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UNDERSTANDING LITIGATION

By Darryl J. Horowitt

On virtually any day of the week, you can pick up a newspaper and read about a lawsuit. You read the article and say to yourself: "There but for the grace of God go I." Then, the seemingly inevitable happens: You receive a letter from an attorney (or their client) that you are to be sued, or worse, you are served with a lawsuit.

In this litigious society, it often seems that it is not a matter of if, but when, you might be named a defendant in a lawsuit. Though many are familiar with litigation in general, they are not as familiar with the specifics of the process of what steps should be taken if sued. This article will discuss the litigation process in general and certain steps you should take if you are sued.

The Complaint

Lawsuits are started by the filing of a "complaint" in the proper court. The party initiating the lawsuit is known as the "plaintiff," while the party responding to the lawsuit is known as the "defendant."

The complaint is required to name all parties who may have responsibility to the plaintiff, and it is also required to concisely set forth facts upon which the plaintiff's claim is based.

In many instances, the lawsuit will contain one or more "causes of action," which is merely another name for a request for relief. For example, where a plaintiff is suing to recover money for a breach of a written agreement, the complaint may contain a cause of action for breach of written agreement *and* one for money on an implied agreement (known as a "common count"). Similarly, a complaint seeking to recover damages for injuries sustained in an automobile accident may set forth a cause of action for negligence in the operation of a motor vehicle, as well as a separate cause of action for general negligence.

The complaint may also set forth seemingly different causes of action to recover the same amount of money; this is known as alternative pleading. For example, a plaintiff seeking to recover money may sue for breach of contract (which is based in contract), as well as a cause of action for fraud, which is a tort.

Upon Receipt, Notify Your Attorney

As soon as practical after the receipt of a lawsuit, notify your attorney. Your attorney should carefully review the lawsuit for any potential defects in the complaint and should also meet with you to determine if there is another party who might be responsible for defending you in the lawsuit. Such a defense might be available either under an insurance policy or under the terms of a contract whereby another party has agreed to indemnify and defend you against such a lawsuit. For example, if you are sued to recover damages for injuries sustained by someone involved in an automobile accident with one of your employees, your general liability or automobile insurance should provide a defense. Similarly, where property damage is claimed for discharge of pollutants that may have occurred several years, if not decades, earlier, earlier-issued insurance policies may provide a defense.

In many instances, you should also immediately notify your insurance agent of the loss so that your insurance carrier can hire an attorney to represent you. It is important that you do so as soon as possible, because most insurance policies require prompt notification of any known or possible claim, and the failure to provide prompt notification may provide grounds for the insurance company to deny you a defense.

If you believe an insurance company has a duty to defend you, and is refusing to do so, return to your attorney. Experience has shown that in many instances, an insurance company will attempt to avoid its obligation to defend you by raising certain clauses in the insurance policy that they believe permit them to deny you a defense. However, in many instances, your attorney may be able to negotiate an agreement with your insurer whereby they will provide you with a defense, either with or without a reservation of their rights to discontinue a defense in the future. Again, the primary goal is to get the insurance company to pay for a defense and negotiate with them to also pay to the plaintiff any damages that might be awarded at arbitration or trial.[1]

Where an insurer refuses to provide you with the benefits of your insurance policy, you may be entitled to sue to recover the benefits under the policy for what is known as a "bad faith" breach of contract. Where it can be established that the insurance company has a pattern of denying benefits even though it knows that benefits are due, you may also be entitled to recover punitive damages.

It is also important to contact your attorney as soon as possible, because generally you are required to respond to a lawsuit within 30 days after you are served with it; 20 days if the complaint was filed in federal court. If you fail to respond promptly, default may be entered against you. A request for entry of default prevents you from taking any other steps in your defense unless the default is set aside. Additionally, once a default is entered, the plaintiff can ask the court for a default judgment, which may be entered by the court without your input.

Generally, the only grounds for setting aside a default or default judgment are surprise, inadvertence, excusable neglect, or the failure to be properly served with the lawsuit.[2] Thus, if you are properly served with a complaint, and simply fail to respond to it, you may not only have a default entered against you, you may be prevented from setting it aside, because the failure to merely note that the lawsuit requires a response within 30 days after its service is generally not a valid reason, by itself, for setting aside the default. However, if you promptly forward the claim to your attorney, who then misplaces it or otherwise fails to timely respond to it, a default may be set aside on the grounds of attorney neglect.[3]

The Response

As noted above, the response to the complaint needs to be timely filed. If it is not, default may be entered against you. Thus, the first step your attorney will generally take is to begin the preparation for a response.

The response may take several forms, the most common of which is the answer. The answer responds to the allegations of the complaint and also sets forth any particular defenses you may have to the lawsuit.

Other pleadings that may be filed by your attorney include a demurrer, which asks that the complaint be dismissed because the complaint, as drafted, does not state a claim against you. In federal court, a motion may be filed known as a motion to dismiss. For example, a party is generally required to sue within a specific period of time (known as the "statute of limitations") and thus the complaint may be improperly filed. A motion filed early on in the process based on the failure to timely file the complaint may be brought

[1] In some instances, it may be necessary for your attorney to actually sue your insurance company to provide a defense.

[2] See Code of Civil Procedure §§ 473 and 473.5.

[3] See Code of Civil Procedure § 473. This provision does not, however, provide for relief from default where you, as the client, specifically instruct your attorney not to respond and a default is thereafter taken against you.

and, if successful, may dispose of the case before any great expense is incurred.

Discovery

Once the answer has been filed, the next stage of the lawsuit is known as "discovery." This is the process by which each of the parties to the lawsuit can gather facts regarding the other party's case.

The methods used in discovery include: Depositions, an oral examination taken under oath, before a court reporter; interrogatories, written questions that require written answers under oath; request for admissions, in which a party is asked to admit or deny the truth of certain facts or the genuineness of documents; and a request to produce documents, in which a party may be required to produce documents relating to a lawsuit.

In many instances, a lawsuit can be defended with little or no discovery. However, other matters may be document-intensive, requiring much in the way of discovery. Thus, while discovery in some cases may be relatively inexpensive;[4] in others, the cost may be much more significant.

Because there is often much gamesmanship during discovery, it is often the most expensive part of any case. It is therefore necessary for you and your attorney to meet and establish a discovery plan so that you, as the client, know what to expect, and the attorney, as your representative, will know his/her limitations.

Pre-trial Motions

With the information learned from discovery, the attorney may determine that a pre-trial motion could be filed that could remove you from the lawsuit. The most common of these motions is the motion for summary judgment, which is a request that the court grant a judgment in your favor because there are no issues that need to proceed to trial.[5] The summary judgment is based on the pleadings and declarations of the parties rather than live testimony.

Because it is relatively easy to raise a "triable issue," summary judgment is rarely granted. However, there are cases where summary judgment is particularly appropriate; especially where your opponent has not provided you with any facts to support their claim. For example, you may be sued for breach of a promissory note. You have evidence that the plaintiff had provided you with a bad product and agreed to give you a credit, but their bookkeeping department did not have a copy of the credit memo that is in your possession. Though you have provided a copy of the credit memorandum, they refuse to dismiss the lawsuit, fearing a malicious prosecution action. A summary judgment motion would be appropriate in such a case.

Another example is where the lawsuit may be barred by a particular statute of limitations. As discussed above, the party may ask the court to dismiss a lawsuit on the grounds of statute of limitations by the filing of a demurrer. However, the party may have alleged sufficient facts to avoid a demurrer but, in discovery, may have disclosed other facts which warranted dismissal. The motion for summary judgment would, therefore, be appropriate.

A similar motion, known as a motion for summary adjudication of issues, which asks that the court grant a summary judgment as to a particular issue only, may also be available. For example, the complaint may set forth five or six causes of action against you, and summary judgment will not eliminate all of them. A motion for summary adjudication of issues, however, may narrow down the case so that the cost of a trial, if necessary, is significantly limited. In some instances, where a motion for summary adjudication is granted, and many of the causes of action are dismissed from the lawsuit, the

[4] In "Limited Jurisdiction" actions (i.e., ones with a value of less than $25,000), a party can actually initiate discovery with the filing of the complaint by serving a "Case Questionnaire," which sets forth the plaintiff's factual and legal position and which requires the defendant to serve, along with the answer, a completed questionnaire setting forth the facts supporting their defense.

[5] In California, the standard for summary judgment is that there is no triable issue of material fact (see Code of Civil Procedure § 437c); in Federal Court, it is that there is no genuine issue of material fact (see Federal Rules of Civil Procedure, Rule 56).

plaintiff may not want to proceed further because the remaining claims in the complaint are weak.

A motion for summary judgment/summary adjudication of issues may also be appropriate where the defendant has not disclosed any significant facts through discovery and you want to determine the opposing party's theory during trial. By filing a motion for summary judgment, the opposing party will be required to at least put forth some facts, by way of affidavit, that would negate your motion. In doing so, they are forced to "lay their cards on the table" prior to trial, thereby enabling you to better prepare for trial. As such, even in some instances where you can believe that a motion for summary judgment may be denied, a motion for summary judgment could be helpful to trial preparation.

Getting Trial Scheduled

Once all of the parties to the lawsuit have filed their answers, the case is "at issue," meaning that it is ready for trial. The court, however, does not automatically set the case for trial once all parties have answered. Rather, in many counties, the parties must file a request to set the case for trial, known as an "At Issue Memorandum." In many counties, such as Fresno and Tulare, trials are scheduled at regularly scheduled status and/or case management conferences. In Federal Court, trials are generally scheduled in a pretrial conference.

ADR

In Fresno County, as well as Sacramento and Sonoma Counties and the Northern District of the United States District Court, counsel are required to discuss alternatives to litigation with their clients and opposing counsel before any trial is scheduled. Such alternatives include more formal negotiation sessions with the opposing party and their counsel, mediation, med-arb (a combination of mediation and arbitration) and arbitration.[6]

Though we recognize that it is often necessary to file a lawsuit to resolve a particular dispute, we recommend that before any lawsuit is filed, all avenues of ADR be explored to determine if the matter can be resolved without a lawsuit. We also recommend that even when a lawsuit is filed, you continually consider resolving your dispute with ADR. In fact, Fresno County courts have revised their local rules to provide that when a lawsuit is filed, the plaintiff is given an information sheet on ADR, which must be served on all parties; and, counsel must certify that before the filing of an At Issue Memorandum they have discussed ADR.

Some counties require participation in ADR, whether it be nonbinding arbitration (in which either party who is not satisfied with the result may request a trial) or mediation (the use of a neutral third party to listen to both sides and help the parties negotiate a settlement.

There are benefits to participating in ADR. First and foremost, you may settle the case without spending significant time and expense in litigation. Additionally, in certain counties, including Fresno County, the local rules provide that where parties agree to ADR, the case will be taken out of the system for at least 90 days to permit the ADR to take place.

Settlement Conference

Generally, prior to a trial, the court will hold a settlement conference. At this conference, a judge or judge pro tem (either a retired judge or an attorney who has been appointed by the court to serve as temporary judge) will meet with the parties in an attempt to settle the dispute. Since the large majority of cases settle prior to trial, settlement conferences are often helpful in avoiding a trial.

Trial

If all else fails, the court will schedule a trial date. As most are aware, there are two types of trials: Jury and non-jury. Any party to the lawsuit can ask for a jury trial and most do so within the time set forth in the applicable court rules. If a jury is not requested within that time, it is forever waived, and your case will be tried before a judge.

The length of the trial depends on the number of witnesses and the issues involved. Many trials can be done in less than one day. For example, claims involving landlord/tenant

[6] This article will not discuss ADR extensively. A more thorough discussion can be found in "Alternative Dispute Resolution: What it is and Why You Should Be Using It." If you would like a copy of this article, please call us.

disputes are often resolved in a matter of hours, while contractual disputes may last for several days, weeks, or even months. The trial phase is perhaps the most expensive part of the lawsuit, because of the enormous amount of time and effort put in by the parties and their attorneys. Significant preparation is necessary to organize the trial in such a manner that it can be understood by the judge or jury within the least amount of time.

Unlike a settlement, where both parties come to final conclusion as agreed to, there is great risk in proceeding to trial. First, there is the fact that you may spend significant amounts of money in preparing for a trial that is thereafter continued, necessitating further preparation and expense. Second, witnesses often change their testimony in trial, making it difficult, if not impossible, to put on your case successfully. Third, a judge or a jury may not fully comprehend the nature of your dispute even though you believe you have set forth the facts succinctly and in an understandable manner. Thus, even though you may see your case one way, a judge or jury may see it a completely different way. This aspect of a trial should, and often does, give clients the greatest cause for concern. The fact is, judges and juries are humans and may make a mistake. Quite often they do not, but on the other hand, quite often they do. Because of this uncertainty in the behavior of humans, trials are often avoided.

In the above, we do not suggest that you should always seek to avoid trial. In some instances, it is extremely important to vindicate your position regardless of cost. Similarly, there may be a situation in which, because of a lack of experience on the part of the opposing attorney or a lack of client control, the opposing party makes a demand that is so outrageous that a settlement is not possible.

Conclusion

The above is meant to serve merely as a guide so that you understand the litigation process better. It is not, by any means, exhaustive, nor does it discuss alternatives to litigation.

This article was prepared by Darryl J. Horowitt, a litigation partner at Coleman & Horowitt emphasizing business, construction, real estate, environmental and personal injury litigation, commercial collections, casualty insurance defense, insurance coverage, and alternative dispute resolution. He is a member of the Fresno County Bar Association, the American Bar Association, the Association of Business Trial Lawyers, California Creditors Bar Association and the Commercial Law League of America. If you have any questions regarding the subject of this article, please contact Mr. Horowitt at (559) 248-4820/(800) 891-8362, or by E-mail at dhorowitt@ch-law.com