

LEGAL BULLETIN



DIOGUARDI
FLYNN LLP
ATTORNEYS AT LAW

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NEWSLETTER

RELATIONSHIPS • RESULTS



FEATURE:
HAS YOUR LENDER
ILLEGALLY CALLED
YOUR LOAN DUE?

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STRETCHING YOUR LITIGATION DOLLAR – THE VALUE OF A COMPREHENSIVE CASE ANALYSIS

by Peter Moolenaar

In challenging economic times, the most valuable legal services are often performed at the inception of a matter. During the initial analysis of a file, skilled attorneys not only measure the strengths and weaknesses of their client's claims, but even more importantly, evaluate the realistic chance of recovering adequate monetary relief. It is no secret that protracted litigation is expensive and often shrinks the pool of collectible assets available for resolution of a dispute. In a recession, an early evaluation of the financial wherewithal of the adverse party is often the most important factor in determining the appropriate litigation model.

Although most litigators pride themselves on their ability to skillfully prepare and present a case at trial (and to a certain degree the author of this article is no exception), the reality is that the super-majority of all cases never reach trial. Most cases are settled through alternative dispute resolution (“ADR”) – typically, negotiation between parties and counsel or through more formal mediation. In down economic cycles, parties often turn to ADR earlier and in greater frequency.

Clients and counsel must conduct due diligence at the onset of a matter to identify whether certain economic factors – *e.g.*, insolvency of the adverse party, changing market conditions

and/or potential competing creditors – prohibit traditional litigation and necessitate adopting a litigation model that aggressively pursues early resolution via ADR. In the early stages, it is often the client that has the best insight into the financial vitality of the opposing party. Therefore, it is critical that clients and counsel work together to compile all available background information about the adverse party before implementing a litigation strategy. Failure to properly evaluate the financial environment of a matter increases the chance of ending up in the unenviable position of discovering, after incurring significant expense in protracted litigation, that the adverse party is judgment proof – insolvent or otherwise lacks sufficient resources to justify continued litigation.

The lawyers at Dioguardi Flynn are experienced in providing a comprehensive analysis, including evaluating the financial environment, and crafting a litigation model for each matter. Recently, we have been successful in resolving several disputes, which primarily arose from tightening market conditions, in the initial phases of litigation by using a combination of negotiation and early mediation. In each case, the preliminary analysis of the parties' relative financial strength and impact of changing market conditions provided the framework for achieving a successful resolution.

FIRM NEWS.



DIOGUARDI – A CENTER OF INFLUENCE

Mark Dioguardi has been recognized by *Arizona Business Magazine* as a 2008 Center of Influence. Mark is one of ten attorneys so honored in the Valley. Mark was previously honored by the *Phoenix Business Journal* as one of the Valley's

“Top 10 Leading Lawyers.” For nearly 30 years, he has positively impacted the legal arena, particularly in the areas of real estate, banking and finance. Congratulations Mark!

FIRM WINS \$14,000,000 JUDGEMENT

John P. Flynn and Peter Moolenaar of Dioguardi Flynn LLP, and co-counsel, Michael Jason Lee of San Diego, California represented Media Services Limited in a Maricopa County Superior Court lawsuit alleging claims against an off-shore Internet billing and payment processing intermediary and its principals for breach of contract, fraud, negligent representation, unjust enrichment and conversion.

At the conclusion of a two week jury trial, attorneys Flynn, Moolenaar and Lee were successful in piercing the corporate veil and prevailing on all counts to secure a verdict in excess of \$14,000,000. *Media Services Limited v. An, et al.*, CV 2004-005095.

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protected. At Dioguardi Flynn LLP we enjoy litigating cases on behalf of our clients. However, the stress felt by our clients is reduced ten-fold if we have had the chance to work with them at the outset to ensure the transaction or relationship has been appropriately documented. It is always easier to budget for and tolerate the minimal front-end legal expenditure, as opposed to financing a long-term litigation battle that has ensued because the documentation is inadequate or missing in its entirety.

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Consultation with an attorney who is knowledgeable in the area of lender liability may determine that the borrower has recourse.

The possibility that a borrower might have a legal remedy in such a confrontation will be heavily dependent on the specific facts of the case. These circumstances need to be carefully examined and explored.

The first area of inquiry should be with the loan documents themselves. Not all loan documents are created equal. The form of loan documents can vary significantly from lender to lender, and their respective attorneys. And “standardized” form loan documents generated by computer programs can be rife with provisions inappropriate to a particular situation.

In either event, the loan documents may not accurately reflect the parties’ agreement, or may by their express terms provide the borrower with defenses or remedies.

It would not be entirely surprising to find an occasional lender who, coming under regulatory pressure to reduce its concentration of real estate loans, might itself peruse a loan agreement in search of a justification to call a default and thereby accelerate the maturity of a loan. But lenders are under a duty to deal with their borrowers in good faith and could expose themselves to significant liability and damages if they do not deal with their borrowers in good faith. Additional legal principles of fraud, equitable subordination, breach of fiduciary duty, anti-trust, interference with contractual relations, and environmental laws, can all affect the outcome of a particular lender liability case, so it is important to consult a lawyer with experience in dealing with these issues before deciding on a course of action.

Lenders may, at times, be tempted to call loans due when they have no legal right to do so.

And while this article focused on real estate loans, most of the principles and dynamics mentioned in this article apply equally to other types of loans.