

Resolving profit participation disputes presents unique challenges

By Diane Wayne and Joel M. Grossman

Profit participation disputes are a world unto themselves, combining classic contract issues with special issues related to motion picture and television industry practice. Rather than end up in high-stakes, “winner take all” trials or arbitrations, mediating these disputes makes sense and can be far more effective. Following are suggestions to help resolve these often thorny disputes.

Don’t just be an advocate, be a problem solver. This suggestion probably applies to all manner of disputes, but can be especially valuable in this area, where the parties have a high likelihood of working together on other projects in the future. While it’s critical to be a zealous advocate for your client’s position, often the best resolution is one that solves all parties’ problems. Be generous to your opposing counsel. The odds are good that you will see them again.

Review the participation agreement carefully to determine if there is an internal statute of limitations. Be aware of any tolling agreements. While you are no doubt familiar with the code’s statute of limitations for written contracts, talent agreements often have their own internal, and binding, statutes of limitations. Most parties are willing to enter into tolling agreements while they attempt to settle the dispute. At the same time, look for ways to streamline the audit process when possible.

Carefully review the agreement’s definition of all defined terms such as “rolling breakeven.” Do not rely on standard industry use of such terms, or definitions in other contracts. Just when you think you understand the unique vocabulary

of entertainment industry contracts, you can discover that one company’s “rolling breakeven” has a different meaning than another. Consult the internal definitions section early and often.

To the extent possible, find out how other similar disputes have been resolved (a) with the same parties, or (b) with other parties. Prior settlements, of course, do not constitute binding precedent, but informally the parties are likely to follow the outcome of prior disputes concerning the same or similar issues. Your opposing counsel may well be receptive to an outcome that has been endorsed and accepted by others.

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As in all negotiations, be flexible. Look for “gives” that will not set a precedent or hamstring your negotiations with others. Suggest non-precedential solutions tied to the specific circumstances of the case. This is part of being a problem solver. Neither side wants to give in on points which it maintains are deal-breakers, and the parties can help each other avoid outcomes that are viewed as bad precedent.

Seek to combine settlement of the claim with a new venture, e.g., resolve an actor’s claim by casting him in a new production. This is one way in which these negotiations are different from many other contractual disputes, in which the parties are unlikely to ever do business with each other again. In this industry new projects come up all the time, and can create a “win-win” resolution for each side.

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ing a resolution, consider a “most favored nations” clause as to the results of that negotiation. When the parties are aware that a similar dispute is being negotiated, it may make sense to preserve resources by agreeing that the result of the present negotiation will be on par with the resolution of the other dispute, in terms of agreed adjustments or other deal points.

If you are unable to settle, consider alternative means of resolving disputes such as baseball arbitration. If the matter cannot be resolved, the parties should at least attempt to negotiate the terms of a practical and cost-effective arbitration, such as a high/low or baseball arbitration, in which each side submits a number to the arbitrator and he picks one of the numbers. This gives each side a strong incentive to set forth a reasonable number.

Each profit participation case is unique, and calls for its own approach, and not all of these suggestions will apply in all cases. Hopefully some of these suggestions will assist the parties in resolving the dispute on terms they agree on, rather than submit the dispute to a third party whom they influence but don’t control.



Hon. Diane Wayne (Ret.) is a neutral with JAMS. For further information, please visit www.jamsadr.com.



Joel M. Grossman, Esq. is a neutral with JAMS. For further information, please visit www.jamsadr.com.