



## Plaintiff Delay - What Are My Options?

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### **Motion for Dismissal For Delay (Rule 24)**

A defendant who is not in default under the *Rules of Civil Procedure* may, in certain circumstances, move to have an action dismissed for delay where the plaintiff has failed to diligently prosecute the action. Generally speaking, the defendant must establish that it has suffered some sort of actual prejudice, or that there is a real risk that a fair trial can not be conducted as a result of the plaintiff's delinquency. The burden is on the defendant to show that the delay is inexcusable and that it is entitled to have the action dismissed for delay.

The timelines that must expire before for a defendant can bring a motion to dismiss for delay are quite short, so the test that must be met to get an action dismissed is not very easy to satisfy. The case law makes clear that, in order to be successful, the defendant must have suffered significant prejudice and, in most instances where the Court has dismissed an action for delay, the action had been delayed for a considerable number of years.

### **Status Hearings/Automatic Dismissal (Rule 48.14)**

Unless you are suffering significant prejudice which makes it quite likely the Court will dismiss the action for delay under Rule 24, a defendant is almost always better off just waiting it out, as a motion to dismiss will often prompt a plaintiff to take steps to move a case forward.

As of July 1, 2017, an action will be automatically dismissed by the Court in either of the following circumstances:

1. the action has not been set down for trial or terminated by some other means within five (5) years after it was commenced; or
2. the action has been struck off a trial list and not restored to a trial list or otherwise terminated by some other means within two (2) years of being struck off the list.

If the plaintiff is cognizant of the time limits, the plaintiff may ask the defendant to consent to a timetable before the time expires and, if the defendant does not consent to a timetable, either of the parties can bring a motion for a "status hearing" under Rule 48.14(6). At the hearing, in order to avoid having the action dismissed for delay, the plaintiff must show cause why the matter should not be dismissed for delay, including explaining periods of delay to the Court and establishing that the defendant will not suffer any prejudice if the action is allowed to proceed. The case law

demonstrates that a plaintiff's action can be dismissed even where the defendant has not suffered any actual prejudice if the delay is significant enough.

Alternatively, if the plaintiff is not paying attention to the times lines, the Court will automatically dismiss the action and/or strike the action from a trial list without notice to any of the parties or their lawyers.

Given the new automatic dismissal provisions, if the defendant can bear to leave the action outstanding for a few years, waiting for a status hearing or an automatic dismissal may be the best course of action. It is much less expensive than bringing a motion and much more advantageous due to the fact that, in comparison to a motion under Rule 24, the burden shifts *from the defendant* to show that the delay is inexcusable and that there is a danger that a fair trial is no longer possible *to the plaintiff* to show why the action should not be dismissed.

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