

Chapter 5

When Settlement Fails—Commencing the Lawsuit

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§500 In General

The preceding four chapters assume that most small personal injury cases settle without the necessity of litigation. Your investigation of the case, preparation of the file, and negotiation with the insurance carrier will, more often than not, result in a mutually acceptable settlement. However, when you have sent the letter of demand and have either received no response or a response that is so low as to be virtually meaningless, the time has come when the men are separated from the boys. The trial lawyer will file suit; the settlement lawyer will make another call in a vain attempt to beg for settlement. This chapter is dedicated to the former, the trial lawyer, and sets forth the factors necessary to commence, and get well into, litigation.

§510 Filing Suit

In most jurisdictions the filing of the lawsuit itself is the ultimate offensive and aggressive tactic. It forces the hand of the insurance carrier to make an important decision: should they make a final attempt to settle, or should they engage the services of an insurance defense firm? In most cases the decision has already been made by the carrier. If your initial demand is met with a response that borders on the ridiculous, the carrier has already made the decision to litigate or at least make you litigate. The following criteria are essential ingredients for the commencement of a lawsuit in a small personal injury case.

§511 Essential Elements for Filing Suit

Before you actually file the suit in court and have it served upon the defendant, take stock of the following five factors.

§511.1 Commitment

Earlier in this book I discussed the importance of commitment. Once you have agreed to take the case, no matter how small or how burdensome, you have committed yourself.

Once the complaint has been filed there is virtually no backing out, at least with any credibility. There are only six ways that the lawsuit will end.

1. Settlement after filing the complaint.
2. Settlement during the discovery process.
3. Settlement just before trial.
4. Settlement during trial.
5. Dismissal of the case.
6. A verdict.

These should be the only reasons not to complete the case. The following are several unacceptable reasons for dropping the case:

1. Too much work.
2. Not enough cooperation from the client (you should have been aware of this long before filing suit).
3. The defense attorney is too difficult to deal with.
4. The potential value of the case is too small.
5. The case is not as good as you thought it was (you should have known this before you filed suit).
6. Other problems and business in your office are more pressing.

In summary, the first major step in filing the lawsuit is the mental adjustment to commitment. File the suit, hope for the best, but be prepared to go all the way to trial. Expect that you will go to trial. Prepare the case as if you will go to trial, and lastly, convince your client that the case is likely to go to trial. When both you and the client have committed to the lawsuit itself, you have taken the first important step toward the expedition.

§511.2 Complaint

The complaint is your vehicle to litigation. Its contents are extremely important. Most jurisdictions do not require a detailed complaint. Notice pleading, as it is called, requires a plain, concise statement of allegations setting forth the essential factors of the lawsuit. If your jurisdiction has adopted Rules of Procedure similar to the Federal Civil Judicial Procedure and Rules, you will note that Rule 8 provides that the pleading shall contain a short and plain statement of the claim showing that the pleador is entitled to relief. Too many words, phrases, statements, and conclusions can hurt you rather than help you. I have seen complaints from experienced trial attorneys that are so simple an inexperienced attorney would think they were drafted by a first year law student.

The average small personal injury case must contain at least the following in the complaint:

1. Identification of the parties.
2. A statement regarding jurisdiction and venue such as residence of the parties.
3. The incident which is the subject of the complaint such as automobile collision, slip and fall, assault, or negligent design of a product.
4. The date of the incident (“on or about” is usually sufficient to set forth the approximate date).
5. The nature of the injuries in general terms and how they affected the plaintiff. It is my practice to indicate generally the nature of the injuries but to say that “they include but are not necessarily limited to....”
6. The results of your clients injuries such as:
 - a. Medical bills—past and future.
 - b. Property damage.
 - c. Loss of income—past and future.
 - d. Pain and suffering—past and future.
 - e. Permanency, including permanent disfigurement and permanent impairment.
 - f. Loss of consortium if sustained by your client’s spouse.
 - g. Negligent infliction of mental and emotional distress if appropriate.