

Options for Effectively Litigating Small Dollar California Business Disputes (Including Business to Business and Business/Customer Disputes)

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Anyone who has been involved in a business dispute that is relatively small in dollar amount knows that it is challenging to litigate that type of dispute at least in part due to the time that it takes to reach resolution and the attorneys' fees and costs that can be incurred. The following discussion gives you some ideas about how a relatively small dispute can be effectively litigated to resolution by settlement or adjudication (trial or arbitration) whether you are the plaintiff or the defendant party. For our purpose the term "effectively litigate" means a prompt (as reasonably possible), correct, cost effective resolution. What is a dispute that is "small dollar" in amount? Well . . . there is no formal or legal definition, and of course different people will have different criteria, but for the purpose of this paper I have in mind disputes that are between \$1 and \$100,000 in amount, not including attorneys' fees.

For the purpose of this paper, I assume that the dispute is already in progress and that the contract or agreement terms and provisions were previously established—in other words we are not at the contract or agreement drafting stage although the underlying contract or agreement terms could be in dispute. A disagreement over the underlying terms and provisions should be taken as a wakeup call to improve the transaction agreement processes for future transactions. Regardless of already existing contract or agreement terms and provisions, the parties should nevertheless consider and work toward alternative processes or parameters that will promote a prompt, correct resolution by settlement or adjudication.

The Small Claims Court Option. Really small business disputes of \$5,000 or less in value can be filed and adjudicated in the Small Claims Court as an effective means of resolution. The parties present their claims to the Court themselves without attorneys. Some Small Claims Courts also have pre-trial mediation programs to help the parties settle their disputes and avoid having the Court impose a resolution by adjudication. A plaintiff party with a claim valued in excess of \$5,000 can nevertheless file that claim in the Small Claims Court; however, any award made cannot exceed the Court's \$5,000 jurisdictional limit. Nevertheless, for example, a plaintiff might find it to be cost and time effective to file an \$8,000 dispute in the Small Claims Court even if any award made by the Court cannot exceed \$5,000. It isn't necessary to file a

claim valued at \$5,000 or less with the Small Claims Court—such a claim can also be filed in the Superior Court as a limited jurisdiction case (see below).

The Superior Court Limited Jurisdiction Option. Disputes of \$25,000 or less in value can be filed with the Superior Court as limited jurisdiction cases. Limited jurisdiction cases have their own set of procedures which are stated at California Civil Code sections 85 through 100. Briefly, limited jurisdiction cases provide for the option of certain required voluntary disclosures of information, evidence/documents and witnesses at the beginning of the case and prior to trial; limited in number written discovery inquiries (interrogatories, requests for documents, and requests for admissions); limited numbers of depositions; subpoenas for records; physical and mental examinations; the exchange and discovery of expert witnesses; and the option of presenting trial evidence by declaration or deposition testimony.

The limited jurisdiction rules and procedural limitations can be used advantageously to effectively litigate business disputes not exceeding \$25,000 in value. My primary concern about the limitations is with the restriction on the number depositions; however a motion can be filed with the court to allow a greater number of depositions (but you cannot predict how a court might rule on such a motion), and the parties can stipulate to a greater number of depositions but that would require the mutual agreement of the parties.

The Superior Court Unlimited Jurisdiction Option. Disputes in excess of \$25,000 are filed in the Superior Court as general or unlimited jurisdiction cases. Generally there are few limitations on written discovery and depositions. Typically cases take a minimum of 1 to 1 ½ years or more to reach trial. For a variety of jurisdictional and strategic reasons this may be the most appropriate means of resolving your dispute, for example, the amount in dispute might exceed \$25,000, or, for whatever reason, adjudication by arbitration might not be appropriate or acceptable. However, this also tends to be the most expensive and time consuming means of reaching resolution. Thus, even if the parties are adjudicating the case under the unlimited jurisdiction process, they should also consider stipulating to other options that might facilitate a more effective process.

Note that for the purpose of this paper I decided to not discuss federal court as a jurisdictional option; however, a case can be filed in federal court if there is federal question or diversity jurisdiction. Certainly you will find diversity jurisdiction (i.e., parties from different states) in a wide variety of business disputes, but before federal court diversity jurisdiction is available the dispute also must be more than \$75,000 in amount. For the purpose of this paper and small amount disputes I am going to assume that in most circumstances a plaintiff will

decide not to file the dispute in federal court, and more often than not most defendants will elect not to move the dispute into federal court.

Arbitration (by Clause or by Stipulation). Many contracts contain arbitration clauses that mandate that a dispute be decided by arbitration. Read the wording of the clause carefully as it may apply to all disputes or to only some disputes in select circumstances. Most likely the clause will also contain parameters or requirements relating to the conduct of the arbitration proceeding. Even if an arbitration clause is not applicable, the parties can nevertheless stipulate to arbitrate the dispute. There can be advantages to arbitration. For example, the parties can agree to the scope of discovery, disputes that are arbitrated typically can be resolved more quickly than disputes that are resolved in court, and in an arbitration the parties can select the arbitrator which can be advantageous if the parties want to ensure that the trier of fact has knowledge or experience in a particular subject matter area. A word to the wise: you should be aware that the courts have held that an arbitrator's decision can seldom be reversed on appeal, unless, for example, the arbitrator clearly exceeds his or her authority as specified in the arbitration clause. By agreeing to arbitration or by signing a contract that contains an arbitration clause, the parties agree to be bound by the arbitrator's award with all of its good and bad aspects, most likely even if the arbitrator arguably fails to follow the law.

Mediation (Court Required or Voluntary). One way or another in each dispute there should be an attempt to settle the matter prior to trial or arbitration. In fact, if possible and reasonable under the circumstances of the case, I believe there should be several attempts to settle the dispute, or to at least determine how far apart the parties are before any adjudication. Sometimes a contract will contain a clause that requires mediation. Additionally, in all likelihood if the case is being adjudicated in court, most likely the court will require that the parties attend at least one mediation or settlement conference session prior to adjudication. And, the parties and their counsel can voluntarily discuss settlement, or case value, or scheduling mediation whenever they want, including at the beginning of or early in the case.

On my website at <http://davidtate.us> you will find the PDF format Dispute Resolution & Mediation Questionnaire Form designed to help parties prepare for dispute resolution discussions and settle their disputes, or, if you are looking at this paper in PDF format, hopefully the following link will take you to the Form, [CLICK HERE](#).

Here is another option that might be useful in a dispute where the prevailing party is also entitled to recover reasonable attorneys' fees, such as in cases where there is an attorneys' fee clause. The recovery of attorneys' fees by the prevailing party can become a significant issue in any dispute, particularly when the fees become significant in amount when compared to the

amount in dispute. It is not uncommon for the attorneys' fees issue to become an impediment to settlement. To encourage realistic settlement offers, after the parties have had sufficient opportunity to evaluate the case, consider a stipulation by the parties that their last settlement offers at a settlement or mediation session will set the parameters for determining prevailing party status for the recovery of attorneys' fees and costs if the case ultimately proceeds to adjudication by trial or arbitration.

Liquidated Damages Clauses. Sometimes a contract or written agreement will contain what is called a liquidated damages clause which specifies that in the circumstance of a dispute damages will be calculated as being in the amount that is specified by the liquidated damages clause. Although a liquidated damages clause in some circumstances can simplify the issue of damages, but not the issue of liability or breach, a liquidated damages clause is only valid, if at all, if at the time that the parties negotiated or entered into the contract there was a reasonable effort by the parties to estimate a fair compensation for the loss that might be sustained in the circumstance of a breach, and it must have been impracticable or extremely difficult to fix the amount of actual damages. On the other hand, when a person signs an agreement, it is presumed by law that that person first read, understood and then agreed to the provisions in the agreement.

The Expedited Jury Trials Act. California enacted the Expedited Jury Trials Act in September 2010. The Act provides that after an action is filed the parties can agree or stipulate to litigate the dispute by the procedures specified under the Act. The Act also requires that the Judicial Council enact applicable rules and forms by January 1, 2011. In summary, the Act provides that when so stipulated by the parties, the dispute will be adjudicated by a jury of 8 or fewer jurors instead of 12, each party will have 3 hours to present that party's case, and the jury's verdict is for the most part binding, subject however to high/low or other agreements, with little opportunity for appeal.

Additional Opportunities to Stipulate to Processes and Parameters. Throughout the course of any dispute there are multiple opportunities for the parties to stipulate to procedures and parameters that can expedite effective litigation.

For example, in a high/low agreement the parties mitigate the risk of an unexpected or unacceptable arbitration or trial award by before the arbitration or trial agreeing to a minimum and maximum award range. The range is not disclosed to the arbitrator or trier of fact. If the ultimate award exceeds the high parameter that was agreed to in the high/low agreement, the award is capped or limited at the high parameter amount. Similarly, if the ultimate award is less than the low parameter amount that was agreed to, the defendant must nevertheless pay the low parameter amount.

As another option, a party can make a statutory California Code of Civil Procedure section 998 offer to compromise which is a formal offer to settle the case on the terms stated in the offer if those terms are accepted by the other party. If the offer is not accepted there can be significant ramifications for the party who did not accept the offer—briefly and generally, if the party who declined to accept the offer does not do better than the offer after arbitration or trial, cost shifting mechanisms kick in thereafter for the benefit of the party who made the offer possibly also relating the recovery of attorneys’ fees if attorneys’ fees are recoverable in the case by statute or agreement. Making a section 998 offer gets technical, but 998 offers are an important tool available to the parties, the use of which should be seriously considered in the course of effectively litigating every case.

Attorney Compensation Options. A few final comments about attorney compensation. Compensation is negotiable, of course. Talk with counsel—in small dollar amount cases at least consider possible options for lower hourly rates, contingency recovery, how to handle a possible award of attorneys’ fees after arbitration or trial, fixed fees, hourly fees at a lower rate with a contingency or other kicker, and variable rates or fixed fees at various different stages in the litigation.

I hope you found this discussion helpful. Contact me if you have comments.

Best regards,
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