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How to Reduce Litigation Costs by Contract

R. Garth Ferrell, Esq.

Litigation costs can be reduced by contract. This can be done in at least two ways. First, you can include an alternative dispute resolution (“ADR”) provision in your company’s contracts. Second, you can contract for payment of attorney fees: a) to the prevailing party or b) in the event of collection. This article discusses the basics of such provisions and explains the ADR process.

Arbitration:

Companies that frequently engage in contractual relationships with third parties in the course of their business can successfully limit potential litigation costs that may arise through disputes with these parties. This can be done through the use of an ADR provision in contracts. Here is an example of an ADR provision:

*The parties agree that if any dispute arises concerning this Agreement, the parties shall submit the dispute to arbitration pursuant to the rules of the American Arbitration Association for the resolution of such disputes. The parties agree that the prevailing party in such dispute shall receive its reasonable attorneys fees and costs.**

This basic ADR provision should be tailored to fit specific circumstances. For example, mediation could be added as a prerequisite to arbitration. Indeed, many of the state courts in Colorado require mandatory mediation in pending lawsuits. Mediation and arbitration are discussed in more detail below.

Attorney Fees:

Purchase orders and invoices. Many companies do not use detailed language in their purchase orders and invoices. Some companies, however, use detailed purchase orders and invoices with extensive legal provisions. Whether or not you believe it is appropriate to have detailed contract terms in your purchase orders and invoices, it can be very beneficial to include on the face of the invoice or purchase order a provision with similar language:

*If this Statement is not paid within thirty (30) days of the date of the statement, interest in the amount of 1.5% per month shall accrue on any unpaid balance. If the Seller is required to initiate collection of any outstanding balance, Purchaser agrees to pay all costs of collection, including reasonable attorneys fees.**

Agreement regarding payment to prevailing party. Parties may agree that in any dispute arising out of an agreement, the prevailing party will be paid reasonable attorney fees. Such provision might read as follows:

*In the event that any dispute arises concerning this Agreement, the prevailing party shall be entitled to recover its reasonable costs and attorney fees.**

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Alternative Dispute Resolution:

Alternative dispute resolution, known as “ADR,” includes methods used by businesses and individuals to avoid the costs and distractions of protracted and expensive litigation. In Colorado, cases involving damages of less than \$15,000 can be tried in County Court and can typically be resolved within a few months. Cases involving more than \$15,000 but less than \$100,000 can be resolved in District Court pursuant to special rules that allow for limited discovery, thus decreasing litigation costs. Many cases, however, require the full litigation process which can be very expensive. Litigation expense includes not only attorney fees, costs and expert fees, but also the time and distraction taken from the business’s main objective - that of producing income and finding new customers and clients. Early use of ADR can help avoid the direct and indirect costs of litigation.

ADR includes settlement negotiations, mediation and arbitration.

Negotiation. In a perfect world, business disputes would be resolved by simply calling up the other side. Sometimes, however, parties are entrenched in positions. Attorneys can help the parties realistically assess their positions and settle the disagreement.

Mediation. If settlement negotiations are not successful, mediation can be a helpful alternative. In mediation, a neutral third party, usually a former judge or attorney with experience in the area of dispute, will review the case and work as a go-between for the parties. Typically, when parties agree to mediation, they submit a mediation statement to the mediator about a week in advance of the mediation. Then, the parties appear at the same time at the mediation location. Some mediators like the parties to speak to each other briefly at the beginning of the mediation to explain their respective positions, but this is not always necessary. During the mediation, the parties typically congregate with their attorney in separate rooms and speak only with the mediator. The mediator acts as the go-between for the parties to communicate settlement offers, positions and concerns to each side. Mediators typically charge in the range of \$200-\$300 per hour, and the cost of mediation is typically split evenly between the parties.

Arbitration. Another form of ADR is arbitration. Under Colorado and Federal law, arbitration agreements impose jurisdictional requirements on the courts. Generally speaking, courts are not allowed to adjudicate cases where parties have agreed to arbitration and when one party asserts its contractual arbitration rights. In such cases, the courts stay the case pending the arbitration. Once the parties engage in arbitration and the arbitrator issues the arbitration award, that award is then presented to the court and made a judgment. Arbitration is usually less expensive than court trials, although arbitration is more expensive than mediation. Arbitration is almost always saves money over typical litigation because the parties have control over schedules, discovery, timing and delays.

A typical case in litigation can take well over a year to reach trial. Appeals can extend this over several years. In arbitration, the awards cannot be challenged or appealed except in those cases where the arbitrator has an undisclosed bias, where some procedural

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“Early use of ADR can help avoid the direct and indirect costs of litigation.”



Bad Checks: Boosting Your Recovery For Bad Checks

R. Garth Ferrell, Esq.

“...if the total amount due is not paid within fifteen (15) days...the maker may be liable ... for three-times the face amount of the check...”

Colorado Revised Statutes, Section 13-21-109, governs recovery of damages for checks not paid upon presentment. This section provides that any person who obtains money, merchandise or property or any other thing of value who makes a payment (other than in a consumer credit transaction as defined by statute) by making a check which is not paid upon its presentment is liable to the holder for certain statutory remedies, which the holder of the check can elect at his or her option. The most effective of these is the assessment of *treble damages* and *attorney fees* against the maker of a bad check if certain statutory requirements are met. The statute provides that if a bad check is drafted, the holder of the bad check can provide notice to the maker that the check did not clear. Notice must be in writing and given in person, by personal service or by depositing the notice by certified mail, return receipt requested and postage prepaid, or by regular mail supported by an affidavit of mailing sworn and retained by the sender. The notice provided must include specific information required by statute regarding the unpaid check: the date the check was issued, the name of the bank on which it was drawn, the name of the payee, the face amount of the check, and the statement amount of the total due. This notice must also include a statement that the maker has fifteen (15) days from the date of notice to make payment in full of the total due, and that if the total amount due is not paid within fifteen (15) days after the date notice was given the maker may be liable in a civil action for three-times the face amount of the check but not less than \$100.00, and that in such civil action, the court may award court costs and reasonable attorney fees to the prevailing party. Care must be exercised in following the statute’s notice requirements exactly.



For example, Company A, a sofa manufacturer, sells ten sofas to a sofa distributor, Company B, for \$5,000. Company B pays with a check. The check is returned for non-sufficient funds. Company A then provides a statutory notice to Company B. Company B does not pay. Company B will be liable for \$15,000, plus attorney fees in an action brought based on this debt. The statute also applies to services. The statute specifically excludes certain consumer credit transactions, which may include certain transactions such as car loans, home loans, and other typical consumer credit.

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defect in the arbitration exists, or where the arbitration was mandated by statute, rather than solely by agreement of the parties. Avoiding an appeal can significantly reduce litigation costs.

Mallgren & Ferrell, P.C. has had extensive experience in alternative dispute resolution, including mediation and arbitration. If you have any questions about these processes or about seeking ways to reduce litigation costs, please do not hesitate to contact us.

* The provisions on page one are sample provisions and are produced only as examples. Legal counsel should be contacted should you need a similar provision.

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Our goal is to provide cost-effective legal assistance to help our clients achieve their personal and financial goals.

What's in Your Mortgage Loan Documents?

Paul Chmielewski, Esq., LL.M.

In an article recently published on HeraldTribune.com entitled "Review of mortgage documents could save your home," experts estimated that between 60%-80% of real estate loans are improperly serviced and administered. This was no surprise to our office. We have assisted many borrowers who were improperly charged fees in residential and commercial loan transactions. The most common problems involve excessive escrow payments on loans (most often residential home loans) and the assessment of loan prepayment penalties with no basis in the loan documents (most often with commercial loans). A warning sign for excessive escrow payments is if you receive an escrow refund at the end of every year or three or more months of escrow payments are required to be prepaid when purchasing your property. Believe it or not, prepayment penalties are sometimes charged without justification. Some of our clients have contested and won prepayment penalty refunds in excess of \$70,000. Feel free to contact us if you suspect that your lender may be requiring you to make excessive escrow payments for property taxes and homeowners insurance or your lender has assessed a prepayment penalty for closing out your loan for which no basis appears to exist.

"Intentional or not, mistakes on the part of mortgage brokers and funding lenders are characteristic of the housing boom."

Lew Sichelman, United Features Syndicate, Inc.

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