Mediation and Arbitration of Small Real Estate Cases in Oregon

What is a "Small" Real Estate Case? As will be seen from the discussion below, a "small" case has to be evaluated based upon the cost and risk of loss. When attorney fees, and mediator and arbitrator fees, are factored into the recovery, a $20,000 dispute can increase exponentially. But under the right circumstance, such as complexity of the case, with expert witnesses, etc., a $50,000+ case can even be viewed as "small".

When the dispute involves non-dollar issues, such as specific performance, settlement often is out of the question, since money is fungible, but real estate is not.

Mediation and Arbitration Generally. Under the OREF Sale Agreement, there is mandatory alternative dispute resolution. Sellers and buyers that have a monetary dispute over $10,000 *must* first offer or agree to mediate before - or promptly after - filing for arbitration.

If the claim is $10,000 or less, the disputants must go to Small Claims Court, should they be unable to agree. And the parties do not need to first go to formal mediation (it can occur in the hallway outside the Small Claims Court via a voluntary mediator).

But the weak spot in the dispute resolution process under the Sale Agreement is the fact that nearly always, disputants going to mediation use an attorney. The mediation can last 3-4+ hours and requires the use of a paid mediator. The end result is that even in mediation, the process can become costly. $5,000 for each side to mediate a case is not out of the question.

Moreover, the Sale Agreement does not provide for attorney fees in mediation. Why? Because in mediation, there is no "prevailing party" and the mediator is a neutral, so he or she cannot "award" attorney fees.

So a $20,000 earnest money dispute can be whittled down significantly even if with a successfully mediated settlement. And if the parties do not settle in mediation, what is the result? Both will certainly expend more than $20,000 each to arbitrate the case. This means the winner (i.e. the party who gets the $20,000) will expend more than that, and seek prevailing attorney fees from the other side. So a $20,000 earnest money dispute could end up costing the losing party $30,000 -$60,000+ in fees paid to their own attorney *and* the other side's attorney.

Rules of Thumb. Mediation gives the parties the ability to each control the outcome and thereby reduce their risk. But arbitration is a zero-sum game since the parties have abdicated their control to an arbitrator. There are certain logical rules about arbitration that should (but don't always) flow from the above discussion:

- In addition to being comfortable with the facts and law on one's side, the decision to arbitrate financial disputes[1] requires a cost-benefit analysis – does the amount in dispute justify the risk of losing?
- Good facts and law are better than a weak case, but is the case airtight? If not, there is risk in arbitration. And if there is risk, it should be settled in mediation.

The Take-Away. If it doesn't seem obvious, a good mediator will make it so. One can say that the more complex the case is, especially with experts, disputes of $10,000 - $30,000 or $40,000 should almost always be settled in mediation.

Beyond that, assuming the case has its strengths and weaknesses, settlement turns on each side's appetite for risk, and their respective abilities to absorb a loss.

A good mediator can settle almost any case, regardless of the amount in dispute. And remember the intangible component in settling a case, large or small; the emotional relief is oftentimes immeasurable.

[1] I say "financial" because some disputes that go to arbitration seek equitable relief – such as specific performance - in addition to money. In those cases, the dollar award takes on less importance that the land at issue.