

Beware the Ides of Rule 48



The following scenario is familiar to all plaintiffs' counsel. Consider it, for example, in the context of a slip and fall claim.

Upon being retained and after having reviewed the relevant factual background, counsel chooses, wisely, to explore the prospect of resolving the claim without the need for formal proceedings. The liability insurer is like-minded and appoints an adjuster to investigate and engage counsel in a settlement dialogue. As is often the case, the running of a limitation period outstrips the pace of negotiations and the expiry of the limitation looms.

To protect the client's interests and preserve the right to formally advance the claim, counsel commences an action. Mindful of the six-month deadline for service, counsel serves the statement of claim and an agreement is struck with the adjuster to hold the action in abeyance pending the outcome of settlement discussions. The outlook in this regard is favourable and counsel is justifiably optimistic. All is well, but for one thing... Rule 48.15.

The Rule provides as follows:

48.15 (1) Dismissal – The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:

1. More than 180 days have passed since the date the originating process was issued.

2. None of the following has been filed:
 - i. A statement of defence.
 - ii. A notice of intent to defend.
 - iii. A notice of motion in response to an action, other than a motion challenging the court's jurisdiction.
3. The action has not been disposed of by final order or judgment.

The action has not been set down for trial in our slip and fall scenario.

The registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned: O. Reg. 438/08, s. 46, O. Reg. 394/09, 21(1).

It does not matter that the parties are engaged in ongoing and perhaps vigorous negotiations, with a clear and unequivocal intent on the part of the plaintiff to proceed with the claim. The rule deems the action as "abandoned" in the absence of the specified filings. Ordinarily, the filing of these documents would be a routine measure if defence counsel were appointed. The problem arises where the defence representative is an adjuster.

Assume for a moment that the court office has delivered the required 45-day notice. Counsel then advises the adjuster of the deadline and asks that defence counsel be

appointed to deal with the appropriate filing. Unfortunately, 45 days is often far too brief a span for the adjuster to communicate with his principals, have the insurer appoint counsel, and have that counsel respond in a timely manner so as to keep the action alive. Add a vacation to the mix, and the result is all too common: The action is dismissed.

While there is recourse by way of a motion to set aside the dismissal, time and money are better spent in some prudent planning so as to avoid the dire consequences of Rule 48.15.

Perhaps the simplest and safest course (instead of issuing the statement of claim) is a "tolling" or "standstill" agreement, whereby the parties agree to suspend the running of the limitation period while negotiations are ongoing. If a formal action becomes necessary, the agreement stipulates the time frame within which an action must be commenced, upon written notice from the defendant.

Perhaps the Rules committee may revisit this issue and see fit to extend the time frame within which an action is allowed to lay dormant. For the moment, it is up to the plaintiff's counsel to be mindful and watchful. ■

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