



Back to Basics

Abandonment *by Allie J. Amedee*

As a result of the various government-mandated shutdowns caused by COVID-19 and the human effects of the pandemic, many pending lawsuits languished with inactivity, creating a need for the prudent practitioner to analyze how to deal with those inactive lawsuits. Abandonment, the procedural device used to end prolonged inactivity in litigation, is an option. The legislature devised this mechanism to prevent litigants from extending litigation as a means of harassment or without a serious intent to hasten the claim toward judgment. The policy considerations surrounding abandonment are two-fold: (1) the desire to provide litigants a chance to have their day in court and not to be overcome by technical carelessness or unavoidable delay and (2) to provide an enforcement mechanism to the rule that lawsuits, once filed, should not indefinitely linger, preserving stale claims from the normal extinguishing operation of prescription.¹

I. The Basics of Abandonment

Louisiana Code of Civil Procedure article 561 provides, in relevant part, the following:

A. (1) An action ... is abandoned when the parties fail to take any step in its prosecution or defense in the trial court for a period of three years

....

(3) This provision shall be operative without formal order, but, on ex parte motion of any party or other interested person by affidavit which provides that no step has been timely taken in the prosecution or defense of the action, the trial court shall enter a formal order of dismissal as of the date of its abandonment.

B. Any formal discovery served on all parties whether or not filed of record, including the taking of a deposition, shall be deemed to be a step in the prosecution or defense of an action.

The framework set forth by article 561 has been broken down into three requirements:

(1) a party must take some “step” in the prosecution

or defense of the action; (2) the step must be taken in the proceeding and with the exception of formal discovery, must appear in the record of the lawsuit; and (3) the step must be taken within three years of the last step taken by either party.²

By its terms, abandonment is self-operating and occurs automatically upon the passing of three years without a step being taken by either party.³ Similar to the effect of peremption, “a plaintiff cannot breathe new life into the suit” once the case has been abandoned by operation of law.⁴ However, because principles of equity and justice are embedded at the forefront of article 561, Louisiana jurisprudence has emphasized that its provisions are “to be liberally construed in favor of maintaining prosecution of an action.”⁵

II. What Constitutes a “Step”?

Louisiana Supreme Court and related jurisprudence define a “step” as “any formal action before the court intended to hasten the suit toward judgment or the taking of formal discovery.”⁶ To avoid dismissal of a case as abandoned,

either the plaintiff or defendant must take some step. Louisiana jurisprudence has established that the intent and essence of a party's actions, the "step," are given more deference than form or technical compliance.⁷

Courts have ruled that formal discovery, including the filing of answers to interrogatories, supplemental answers to interrogatories, and notices to take depositions will constitute a "step."⁸ But it is well established that written discovery must be properly served on all parties to be deemed a step under article 561.⁹

Less obvious actions have also been found to constitute a step in the prosecution of a case. In *Fowler v. McKeever*, the court found that a signed letter in which plaintiff's counsel authorized the release of medical and billing records was a supplemental discovery response and a valid, recognized step in the prosecution of the case.¹⁰ Louisiana courts have also found that a request for a status conference, either by filing a formal motion or an

informal request to the court, amounts to a step in the prosecution of the case because the purpose of such a conference is to fix discovery deadlines and set a trial date, actions that attempt to hasten the case toward judgment.¹¹

III. What Does *Not* Constitute a Step?

Understanding what does *not* constitute a step for purposes of abandonment is just as important as knowing what does. Actions that "merely grant counsel the right to take steps, or prepare to take steps, toward the prosecution or defense of a case," but do not move the suit toward judgment, are not considered steps sufficient to interrupt the abandonment period.¹² For instance, motions to withdraw or enroll counsel or to substitute counsel have repeatedly been held insufficient to constitute a step for abandonment purposes.¹³ Additionally, "extrajudicial" efforts, such as informal correspondence and settlement negotiations between the parties, have uniformly been found inadequate to constitute a step.¹⁴ In fact, courts have

stressed that "correspondence evidencing even extensive settlement negotiations between the parties" is not considered a step in the prosecution because counsel is still permitted to take formal action in court during these ongoing negotiations.¹⁵

Indeed, practitioners must be prudent when dealing with the clock ticking on languishing cases even in the face of extraordinary circumstances. Despite the decreased availability of judicial resources during the pandemic, the Second Circuit Court of Appeal in *Johnson v. CLD, Inc.* rejected the plaintiff's contention that the Governor's COVID-19 emergency orders forbade her from prosecuting her case.¹⁶ The court explained that under Louisiana Revised Statutes 9:5829, "any suspension of abandonment was limited to the period from March 17, 2020, through July 5, 2020, and such suspension applied only if the abandonment period would have otherwise expired within those dates."¹⁷ As abandonment occurred outside the limited time period, the court found that the governor's orders were not relevant to the plaintiff's ability to have

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taken some step to hasten the matter toward judgment.¹⁸

Complicating matters further, the Louisiana Supreme Court recently held that filing an answer by a defendant served with a petition within the abandonment period does not interrupt the three-year period as to another defendant who was not served with the petition.¹⁹ The court highlighted that a logical distinction existed between served and unserved defendants because implicit in the abandonment jurisprudence is the necessity of notice and the right of a defendant to adequately defend himself.²⁰ Accordingly, if the plaintiff fails to serve one of the defendants during the abandonment period, any actions taken with respect to other defendants do not interrupt abandonment as to the unserved defendant.²¹

Even some appellate courts have come to view some abandonment issues differently. A split among Louisiana appellate courts has emerged regarding whether continuing a trial, without date, constitutes a step in the prosecution of the case.²² The Fourth Circuit Court of Appeal has held that an order granting such a continuance qualifies as a step, while jurisprudence from the First, Second, Third and Fifth Circuit Courts of Appeal has concluded otherwise, each explaining that an indefinite continuance, by its very nature, is not intended to hasten the matter to judgment.²³ This issue remains unaddressed by the Louisiana Supreme Court.

Other actions that have been determined not to represent a “step” in the prosecution of the case include: filing of witness lists, absent motions to set trial or for a scheduling order by either

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party;²⁴ opposition to a motion for sanctions filed in the record of a defamation case but related to another action pending before a different division;²⁵ and sending a letter to the court requesting the issuance of a subpoena not served on all parties.²⁶ It goes without saying, and reveals the complexity of the issues, that this list is not exhaustive.

IV. What Is the Next Step?

Because neither the Louisiana legislature nor the courts have provided a comprehensive list of “steps” that interrupt the abandonment

period, practitioners must take caution that their steps in a case demonstrate action that is intended to hasten the case toward judgment as contemplated by article 561. Indeed, the notion that unprecedented times call for unprecedented measures is seemingly contradicted by recent case law addressing article 561, which illustrates how abandonment—commonly recognized as one of the harshest remedies in the law—has extinguished numerous pending lawsuits during, or soon after, the pandemic. Bearing this in mind, practitioners on both sides of a lawsuit should carefully maintain timelines and calendar reminders regarding abandonment.

¹ Clark v. State Farm Mut. Auto. Ins., 00-3010 (La. 5/15/01), 785 So.2d 779, 787.

² Williams v. Montgomery, 20-1120 (La. 5/13/21), 320 So.3d 1036, 1041.

³ Cassilli v. Summerfield Apts., LLC, 21-0261 (La. App. 5 Cir. 1/26/22), 336 So.3d 554, 556.

⁴ Clark, 785 So.2d at 779.

⁵ Roubion Shoring Co. v. Crescent Shoring, L.L.C., 21-0237 (La. App. 5 Cir. 12/22/21), 335 So. 3d 354, 361; see also W.L. Wyman Constr. Co. v. Sewerage & Water Bd. of New Orleans, 22-0175 (La. App. 4 Cir. 9/30/22), 2022 WL 4597469, at *4 (applying the

principle of liberal construction to applicable law to find that plaintiff’s re-notice of deposition sent to defendant’s email address was a step that interrupted the abandonment period).

⁶ Williams, 320 So. 3d at 1041; Small v. AR Scientific, 21-0823 (La. App. 3 Cir. 11/23/22), 2022 WL 17175801 at *5.

⁷ La. Dep’t of Transp. & Dev. v. Oilfield Heavy Haulers, L.L.C., 11-0912 (La. 12/6/11), 79 So.3d 978, 982 (citing Thibaut Oil Co. v. Holly, 06-0313 (La. App. 1 Cir. 2/14/07), 961 So.2d 1170, 1172-73).

⁸ See, e.g., Tessier v. Pratt, 08-1268 (La. App. 1 Cir. 2/13/09), 7 So.3d 768, 773.

⁹ Rollins v. State through Dep’t of Pub. Safety & Corr., 17-0901 (La. App. 4 Cir. 3/7/18), 240 So.3d 258, 261-62, writ denied, 18-0553 (La. 5/25/18), 243 So.3d 570.

¹⁰ 52,754 (La. App. 2 Cir. 6/26/19), 277 So.3d 1238, 1243.

¹¹ Jacobs v. Metzler-Brenckle, 20-0585 (La. App. 4 Cir. 5/26/21), 322 So. 3d 347, 360.

¹² Lewis v. Jones, 16-0048 (La. App. 5 Cir. 5/26/16), 193 So.3d 546, 550.

¹³ McNealy v. Englade, 19-0573 (La. App. 1 Cir. 2/21/20), 298 So.3d 182, 187; Paternostro v. Falgoust, 03-2214 (La. App. 1 Cir. 9/17/04), 897 So.2d 19, 22, writ denied, 04-2524 (La. 12/17/04), 888 So.2d 870.

¹⁴ Burgess, Inc. v. Par. of St. Tammany, 17-0153 (La. App. 1 Cir. 10/25/17), 233 So. 3d 58, 63, writ denied, 17-2179 (La. 2/23/18), 237 So. 3d 515; see also Allen v. Humphrey, 51,331 (La. App. 2 Cir. 4/5/17), 218 So 3d 256, 260 (finding that a letter from an insurer that stated its intention to settle the case was an informal settlement negotiation, falling short of constituting a step).

¹⁵ Hercules Offshore, Inc. v. Lafayette Par. Sch. Bd., Sales & Use Tax Dep’t, 14-0701 (La. App. 3 Cir. 2/11/15), 157 So.3d 1177, 1181.

¹⁶ Johnson v. CLD, Inc., 54,749 (La. App. 2 Cir. 10/12/22), 349 So.3d 720, 722.

¹⁷ Id.

¹⁸ Id.

¹⁹ Williams, 320 So.3d at 1044.

²⁰ Id.

²¹ Daoteuang v. Cotugno, 22-1275 (La. 11/8/22), 349 So. 3d 569.

²² Compare Fischer v. Chad Rogers, Cuvee, L.L.C., 19-0337 (La. App. 4 Cir. 10/9/19), 280 So.3d 1199, writ granted, 19-1808 (La. 1/22/20), 347 So.3d 737 (finding that an order continuing trial, without date, constitutes a step), with Hutchison v. Seariver Mar., Inc., 09-0410 (La. App. 1 Cir. 9/11/09), 22 So.3d 989, writ denied, 09-2216 (La. 12/18/09), 23 So.3d 946 (finding that a joint or unopposed motion to continue, without date, was not a step), and Provenza v. City of Bossier City, 54,002 (La. App. 2 Cir. 6/30/21), 324 So.3d 246, 258 (same), amd Taylor v. Dash Equip. & Supplies, Inc., 18-0335 (La. App. 3 Cir. 11/7/18), 258 So.3d 909 (same), and First Bank & TR. v. Proctor’s Cove II, LLC, 19-0299 (La. App. 5 Cir. 12/30/19), 287 So. 3d 888 (same).

²³ Provenza, 324 So 3d at 258.

²⁴ Lewis, 193 So.3d at 550.

²⁵ Sutton v. Adams, 19-0394 (La. App. 4 Cir. 5/29/22), 273 So.3d 1276, 1279.

²⁶ Giglio v. State, 17-0405 (La. App. 3 Cir. 9/20/17), 227 So.3d 851, 856.