



SETTLE OR SUE?

Only about 10% of filed lawsuits make it to the courtroom; many disputes that could lead to lawsuits are settled before litigation ever starts. One of the primary reasons for this is the concept of *settlement*. Once the parties bring the facts out and lay out their respective views of the situation, it is often discovered that there is a solution the defendant can offer and that the damaged party is willing to accept to resolve the dispute. For instance, in an employment discrimination situation, the employer may be willing to pay some amount of back pay in order to get the employee to drop a lawsuit (or the threat of a lawsuit). Likewise, many employers are often willing pay severance in exchange for a release of liability or a waiver, for the reassurance that there will not be a surprise lawsuit in the future; in modern business, severance is no longer a thank-you for years of service and an apology for hard times, it's an insurance policy against a lawsuit.

The question of whether or not to accept a settlement offer *always* rests with the client. This is not to say that the attorney won't have recommendations or advice on the value of a settlement with respect to the potential value of a lawsuit. An attorney *can* offer advice or insight on whether an offer to settle is reasonable or fair in a particular situation, or under specific circumstances, based on her or his experience with similar cases in the past.

The decision of whether or not to accept a settlement is often a difficult – even gut-wrenching – decision, often not made until you're coming down to the wire, nearing a deadline for filing suit under a statute of limitations. Or, it may be the result of a negotiation that is made shortly before someone files for summary judgment, or moves to have a case dismissed. In fact, settlement has become so common, that in many cases the court will order the parties to attempt to settle through a mediation process at some point along the litigation timeline, to see if the parties can come to some agreement if they're forced to sit down and hash it out.

The decision is a difficult one because, in making the decision to settle, there are upsides and downsides, benefits and disadvantages. The biggest benefit to a settlement is *finality*. If you pursue a dispute in litigation all the way through to hearing before a judge or a jury, even if you win, there is always the possibility that the other party will appeal the decision or the amount of an award. In the end, after even more legal wrangling, the decision could be overturned or modified, further delaying (or eliminating) compensation. This can go on for years in the worst of cases.

In fact, a typical federal lawsuit (such as most employment discrimination litigation) can be expected to be "in court" for about 18 months, even for a case of only modest complexity. This is on top of any time you spent waiting for investigation and permission to sue from the EEOC or the Department of Labor – typically from 60 days to 6 (or as long as 18) months – and preparing your case for filing. It can be a very expensive, drawn-out, and emotionally exhausting process. Therefore, the prospect of finality and closure early on, allowing you to recover some of your losses and move on, can be very appealing if the offer is reasonable.

The reason it's a difficult decision is that, in getting that finality, in cutting the process short, you're making a trade-off. You're giving up something for what you're gaining. The trade-off for that finality is that the settlement is limited to the most concrete, clearly identifiable damages. You're far less likely, in a settlement, to get compensation for "pain and suffering," emotional distress, inconvenience, or embarrassment, than you would from a jury after trial. While the award may be considerably less, it'll come much sooner.

Resolving the dispute earlier has the advantage that you don't spend months or years of arduous and agonizing telling and retelling, analyzing, and rehashing the situation that already put you into a position of hardship; it allows you to close the book and move on with your life. Drawing the process out for a couple of years *could* make that part of the process much harder.

With all of that being said, settlement has other downsides. Almost every settlement is accompanied by some sort of waiver or release of future liability; you're calling your claim done, and agreeing not to sue for anything else. It almost always involves a statement of no admission of guilt, so if you're hoping for an apology or a declaration of responsibility, a settlement means you'll be passing up that satisfaction. A settlement will almost

always come with a confidentiality agreement or limitation on disclosure – a gag order. So, if part of what you hoped to accomplish was publicity or exposure of a problem, a settlement will likely defeat that purpose; you'll be barred from any public discussion of the matter. (One exception to this rule is that, if the defendant is a public agency or a branch of the State, or if the lawsuit is brought by the government itself, public records requirements will often require that at least part of the agreement be disclosed. This is more likely to happen in a high-profile case, where the dispute itself was already public.)

The balance of these factors will vary by the nature of the damages, and the sort of compensation you're seeking. Compensation for "soft" injuries – non-specific damages like pain & suffering, insult, emotional distress, humiliation, or damage to reputation – many of those damages will *not* be addressed in a settlement. If, on the other hand, you just want to be paid for what happened, to cover medical expenses or lost work, income not covered by unemployment, a settlement may very well make you as close to whole as you can expect to get. If you're suing "on principle," you're likely to defeat your purpose in seeking a settlement, unless the settlement includes a statement of principle, a public apology, etc.

Your attorney can (and should) review with you the facts of your case, their relative weakness or strength with respect to the claims you could bring, and discuss whether those facts are more likely to be relevant at settlement or litigation, and how they will bear, respectively, on your prospects and likely outcomes.

COMMON MOTIVATIONS FOR LITIGATION

It's not about the money; it's the principle. *No, it's not.* While there may be a principle involved (there are basic principles and goals underlying the Law, after all), if there's no monetary damage involved, you'll have a hard time finding an attorney to prosecute your case (unless "the principle" is important enough to you to pay for it out of your own pocket). Ultimately, with the exception of injunctive relief (making someone do something, or stop doing something – both of which can be very difficult), the courts find it difficult to grant relief that is *not* monetary. Even pain and suffering, personal loss, and grief must be reduced to some amount of monetary damages, because that's the easiest way to make it compensable.

I just want closure. *There are no zeroes in "closure."* While the "oh" may look like a zero when you type it in caps, money will not get you closure. It will help you catch up bills, but it won't help you heal. The healing, the inner peace, must come from within. Litigation may actually *delay* your ability to find closure and move on, since you'll be spending months reliving the situation that brought you there, leaving you more bitter because the litigation process comes to be seen as a further wrong that you've been forced to endure.

I just want an apology. *You will not get it.* If you settle, the first thing the Settlement Agreement will say is some variation of "Without admitting guilt, and acknowledging that the facts are disputed...." The very idea of a settlement, to many defendants, grows out of the desire to avoid going on the record as having committed a violation or broken a law. To the defendant, avoiding a public record of wrongdoing has a value. On top of this, the Agreement will almost always have a confidentiality clause, which would make an apology irrelevant, because you will almost certainly walk away with permission to say nothing more than "The matter has been resolved." If it goes to trial, the jury will find them liable or not liable, and the closest thing to an apology you're likely to get is a formal statement that they will not commit a particular violation again. In any other circumstances, an apology would amount to an admission of guilt, and you can rest assured *that* is not going to happen in any but the rarest circumstances.

I want to make them hurt. *You won't.* While this is understandable, "they," like you, will hire an attorney. (In fact, in most jurisdictions, a corporation *must* be represented by an attorney.) They want to make you work for anything you get. Therefore, most of the accusations, arguments, and discussions will be between your attorney and theirs, and the actual employees will only be involved for the purpose of collecting, organizing, and clarifying facts, and you'll only see them in depositions or hearings (if you make it that far). "They" will do all they can to insulate themselves from you, and you can be reasonably certain that they'll have gone back to work and moved on, giving little thought to the dispute. The smaller the defendant, the more likely they'll take it personally, but by the same token, the smaller the defendant the less likely it will be cost-effective to sue in the first place, unless you know ahead of time that they're insured against the sort of claim you're making. If the defendant is a large corporation or a government body, they probably have insurance to pay for this sort of mistake, so it won't really affect their bottom line in any serious way, and they have a staff to manage any impact on their reputation.