Right when things get going, you want to include all important parties and get them all served with copies of the lawsuit or arbitration to reduce the chances of the litigation dragging out. Among those defendants who should be named are:

- All guarantors, personal guarantors or co-sureties liable as a matter of contract.
- Successor companies, companies that have taken over the operations of your debtor, with no significant changes in ownership, capitalization, or other aspects of the business such as location, phone number, inventory, signs on the building, phone numbers. For example, your debtor is Sam's Bike Shop sensory named Sam & Sally's Bike Shop but under the exact same ownership and it is essentially the same company.
- Issuers of bad checks. Persons or companies that have written checks for payments that fail to clear the bank.
- Individuals liable as a matter of law. For example, your state may have a law that holds individuals or companies responsible for certain types of construction contract violations, such as taking money from homeowners and not paying suppliers and subcontractors.
- Principal to a contract. Sometimes the person who signs the contract is an authorized agent or employee and not the person who is ultimately responsible for payment. If the principal is undisclosed, the agent may be personally liable.
- Beneficiaries of the fraud or the agreement. If the debtor has transferred property or other assets out of his name to try and hide the assets from creditors or there are other beneficiaries of the agreement.
- Owners, partners, persons who hold themselves out as owners, owners of expired entities or some form of piercing the corporate veil.

Use all legal theories that you have including the obvious, breach of contract and account stated. But there also might be theories such as:

- Fraud, in simple terms, a claim of fraud alleges the debtor made a false claim and representation to you, knowing that the claim was false and that you were acting in reliance on that statement and that as a result of that reliance injury was suffered. Fraud is difficult to establish in a collection case and should be avoided if it isn't clear cut.
- Claims against the owners of a corporation or an LLC are difficult to establish and should be clear cut before you even recommend it (frequently, stay away from this) as follows:
- Undercapitalization. No enough money was invested at the start to adequately finance the business, or the principals withdrew too much money from the business resulting in financial problems.
- Co-mingling personal and corporate assets. No clear line exists between the personal assets of the owner and the assets of the business. For example, funds belonging to the business were used to pay college tuition expenses of a child or personal automobile expenses of a non employee, etc.
- Piercing the corporate veil theories may exist for the corporation being a mere instrumentality of another entity or individual or to commit a fraud or a wrong or bringing an unjust loss or injury.
- Foreclosure, recover of property such as claim and delivery.