

Abandonment: An Evolving Concept of Liberative Prescription

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I. INTRODUCTION

The notion of liberative prescription was developed to prevent a plaintiff from bringing suit years after the accrual of his cause of action for damages, when evidence was likely to have been lost and witnesses likely to have disappeared, making it difficult or impossible to defend against the suit. To prevent this occurrence, time limits were set within which a plaintiff was required to file suit in a court of competent jurisdiction. Failure to do so resulted in the prescription of the plaintiff's cause of action. However, once a plaintiff filed suit, he was not required to prosecute his suit to judgment, thus making suits imprescriptible. Therefore, the notion of abandonment of actions was developed to prevent plaintiffs from filing suit and then leaving the suit to languish indefinitely over the defendants' heads.

The principle of abandonment was conceived as a form of liberative prescription. Originally, a plaintiff was penalized only for failing to timely file suit by the threat of liberative prescription. Later, he was also penalized for failing to timely prosecute his suit to judgment once it had been filed by the threat of abandonment. Like the doctrine of liberative prescription, the doctrine of abandonment has given rise to its fair share of litigation and the creation of parallel jurisprudential exceptions.

Throughout its history, the doctrine of abandonment has evolved and grown. Abandonment initially applied to plaintiffs but has been expanded to apply to all parties. Its time period has been shortened from five to three years. The doctrine has also developed into a fairly complex set of rules and requirements; as a result, abandonment is truly an evolving concept of liberative prescription.

II. HISTORY OF THE DOCTRINE OF ABANDONMENT

A. *Louisiana Civil Code Roots*

Modern Louisiana Code of Civil Procedure article 561 finds its roots in the Louisiana Civil Code of 1870, within the articles on liberative prescription. In 1870, it was "an established rule that the mere filing of suit placed an action within the hallowed realm of imprescriptibility."¹ Former Louisiana Civil Code article 3519 (1870) was drafted to limit the effect of Article 3518, which provided for the interruption of prescription by the filing of suit.

Article 3519 (1870) stated: "If the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption

1. Roger H. Doyle, *The Abandonment of Suit—Its Effect on Prescription*, 22 Tul. L. Rev. 504 (1948).

shall be considered as never having happened."² The article's purpose was to nullify the effect of Article 3518 when the plaintiff voluntarily abandoned his suit; thus, interruption of prescription was considered never to have occurred. However, even with article 3519 in place, the plaintiff was under no duty to prosecute his case once it had been filed, subjecting the defendant to harassment by a suit which would not otherwise prescribe or be prosecuted to judgment.³

Article 3519 was amended in 1898 to include a second paragraph:⁴

Whenever the plaintiff having made his demand shall at any time before obtaining final judgment allow five years to elapse without having taken any steps in the prosecution thereof, he shall be considered as having abandoned the same.⁵

This provision was added to end the unfairness defendants faced by having a suit pending indefinitely against them when plaintiffs failed to prosecute.

The abandonment article is a species of liberative prescription. However, abandonment is separate and distinct from the prescription of the substantive claim itself.⁶ Prescription of a claim differs from prescription of the suit based on abandonment. Additionally, the means by which the prescriptive periods may be interrupted are also different. The prescriptive period for a claim begins to run from the time the action accrues and is interrupted by the filing of suit in a court of competent jurisdiction. The abandonment period begins to run from the time suit is filed and is interrupted each time a party takes a formal step toward the prosecution or defense of his case within the abandonment period, from the last step taken by any party.⁷

If the plaintiff abandons his suit, the interruption of prescription is considered never to have occurred, and the effect is to put the plaintiff in the same position he would be in had he never filed suit.⁸

2. La. Civ. Code art. 3519 (1870).

3. See Doyle, 22 Tul. L. Rev. at 505 (1948).

4. The second paragraph of Article 3519 was derived from Article 397 of the French Code of Procedure. Article 397 provided for the extinguishment of a suit in three years by failure to prosecute the suit for that period of time. See Doyle, 22 Tul. L. Rev. at 505, citing Saunders, Lectures on the Civil Code 1906-1907, at 146 (1925). Article 397 served to effectuate the method in Article 2247 of the Code Napoleon which provided that interruption was considered never to have occurred where a demand for dismissal was made. *Id.* Doyle, 22 Tul. L. Rev. at 505 n. 4.

5. La. Civ. Code art. 3519 (1870), as amended by 1898 La. Acts 107.

6. *Melancon v. Continental Gas Co.*, 307 So. 2d 308, 311 (La. 1975).

7. *Id.* at 310, 313 n.1.

8. *Id.* at 313 n.1. See also *Charbonnet v. State Realty Co.*, 155 La. 1044, 1049, 99 So. 865, 867 (1923).

Therefore, where a suit has abandoned for failure to prosecute, a separate determination of whether the substantive claim has also prescribed must be made.⁹ It is possible that a suit may have abandoned and, yet, the substantive claim has not prescribed, especially where the prescriptive period for the cause of action is greater than the abandonment period.

The Louisiana Supreme Court held that the 1898 amendment to Article 3519 provided a method of abandonment of a suit by failure to prosecute for five years.¹⁰ Although the language of the amended article did not set forth the legal effects of abandonment for failure to prosecute, the courts construed the amendment as adopting the provisions in the first paragraph. Thus, abandonment for failure to prosecute had the same effect on prescription as voluntary dismissal—it was as if the interruption of prescription had never occurred.¹¹

In *Reagan v. Louisiana Western Railroad*,¹² the Louisiana Supreme Court held that Article 3519 did not apply to appeals, attempting to limit the application of Article 3519 to suits in the courts of original jurisdiction.¹³ The attempt proved to be unsuccessful, since the appeal was filed by the *defendant* and Article 3519 applied only to *plaintiffs*.¹⁴ In subsequent cases where the plaintiff filed the appeal, courts did not feel constrained to follow *Reagan* and dismissed appeals under Article 3519.¹⁵ Finally, in 1932, the issue was settled when the Louisiana Supreme Court, in *Verrett v. Savoie*, held that Article 3519 did not apply to cases pending on appeal.¹⁶

The application of the abandonment article to a case involving an appeal was again questioned in a recent case. In *James v. Formosa Plastics Corporation of Louisiana*, the Louisiana Supreme Court addressed whether an action against one defendant remaining in the trial court could abandon while the judgment dismissing the plaintiff's action against another defendant was pending on appeal.¹⁷

9. *Melancon*, 307 So. 2d at 311 n.1.

10. *Lockhart v. Lockhart*, 113 La. 872, 37 So. 860 (1905).

11. *Doyle*, 22 Tul. L. Rev. at 506; *Teutonia Loan & Bldg. Co. v. Connolly*, 133 La. 401, 63 So. 63 (1913).

12. *Reagan v. Louisiana Western R. Co.*, 143 La. 754, 79 So. 328 (1918).

13. *Id.* at 329.

14. *Id.* The court refused to treat the appellant-defendant as the plaintiff, or to transform a defendant into a plaintiff on appeal.

15. *Hibernia Bank & Trust Co. v. Zimmerman & Sons*, 167 La. 751, 120 So. 283 (1929); *Eichelberger v. B&T Const. Co.*, 173 La. 400, 137 So. 194 (1931); *Mouton v. Morganis Louisiana & Texas Railroad & Steamship Co.*, 5 La. App. 745 (1927); *Good v. Picone*, 18 La. App. 42, 137 So. 870 (Orl. 1931).

16. *Verrett v. Savoie*, 174 La. 844, 141 So. 854 (1932).

17. *James v. Formosa Plastics Corp.*, 01-2056 (La. 4/3/02), 813 So. 2d 335. That case is discussed in depth at Section VI.

The court held that the plaintiff's suit against the defendant, who remained subject to the trial court's jurisdiction, could abandon.¹⁸

Article 3519 applied only to plaintiffs. As noted by one court:

It will be observed that this language [in Civil Code Article 3519] plainly provides that only the plaintiff shall be considered as having abandoned the case The evident purpose and intention of the Legislature was to penalize a plaintiff in a suit for failure to take any steps in the prosecution of it for a period of five years. The law does not place any penalty upon any other party litigant except the plaintiff.¹⁹

The defendant's filing an answer could not be deemed a step in the prosecution of the action by the plaintiff to prevent abandonment.²⁰ Yet, in another Louisiana Supreme Court case, the court held that the defendant's filing of an answer in a case "ripe for default" to prevent the default under a stress of necessity created by the plaintiff was a step taken by the plaintiff to prevent dismissal for abandonment.²¹ The plaintiffs thereafter moved to set the case for trial.²²

Article 3519's application only to plaintiffs—and not to defendants—gave rise to litigation over which party was the plaintiff.²³ For example, a defendant-in-reconvention did not become a plaintiff for purposes of Article 3519.²⁴ However, when Article 3519 was transferred to the Louisiana Code of Civil Procedure in 1960, the application of the article was broadened to include defendants.

Much of the litigation involving Article 3519 concerned a determination of what constituted an action sufficient to avoid abandonment.²⁵ The requirement that the plaintiff take a formal step in the trial court gave effect to the legislative intent that there be certainty in determining when a suit had abandoned.²⁶ Article 3519

18. *James*, 01-2056 (La. 4/3/02), 813 So. 2d at 341.

19. *Hibernia Bank & Trust Co. v. J.M. Dresser Co.*, 131 So. 752, 14 La. App. 555 (1930) (holding that a cause of action to have fees assessed as costs by an accountant who had been appointed by the court as an expert did not abandon in five years).

20. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So. 213 (1921).

21. *Schutzman v. Dobrowolski*, 191 La. 791, 796, 186 So. 338, 340 (1939).

22. *Id.*

23. *Hibernia Bank & Trust Co. v. J. M. Dresser Co., Ltd.*, 14 La. App. 555, 131 So. 752 (1930).

24. *Carmody v. Land*, 207 La. 625, 635, 21 So. 2d 764, 767 (1945).

25. Likewise, much of the litigation involving our modern version of La. Code Civ. P. art. 561 concerns what constitutes a step in prosecution to interrupt the abandonment period.

26. *Sliman v. Araguel*, 196 La. 859, 863, 200 So. 280, 281 (1941).

required "some active measure taken by plaintiff, intended and calculated to hasten the suit to judgment."²⁷ Neither an opposing defendant's motion to dismiss nor the filing a supplemental petition to substitute another party for the plaintiff was sufficient to avoid abandonment.²⁸ Additionally, a motion to withdraw the record was for the convenience of counsel and not a step in prosecuting the case and was not sufficient to prevent abandonment.²⁹ Conferences between counsel were not formal steps taken in the court and would not prevent abandonment.³⁰ An action taken by a non-party did not save a suit from abandonment.³¹ Likewise, the issuance of citations by the clerk and service by the sheriff were not adequate steps taken by the plaintiff to preclude abandonment.³²

A plaintiff's inaction could be excused if he showed that his failure to prosecute the case was due to circumstances beyond his control.³³ Furthermore, Article 3519 did not apply where the court failed to take action after the case had been submitted for trial.³⁴ However, an act or failure to act by another person did not excuse the plaintiff's failure to take a step toward the prosecution of his case.³⁵ For example, where a case was never submitted because a clerk failed to file the transcript of testimony, the plaintiff was charged with the failure to act, and the case abandoned.³⁶ Similarly, although a trial record did not exist, where the clerk failed to notify the plaintiff of the disposition of his motion and the plaintiff failed to find the record of the disposition in the minutes, the plaintiff had no excuse for his failure to prosecute.³⁷ Thus, his suit abandoned.³⁸

Louisiana courts have stated that a plaintiff's failure to prosecute his case for a period of five years resulted in automatic abandonment.³⁹ In *Sandifield Oil & Gas Company v. Paul*, a Louisiana appellate court further stated that the defendant did not waive his right to seek dismissal for the plaintiff's failure to prosecute

27. *Augusta Sugar Co. v. Haley*, 163 La. 814, 816, 112 So. 731, 732 (1927).

28. *Id.*

29. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So. 213 (1921).

30. *Sliman*, 196 La. 859, 860, 200 So. 280, 281 (1941), citing *State ex rel. Yazoo & Miss. Valley R. R. v. Edrington*, 11 Orl. App. 288 (La. 1914).

31. *Seligman v. G. A. Scott & Bro.*, 17 La. App. 486, 488, 134 So. 771, 772 (La. App. 2d Cir. 1931).

32. *Id.*

33. *Jones v. Phelps*, 95-0607 (La. App. 1st Cir. 11/9/95), 665 So. 2d 30.

34. *Barton v. Burbank*, 138 La. 997, 71 So. 134 (1916).

35. *Barton v. Burbank*, 114 La. 224, 38 So. 2d 150 (1905).

36. *Id.*

37. *Bell v. Staring*, 170 So. 502 (La. App. 1st Cir. 1936).

38. *Id.*

39. *Evans v. Hamner*, 209 La. 442, 24 So. 2d 814 (1946).

when he took no action himself.⁴⁰ Abandonment was self-operative; thus, the defendant was not required to file a motion to dismiss for the abandonment to be effective.⁴¹

Since Article 3519 applied only to plaintiffs, the filing of an answer or other pleading by a defendant *prior to the accrual* of the five year abandonment period did not constitute a waiver to prevent abandonment for the plaintiff's failure to prosecute. However, a defendant could waive abandonment by taking an action inconsistent with the intent to consider the suit abandoned *after* the plaintiff failed to take a step for five years. Therefore, the defendant's filing of an answer after the accrual of the abandonment period waived abandonment,⁴² even where the answer was combined with a motion to dismiss.⁴³ Similarly, asserting prescription coupled with abandonment as affirmative defenses constituted a waiver of abandonment.⁴⁴

Unfortunately, the incorporation of the second paragraph of Article 3519 regarding abandonment for failure to prosecute did not entirely solve the problem of inprescriptibility once a suit was filed. A plaintiff could merely take some action every five years to prevent abandonment. Thus, for practical purposes, the suit continued indefinitely and the defendant would be "saddled with the burden of carrying forward an action against himself."⁴⁵ Recommendations that the five year abandonment period should be shortened were made as early as 1948. The time period was finally reduced from five to three years in 1997—49 years after that recommendation was first made.⁴⁶

B. Transfer to Louisiana Code of Civil Procedure

Article 3519 saw no further changes after its amendment in 1898 until 1960, when the Louisiana Code of Civil Procedure was adopted. Article 3519 was incorporated into the new Code of Civil Procedure as Article 561.⁴⁷ The new Article 561 incorporated the courts' interpretation of "a step in the prosecution of the case" to mean "a

40. *Sandifield Oil & Gas Co. v. Paul*, 7 So. 2d 725 (La. App. 2d Cir. 1942).

41. *Id.*

42. *Geisenberger v. Cotton*, 116 La. 651, 40 So. 929 (1906).

43. *King v. Illinois Central R.R.*, 143 So. 95 (La. App. Orl. 1932).

44. *Continental Supply Co. v. Fisher Oil Co.*, 156 La. 101, 105, 100 So. 64, 66 (1924); *Doyle*, 22 Tul. L. Rev. 504, 511 n.52 (stating this was a "hard" decision based on a highly technical point).

45. *Doyle*, 22 Tul. L. Rev. at 512.

46. Article 397 of the French Code of Civil Procedure on which article 3519 was modeled incorporated a three year abandonment period. *Doyle*, 22 Tul. L. Rev. at 505.

47. See 1960 La. Acts No. 30 § 1, transferring La. Civ. Code art. 3519 (1870) to La. Code Civ. P. art. 561 (1960).

formal action taken before the court intended to hasten the suit to judgment."⁴⁸ It also expanded the application of the article to include all parties. The intent to make the abandonment article applicable to steps taken by defendant is replicated in the language expanding a "step" to include one taken in the *prosecution* or the *defense* of the case.

In the controversial case of *DeClouet v. Kansas City Southern Railway*, decided after the inception of the Code of Civil Procedure, the plaintiff's suit was dismissed on grounds of abandonment for failure to take a formal action intended to hasten the suit to judgment before the court.⁴⁹ The plaintiff took the depositions of the defendant's engineer, fireman and other employees, pursuant to Article 1421 of the Code of Civil Procedure, four years after filing suit. At the end of the fifth year, the defendant moved to have the suit dismissed on grounds of abandonment. The trial court dismissed the suit. The Third Circuit affirmed, holding that the taking of discovery depositions under stipulation by the parties, but without filing formal motions in court, did not constitute a formal step sufficient to defeat abandonment.⁵⁰

Prior to 1952, depositions taken by the plaintiff would have constituted formal steps in the prosecution since depositions and written discovery requests had to be executed under court order.⁵¹ Therefore, with the jurisprudential rule in place interpreting a step in the prosecution to mean "a formal action before the court", the taking of a deposition was necessarily a formal step before the court.⁵² However, the Depositions and Discovery Act of 1952 relieved the trial court of the burden of issuing court orders for depositions and written discovery requests. Consequently, the taking of a deposition was no longer a "formal action" before the court.⁵³ The *DeClouet* court refused to consider steps taken outside the court record because of the uncertainties posed by informal moves.⁵⁴

In his dissent of the denial of the application for rehearing in *DeClouet*, Judge Tate argued that there was no need for formal action before the court where the plaintiff's conduct was active and known

48. Richard A. Tonry, *Civil Procedure—Abandonment of Suit*, 26 La. L. Rev. 719 (1966).

49. *DeClouet v. Kansas City Southern Railway*, 176 So. 2d 471, 473 (La. App. 3d Cir.), *writ refused*, 178 So. 2d 662 (La. 1965).

50. *Id.*

51. Tonry, 26 La. L. Rev. at 721.

52. Jimmy L. Dauzat, *Pleadings and Practice—Abandonment of Suit—Taking Discovery Depositions as Steps in the Process*, 40 Tul. L. Rev. 431 (1966).

53. *Id.*

54. *DeClouet*, 176 So. 2d at 476.

to the defendant.⁵⁵ Judge Tate criticized the majority for failing to realize an important objective of the redactors of the new Code—to eliminate many unnecessary technical rules which served to defeat justice.⁵⁶

After the *DeClouet* decision in 1965, the Reporters on the Code of Civil Procedure project proposed an amendment to Article 561.⁵⁷ The proposed amendment would have included, in addition to taking a formal step in the trial court, the taking of a deposition or the use of any of the authorized discovery devices as methods by which the plaintiff could prevent abandonment.⁵⁸ The Reporter's Advisory Committee gave a qualified approval of the proposed legislative overruling of *DeClouet* and also recommended that the abandonment period be shortened from five to three years. The Council of Law reaffirmed the five year abandonment period and decided against the proposed amendment to Article 561.⁵⁹ However, both of these recommendations were eventually incorporated into Article 561 in 1997.

C. Expansion of Application

Former Article 3519 applied only to plaintiffs. However, when Article 3519 was transferred to the new Code of Civil Procedure as Article 561, it was expanded to apply to both plaintiffs and defendants. Article 561 (1960) expressly stated that a step by either party within five years from the last step taken would interrupt the abandonment period.⁶⁰

In cases involving multiple defendants, certain questions were repeatedly presented to Louisiana courts. The questions included

55. *Id.*

56. Dauzat, 40 Tul. L. Rev. at 436, n.34, citing Henry G. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. 1, 19 (1960).

57. Tonry, 26 La. L. Rev. at 723.

58. *Id.*

59. *Id.*

60. Article 561 (1960), as amended by 1966 La. Acts No. 36 § 1, provided in pertinent part:

An action is abandoned when the parties fail to take any steps in its prosecution or defense in the trial court for a period of five years. This provision shall be operative without formal order, but on ex parte motion of any party or other interested person, the trial court shall enter a formal order of dismissal as of the date of its abandonment.

By this language, the article makes clear that an action is abandoned if five years elapse without a step taken by any party—plaintiff(s) or defendant(s). The change provides for the case where the defendant takes a step in the defense of the action and then attempts to have the suit declared abandoned for the plaintiff's failure to take any step toward prosecution in five years. See *Melancon*, 307 So. 2d at 313 n.3.

whether the plaintiff was required to take a step in the prosecution of his action against each defendant to prevent abandonment of his cause of action against that defendant; whether a step taken in the prosecution or defense by any party would interrupt abandonment as to all parties; and whether steps taken would be effective against unserved defendants.

In *Bolden v. Brazile*, the plaintiffs filed suit to be declared the owners of immovable property and sought damages for the value of oil, gas and other minerals removed from the property.⁶¹ The plaintiffs sued the Texas Company (now Texaco Inc.) and twelve individuals who claimed to be the owners of the property and who had contracted with Texaco for oil and gas production. The plaintiffs never effected service on the twelve individual plaintiffs. Texaco, on its own behalf and on behalf of the twelve individual defendants, eventually filed a motion to dismiss the plaintiffs' suit on grounds of abandonment. The trial court dismissed the suit against all parties and the plaintiffs appealed. The appellate court affirmed.⁶² The appellate court rejected the plaintiffs' arguments that Texaco had no right to file the motion to dismiss on behalf of the twelve individual defendants, finding that Texaco was an interested party entitled to file a motion to dismiss on behalf of all defendants pursuant to Article 561.⁶³

The appellate court also rejected plaintiffs' argument that Texaco and the twelve individual defendants were solidary obligors and decided that prescription was, therefore, not interrupted against all by an action taken against one party.⁶⁴ The court based its conclusion on the fact that the plaintiffs took no step in the prosecution of their case against the individual defendants during the abandonment period, rather than on the fact that individual defendants had never been served.⁶⁵

Interestingly, the appellate court found that the plaintiffs' filing of a motion to fix exceptions for trial was a step in the prosecution which interrupted abandonment as to Texaco.⁶⁶ However, the court determined that the twelve individuals were indispensable parties who could not be brought back into the suit by amendment of the pleadings.⁶⁷ On that ground, the court dismissed the suit against Texaco for failure to include indispensable parties.⁶⁸

61. *Bolden v. Brazile*, 172 So. 2d 304 (La. App. 4th Cir. 1965).

62. *Id.* at 308.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 309.

67. *Bolden*, 172 So. 2d at 310.

68. *Id.*

The holding in *Bolden v. Brazile* was rejected in *Sprowl v. Wohl*⁶⁹ some twenty-six years later. In *Sprowl*, the fourth circuit interpreted the Louisiana Supreme Court's decision in *Delta Development Company, Inc. v. Jurgens*⁷⁰ as overruling the premise that an action taken against one defendant did not interrupt the abandonment period as to other defendants.⁷¹ The *Delta Development* Court held that the abandonment period was interrupted as to all defendants by interrogatories served on one defendant, even though the defendants were not solidary obligors.⁷² Based on this decision, the fourth circuit held in *Sprowl* that an action taken against one defendant interrupted the abandonment period as to all defendants, without noting a distinction between served and unserved defendants.⁷³

The *Sprowl* court also relied upon *Bissett v. Allstate Insurance Company*,⁷⁴ where the Louisiana Supreme Court reversed the dismissal of the plaintiffs' action on grounds of abandonment and adopted Judge Shortress' dissenting opinion in the lower court.⁷⁵ In *Bissett*, the plaintiffs deposed a defendant who had not yet been served. The defendant participated in the deposition with representation by counsel. Although noting that participation in the deposition would not constitute a general appearance under Louisiana Code of Civil Procedure article 7, the court held that the deposition was a step in the prosecution of the lawsuit.⁷⁶ In his dissenting opinion in *Bissett*, Judge Shortress of the First Circuit found that the ruling in *Delta Development Company v. Jurgens* applied, and the plaintiff's action against the unserved defendant who was deposed should not have abandoned.⁷⁷

Judge Shortress found the facts in *Bissett* to be similar to those in the case of *Landry v. Thomas*.⁷⁸ In *Landry*, a defendant, who had not been served with process in the lawsuit, was served with notice of a motion to take his deposition just before the abandonment period had run. In *Landry*, the fourth circuit held that the abandonment period had been interrupted by the motion to depose the unserved defendant.⁷⁹ The fourth circuit also distinguished *Landry* from its

69. 576 So. 2d 638 (La. App. 4th Cir.), writ denied, 580 So. 2d 928 (La. 1991).

70. *Delta Dev. Co., Inc. v. Jurgens*, 456 So. 2d 145 (La. 1984).

71. *Sprowl*, 576 So. 2d at 639.

72. *Delta Dev. Co.*, 576 So. 2d at 146.

73. *Sprowl*, 576 So. 2d at 639.

74. *Bissett v. Allstate Ins. Co.*, 567 So. 2d 598 (La. 1990).

75. See *Bissett v. Allstate Ins. Co.*, 560 So. 2d 884, 887 (La. App. 1st Cir. 1990).

76. *Id.*

77. *Id.* at 887.

78. *Landry v. Thomas*, 422 So. 2d 513 (La. App. 4th Cir. 1982), writ denied, 429 So. 2d 143 (1983).

79. *Id.*

earlier holding in *Bolden v. Brazile*, stating that *Bolden* was based upon the failure to take any step against the unserved defendants.⁸⁰ The failure to serve the defendants was *not* the dispositive fact.⁸¹

However, there is some disagreement among the circuit courts as to whether interruption of abandonment is effective against unserved defendants. For example, in *Bridges v. Wilcoxon*,⁸² the Second Circuit held that an action taken by or against a plaintiff or served defendants did not interrupt the abandonment period as to unserved defendants.⁸³

The Second Circuit outlined the jurisprudential rules regarding interruption of abandonment by steps taken against served and unserved defendants.⁸⁴

- 1) If all defendants are served, steps taken by or against any defendant will interrupt the abandonment period as to all defendants.⁸⁵
- 2) If steps in the prosecution are taken against an unserved defendant, the abandonment period is interrupted as to that defendant and all served defendants.⁸⁶
- 3) Even though steps are taken by or against a served defendant, if no steps in the prosecution are timely taken against an unserved defendant, the abandonment period is not interrupted as to the unserved defendant.⁸⁷

The Fourth Circuit relied on *Delta Development Company, Inc. v. Jurgens* to reach its decision in *Sprowl v. Wohl* and to formulate the rule in that circuit that no distinction would be made between served and unserved defendants for purposes of interruption of the abandonment period.⁸⁸ However, as pointed out by the Second

80. *Id.*

81. *Bissett*, 560 So. 2d at 886.

82. *Bridges v. Wilcoxon*, 34,660 (La. App. 2d Cir. 5/09/01), 786 So. 2d 264.

83. See also *Murphy v. Hurdle Planting & Livestock, Inc.*, 331 So. 2d 566, 568 (La. App. 1st Cir. 1976); *McClure v. A. Wilbert's Sons Lumber & Shingle Co.*, 232 So. 2d 879, 884 (La. App. 1st Cir. 1970); but see *Sprowl v. Wohl*, 576 So. 2d 638 (La. App. 4th Cir. 1991).

84. *Bridges v. Wilcoxon*, 786 So. 2d at 268.

85. *Delta Development Company, Inc. v. Jurgens*, 456 So. 2d 145 (La. 1984).

86. *Bissett v. Allstate Ins. Co.*, 567 So. 2d 598 (La. 1990); *Landry v. Thomas*, 422 So. 2d 513 (La. App. 4th Cir. 1982) writ denied, 429 So. 2d 143 (La. 1983).

87. *Murphy v. Hurdle Planting & Livestock, Inc.*, 331 So. 2d 556 (La. App. 1st Cir. 1976), writ denied, 334 So. 2d 434 (La. 1976); *McClure v. A. Wilbert's Sons Lumber & Shingle Co.*, 232 So. 2d 879 (La. App. 1st Cir. 1970); *Bolden v. Brazile*, 172 So. 2d 304 (La. App. 4th Cir. 1965); *Wicker v. Coca-Cola Bottling Co.*, 418 So. 2d 1378 (La. App. 5th Cir. 1982), writ denied, 423 So. 2d 1148 (La. 1982).

88. *Bridges v. Wilcoxon*, 786 So. 2d at 269 n. 3.

Circuit, all defendants in *Delta Development Company, Inc. v. Jurgens* had been served with process so the issue of unserved defendants was not presented in that case. Therefore, the rule announced by the Fourth Circuit, while in accord with *Bissett v. Allstate Insurance Company* (an action against an unserved defendant interrupted abandonment as to that defendant and all served defendants), failed to recognize the distinction made between unserved and served defendants.⁸⁹

The Second Circuit's decision in *Johnson v. Berg Mechanical Industries* is an aberration and is contrary to the long line of cases holding that a step intended to interrupt abandonment must be taken in the trial court where the action is filed.⁹⁰ In *Johnson*, the appellate court reversed the trial court's dismissal for abandonment, making clear that its ruling was limited to the peculiar facts of the case.⁹¹ The plaintiff took nine depositions which were noticed only in his state workers' compensation proceeding but were not cross-noticed in his concurrent state court tort suit. Counsel for the defendants in the tort suit, who were not parties to the workers' compensation proceeding, attended but did not participate in the depositions. Subsequently, the defendants sought to have the state court suit dismissed for failure to prosecute. The plaintiff opposed the motion, arguing that he did not know that his attorney had failed to cross-notice the depositions in the state court proceeding and that he did not intend to abandon that action.⁹²

The Second Circuit cited Article 561's language that the taking of a deposition, with or without formal notice, was a step in the prosecution or defense of the action.⁹³ The appellate court stated that the defendants were careful to attend the depositions in the workers' compensation proceeding and to reserve their rights to depose the witnesses in the state court proceeding.⁹⁴ The court reasoned that the defendants would not have attended the workers' compensation deposition had they considered the tort suit abandoned.⁹⁵ Thus, the Second Circuit found that the depositions taken in a workers' compensation proceeding, attended for monitoring purposes only by the nonparties to that proceeding, were steps in the prosecution or defense of the state court tort suit.⁹⁶

89. *Id.*

90. *Johnson v. Berg Mech. Indus.*, 35,290 (La. App. 2nd Cir. 12/19/01), 803 So. 2d 1067, writ denied, 02-0240 (La. 4/26/02), 814 So. 2d 556.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Johnson*, 803 So. 2d 1067, 1073.

96. *Id.*

Hence, the abandonment period was interrupted and the state court tort suit was not abandoned.⁹⁷

III. MODERN VERSION OF ARTICLE 561

The current version of Article 561⁹⁸ provides:

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, unless it is a succession proceeding:

- (a) Which has been opened.
- (b) In which an administrator or executor has been appointed.
- (c) In which a testament has been probated.

(2) 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 taken for a period of three years 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. The order shall be served on the plaintiff pursuant to Article 1313 or 1314, and the plaintiff shall have thirty days from the date of service to move to set aside the dismissal. However, the trial court may direct that a contradictory hearing be held prior to dismissal.

B. Any formal discovery as authorized by this Code and served on all parties whether or not filed of record, including the taking of a deposition with or without formal notice, shall be deemed to be a step in the prosecution or defense of an action.

97. *Id.*

98. Article 561 was amended in 1997 to reduce the abandonment period from five to three years. The amendment became effective on July 1, 1998 and applied to all actions pending on that date. See 1997 La. Acts No. 1221, § 2. The amendment applies retroactively. See *Bourgeois v. Veal*, 99-0786 (La. 5/07/99), 740 So. 2d 1291; *Theisges v. Boudreaux*, 99-1458 (La. 7/2/99), 747 So. 2d 4; *Dempster v. Louisiana Health Servs. Indem. Co.*, 98-1112 (La. App. 5th Cir. 3/10/99), 730 So. 2d 524, *reh'g denied, writ denied*, 99-1319 (La. 7/2/99), 747 So. 2d 20; *Naussbaum v. McKee*, 99-171 (La. App. 5th Cir. 5/19/99), 735 So. 2d 930, *writ denied*, 99-1778 (La. 10/1/99), 748 So. 2d 448; *Coe v. State, Health Care Authority*, 32,635 (La. App. 2d Cir.2000), 751 So. 2d 432; *and Matthews v. Fontenot*, 99-0484 (La. App. 4th Cir. 1999), 745 So. 2d 691.

C. An appeal is abandoned when the parties fail to take any step in its prosecution or disposition for the period provided in the rules of the appellate court.⁹⁹

The statute's express language requires three things of the plaintiff:

1. The plaintiff must take some step in the prosecution of his lawsuit;
2. The step must be taken in the trial court;
3. The step must be taken within the abandonment period from the time of the last step taken by any party.¹⁰⁰

Much of the litigation arising under Code of Civil Procedure Article 561 regards whether a party has taken a step in the prosecution or defense of a suit within the time required to prevent abandonment. Those actions that constituted a formal step sufficient to interrupt abandonment under the original Civil Code article 3519 generally survived the transition to Code of Civil Procedure article 561. A party takes a step in the prosecution or defense of the suit by taking a formal action before the court and on the record, which is intended to hasten the matter to judgment.¹⁰¹

Similarly, those actions which were deemed not to be steps in the prosecution before the transition are still insufficient after the transfer. However, there was one major change rendered by the transfer. Article 561 applied to both plaintiffs and defendants, whereas former Article 3519 applied only to plaintiffs.¹⁰² Therefore, after the transfer, the abandonment article did not specify which party had to take a step in the suit's prosecution or defense.¹⁰³

99. La. Code Civ. Proc. art. 561.

100. *Melancon v. Continental Cas. Co.*, 307 So. 2d 308, 310 (La. 1975). Some of the dicta in *Melancon* was later rejected in *Clark v. State Farm Mut. Auto Ins. Co.*, 00-3010 (La. 5/15/01), 785 So. 2d 779.

101. *Bridges v. Wilcoxon*, 34,660 (La. App. 2d Cir. 5/09/01), 786 So. 2d 264; *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 532 (La. 1983); *Jones v. American Bank & Trust Co.*, 175 La. 160, 167, 143 So. 35, 37 (1932); *State ex rel. Yazoo & Miss. Valley R.R. Co. v. Edrington*, 11 Teiss. 288 (La. App. 1914).

102. See *Augusta Sugar Co. v. Haley*, 163 La. 814, 816, 112 So. 73, 7321 (La. 1927) (A step in the prosecution of the suit sufficient to avoid abandonment means active measures taken by *plaintiff* to hasten judgment.).

103. *Jones v. Phelps*, 95-0607 p.4 (La. App. 1st Cir. 9/9/95), 665 So. 2d 30, 33, *writ denied*, 95-2907 (La. 2/2/96), 666 So. 2d 1104.

Louisiana courts have held that steps taken by a plaintiff after the suit has abandoned are without effect.¹⁰⁴ For example, a plaintiff's amendment of a suit against a clinic to add a doctor as a defendant, after the suit against the clinic had abandoned, did not create a new suit against the doctor which could be maintained after the suit against the clinic had abandoned.¹⁰⁵ Similarly, a plaintiff's motion to compel discovery responses filed after his action had abandoned did not revive the suit.¹⁰⁶ Nor did a plaintiff's attempt to file a motion for summary judgment or to reset a summary judgment for hearing after the abandonment period had run revive his suit.¹⁰⁷ However, a step taken by a defendant after the abandonment period has run may constitute waiver of the right to plead abandonment.¹⁰⁸

A. Steps In the Prosecution

Merely intending to take a step is not enough to interrupt the abandonment period—the party must actually have taken the step.¹⁰⁹ Generally, the action taken must be designed to have the effect of hastening the matter to judgment. Otherwise, the step is not sufficient to interrupt abandonment. Much litigation has arisen regarding what actions are sufficient to constitute a step in the prosecution or defense of the suit sufficient to interrupt abandonment.

1. Actions Deemed Not Sufficient to Prevent Abandonment

The following actions have generally been deemed to be insufficient to prevent abandonment: correspondence, particularly if not filed into the court record; settlement negotiations; and, motions to withdraw, add, or substitute counsel. Correspondence filed into the court record which evidenced the parties' willingness to participate in mediation did not interrupt or suspend the running of the

104. *Willey v. Roberts*, 95-1037p.6 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1371, 1376 n.2, *writ denied*, 96-0164 (La. 3/19/99), 740 So. 2d 113.

105. *Varnado v. Gentilly Medical Clinic for Women*, 98-0264 (La. App. 4th Cir. 12/23/98), 728 So. 2d 479, *writ denied*, 99-0146 (La. 3/19/99), 740 So. 2d 113.

106. *Clark v. Southern Tire Service, Inc.*, 20-1548 (La. App. 5th Cir. 2/14/01), 782 So. 2d 27.

107. *Louisiana Central Credit Union v. LeBlanc*, 98-23 (La. App. 5th Cir. 5/13/98), 721 So. 2d 9214; *Jones v. Phelps*, 95-0607 p.4 (La. App. 1st Cir. 9/9/95), 665 So. 2d 30, 33, *writ denied*, 95-2907 (La. 2/2/96), 666 So. 2d 1104.

108. See *infra* Section IV(B) for discussion of waiver or acknowledgment as an exception to abandonment.

109. *Benjamin-Jenkins v. Lawson*, 2000-0958 p.4, (La. App. 4th Cir. 3/7/01), 781 So. 2d 893, 895, *writ denied*, 2001-1546 (La. 9/4/01), 796 So. 2d 681; *Sullivan v. Cabral*, 32-454 p.2, (La. App. 2nd Cir. 10/27/99), 745 So. 2d 791, 792, *writ denied*, 99-3324 (La. 1/28/00), 753 So. 2d 837.

abandonment period, at least where the mediation never actually took place.¹¹⁰ Motions to withdraw, add or substitute counsel are not formal steps before the court in the prosecution or defense of a suit. Rather, these motions grant to counsel the *right* to take steps, but do not hasten the matter to judgment.¹¹¹

Settlement negotiations are not steps in the prosecution of a case sufficient to interrupt abandonment and do not constitute a waiver by defendant to plead abandonment.¹¹² Louisiana courts have stated that the plaintiff is not relieved of the duty to protect the court record and to prevent abandonment because of on-going settlement negotiations.¹¹³ In *Chevron Oil Company v. Traigle*, numerous correspondence were filed into the court record which evidenced extensive settlement negotiations between the parties.¹¹⁴ However, these were not formal actions sufficient to interrupt abandonment, even though the negotiations were conducted pursuant to court order.¹¹⁵ The plaintiffs retained the ability to take a formal action in the trial court to hasten the suit to judgment and could have set the case for trial if not satisfied with the settlement negotiations.¹¹⁶

A liability insurer did not waive its right to plead abandonment by acknowledging an agreement with the plaintiffs to withhold service of the petition during settlement negotiations.¹¹⁷ Settlement negotiations were not a step that could interrupt abandonment, and participation in settlement negotiations did not serve as a waiver of the right to plead abandonment.¹¹⁸ The general rule is that settlement negotiations are not steps in the prosecution which will interrupt abandonment, and settlement negotiations are not transformed into

110. *Gallagher v. Cook*, 34,158 p.5 (La. App. 2d Cir. 12/15/01), 775 So. 2d 79.

111. *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 532-33 (La. 1983); *Willey v. Roberts*, 95-1037 p.5 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1371, 1375, *writ denied*, 96-0164 (La. 3/15/96), 669 So. 2d 422; *Brown v. City of Shreveport Urban Dev.*, 34,657 p.1 (La. App. 2d Cir. 5/9/01), 786 So. 2d 253, 255 n.1; *Varnado v. Gentilly Med. Clinic for Women*, 98-0264 p.2 (La. App. 4th Cir. 12/23/98), 728 So. 2d 479, 480-81, *writ denied*, 99-0146 (La. 3/19/99), 740 So. 2d 113; *Brown v. Edwards*, 435 So. 2d 1073 (La. App. 1st Cir.), *writ denied*, 441 So. 2d 751 (La. 1983); *Lips v. Royal Ins. Co.*, 149 La. 359, 361, 89 So. 213, 215 (1921).

112. *Newson v. Bailey*, 88 So. 2d 391, 393 (La. App. 2nd Cir. 1956); *Porter v. Progressive Specialty Ins. Co.*, 99-2542 p.4 (La. App. 1st Cir. 11/8/00), 771 So. 2d 293, 295; *Alexander v. Liberty Terrace Subdivision, Inc.*, 99-2171 p.4 (La. App. 4th Cir. 4/12/00), 761 So. 2d 62, 64.

113. *Lizama v. Williams*, 99-1040 p.5 (La. App. 5th Cir. 3/22/00), 759 So. 2d 865, 868.

114. *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 533 (La. 1983).

115. *Id.*

116. *Id.*

117. *Porter v. Progressive Specialty Ins. Co.*, 99-2542 p.4 (La. App. 1st Cir. 11/8/00), 771 So. 2d 293, 295.

118. *Id.*

formal steps in litigation merely by filing documents into the court record.¹¹⁹ Additionally, the Louisiana Supreme Court recently held that an insurance company's submission of a binding tender was not part of settlement negotiations; rather, it was a step in the defense of the case which served to waive defendant's right to plead abandonment.¹²⁰

Reported decisions offer a variety of examples of actions which courts have found insufficient to prevent abandonment. For example, the filing of a transcript of testimony was not regarded as a step to avoid abandonment.¹²¹ Nor was payment of court costs a step in the prosecution or defense of a case.¹²² The filing of a request for notice was also not considered a step in the prosecution of the case.¹²³ The plaintiff's filing a notice of suit to enforce a lien, which, at the time, was not required to be filed and had no legal effect, was not a formal step by plaintiff to prevent his suit from abandoning.¹²⁴ A joint motion to continue a hearing was not a step in the prosecution of the action to interrupt abandonment since, by its very nature, the motion to continue was not intended to hasten the matter to judgment.¹²⁵

2. *Actions Deemed Sufficient to Prevent Abandonment*

Generally, any action taken which is intended to hasten the suit to judgment is a step sufficient to interrupt the abandonment period. The following actions have met this standard: filing an amended petition which does more than restate the original petition is a step in the prosecution¹²⁶ and filing a supplemental response to discovery

119. *Clark v. State Farm Mut. Auto. Ins. Co.*, 33,960 p.2-3 (La. App. 2d Cir. 9/27/00), 769 So. 2d 176, 177-78, *rev'd*, 00-3010 (La. 5/15/01), 785 So. 2d 779.

120. *Clark*, 00-3010 (La. 5/15/01), 785 So. 2d 779. .

121. *Henry v. Stephens*, 169 So. 2d 422, 423 (La. App. 3rd Cir. 1964); *Newson v. Bailey*, 88 So. 2d 391, 393 (La. App. 2d Cir. 1956); *State through Dept. of Highways v. Jackson*, 211 So. 2d 93, 95 (La. App. 1st Cir. 1968); *Reagor v. First Nat. Life Ins. Co.*, 85 So. 2d 312, 315 (La. App. 2d Cir. 1956).

122. *D & S Builders, Inc. v. Mickey Const. Co., Inc.*, 524 So. 2d 245, 247 (La. App. 5th Cir. 1988). *See also Sanders v. Luke*, 92 So. 2d 156, 158-59 (La. App. 1st Cir. 1957).

123. *D & S Builders, Inc.*, 524 So. 2d at 247.

124. *Better Heating & Air Conditioning Co., Inc. v. United Ben. Fire Ins. Co.*, 269 So. 2d 502, 505 (La. App. 1st Cir. 1972).

125. *Oliver v. Oliver*, 95-1026 p.13-14 (La. App. 3d Cir. 3/27/96), 671 So. 2d 1081, 1090. *But compare with Watt v. Creppel*, 67 So. 2d 341, 343 (La. App. Or. 1953) (Orders for a continuance and an order making parties plaintiffs are sufficient steps to avoid abandonment.).

126. *Carraway v. City of Alexandria*, 96-1629 p.4-5 (La. App. 3d Cir. 4/30/97), 693 So. 2d 314, 316; *Guarango v. Pendleton Mem'l Methodist Hosp.*, 94-1264 p.3 (La. App. 4th Cir. 2/23/95), 650 So. 2d 1243, 1245; *Succession of Moody*, 306 So. 2d 869, 872 (La. App. 1st Cir. 1974), *writ denied*, 310 So. 2d 639 (La. 1975).

requests and filing additional discovery requests within a five year period were steps in the prosecution or defense of the suit which prevented the suit from abandoning.¹²⁷ Additionally, an attorney's payment of a jury fee on behalf of his client interrupted abandonment because the payment was necessary to preserve a jury trial, and the rule demanding payment was stamped by the clerk of court's cashier to show the payment had been received.¹²⁸

In *Modeliste v. Sehorn*, the plaintiff's petition to nullify a judgment of dismissal as to all other plaintiffs in a breach of contract suit, even if plaintiff failed in his motion, was a step which precluded a finding of abandonment, notwithstanding the defendant's argument that plaintiff had no right or cause of action.¹²⁹ The plaintiff had demonstrated his desire to pursue his day in court.¹³⁰ Additionally, Louisiana courts have also stated that an entry of an order of partial dismissal of less than all defendants was effective to interrupt abandonment as to all parties.¹³¹

Similarly, entries in a call docket made on behalf of the plaintiff in the orderly course of litigation were a step in the prosecution of the plaintiff's case.¹³² Likewise, a motion to have an appeal placed on the preference docket of the Louisiana Supreme Court was a step which prevented abandonment.¹³³ A motion by a plaintiff to proceed *in forma pauperis* was also a step to prevent abandonment.¹³⁴ A motion to substitute party plaintiffs was an active step in prosecution of a suit for default on a promissory note by a bank against the borrowers where the bank had been closed and put into receivership, making the motion to substitute plaintiffs necessary to proceed with the suit.¹³⁵

Filing a motion to set the case for trial will interrupt abandonment.¹³⁶ In *Kanuk v. Pohlman*, even the filing of an unsigned

127. *Manale v. Executive Healthcare Recruiters, Inc.*, 98-2652 p.3 (La. App. 4th Cir. 11/18/99), 747 So. 2d 1200, 1202, *writ not considered*, 99-3595 (La. 2/18/00), 754 So. 2d 957.

128. *Haley v. Galuszka*, 98-2854 p.5 (La. App. 4th Cir. 9/8/99), 744 So. 2d 170, 173, *writ denied*, 99-2883 (La. 12/10/99), 751 So. 2d 857.

129. *Modeliste v. Sehorn*, 94-1994 p.3-4 (La. App. 4th Cir. 3/29/95), 653 So. 2d 753, 756.

130. *Id.*

131. *McCandless v. Poston*, 540 So. 2d 1310, 1312 (La. App. 2d Cir. 1989).

132. *Jones v. Am. Bank & Trust Co.*, 175 La. 160, 167-68, 143 So. 35, 38 (1932); *Cocke v. Cavalier*, 175 La. 151, 155, 143 So. 33, 34 (1932).

133. *Barbari v. Firemen's Ins. Co.*, 96 So. 2d 252, 254 (La. App. 1st Cir. 1957).

134. *Acosta v. Hepplewhite Home, Inc.*, 450 So. 2d 770, 772 (La. App. 5th Cir. 1984).

135. *Deposit Trust Sav. Bank, FSB v. Kucharchuk*, 99-0950 p. 2-3 (La. App. 1st Cir. 8/12/99), 739 So. 2d 380, 381, *writ denied*, 99-2672 (La. 11/19/99), 749 So. 2d 684. *See also* *Family Fed. Sav. & Loan Ass'n of Shreveport v. Huckaby*, 30,481 (La. App. 2d Cir. 5/13/98), 714 So. 2d 80.

136. *Coastal Erection Co., Inc. v. Milan Eng'g Co.*, 305 So. 2d 713, 715 (La.

motion to fix trial on the merits was a step in the prosecution of the case, since the failure to sign the motion was a technical defect only.¹³⁷ Here, the plaintiff intended to take a step to hasten his suit to judgment and clearly did not intend to abandon his suit.¹³⁸ Likewise, a motion by the plaintiff in open court to place the case on the trial docket was a step to interrupt abandonment.¹³⁹

However, in *Melancon v. Wood*, the plaintiff's counsel filed a motion to fix the case for trial on the merits which was physically received in the clerk's office and physically placed in the file folder.¹⁴⁰ The plaintiff's counsel denied ever receiving a bill for costs and failed to pay the filing fee. Consequently, the order to fix trial was never presented to the judge for signing. The court found no steps in the prosecution of the case had been taken, and the suit was dismissed as abandoned.¹⁴¹

3. *Discovery Methods to Interrupt Abandonment*

Cases involving discovery issues present special problems when considered in connection with the abandonment article. Prior to 1952, all discovery necessarily involved formal actions before the trial court. In 1952, the Depositions and Discovery Act¹⁴² relieved trial courts of issuing formal orders for discovery. This change created a pitfall for the unwary, as the courts refused to consider discovery to be steps in the prosecution of the case since they were not taken in the trial court. Therefore, after 1952, formal discovery requests had to be filed into the court record to be considered steps to avoid abandonment.¹⁴³ However, the 1997 amendment to Article 561

App. 4th Cir. 1974). See also *Evergreen Plantation, Inc. v. Zunamon*, 272 So. 2d 414 (La. App. 2d Cir.), writ denied, 274 So. 2d 708 (La. 1973).

137. *Kanuk v. Pohlmann*, 338 So. 2d 757 (La. App. 4th Cir. 1976), writ denied, 341 So. 2d 420 (La. 1977) (even where plaintiff's counsel subsequently moved to upset the trial date).

138. *Id.*

139. *Crabtree v. Reed*, 224 So. 2d 64 (La. App. 3rd Cir. 1969).

140. *Coastal Erection Co., Inc. v. Milan Engineering Co.*, 305 So. 2d 713 (La. App. 4th Cir. 1974).

141. *Id.*

142. 1952 La. Acts No. 202, §2; See also La. Code Civ. P. art. 1421 (1960) formerly La. R.S. 13:3741.

143. See, e.g., *Melancon v. Wood*, 303 So. 2d 222 (La. App. 4th Cir. 1974); *Edwards v. Giambone*, 353 So. 2d 326 (La. App. 1st Cir. 1977), writ denied, 354 So. 2d 1375 (La. 1978); *Michel v. Home Town Supermarket, Inc.*, 493 So. 2d 142 (La. App. 5th Cir.), writ denied, 493 So. 2d 1207 (La. 1986); *De Salvo v. Waguespack*, 187 So. 2d 489 (La. App. 4th Cir. 1966); *DeClouet v. Kansas City Southern Railway Co.*, 176 So. 2d 471 (La. App. 3rd Cir.), writ refused, 248 La. 383, 178 So. 2d 662 (La. 1965). But compare with *Charpentier v. Goudeau*, 95-2357 (La. App. 4th Cir. 3/14/96), 671 So. 2d 981.

created an exception to the "in the trial court" requirement by expressly stating that discovery actions would interrupt abandonment. It was no longer necessary to file formal discovery requests into the court record.¹⁴⁴ Consequently, cases discussing whether actions related to discovery are sufficient to prevent abandonment must be read in the context of both of these developments.

In *Breaux v. Auto Zone, Incorporated*, a manufacturer defendant served plaintiffs interrogatories requesting medical records.¹⁴⁵ The plaintiffs, an injured motorist and passenger, sent the manufacturer a letter, which attached medical reports. The letter did not reference the discovery requests or identify the medical reports as discovery responses; however, the letter and medical reports were construed as formal discovery that interrupted the abandonment period.¹⁴⁶ Conversely, in *Sullivan v. Cabral*, discovery requests sent to the defendant's former attorney were not effective to prevent the plaintiff's action from abandoning where the defendant's former attorney's motion to withdraw and substitute counsel was filed into the court record.¹⁴⁷

Other reported cases state that a request for production of documents filed by a non party was not a step in the prosecution of the plaintiff's case and did not prevent his suit from abandoning.¹⁴⁸ However, the filing of a notice to take the deposition of a non-party was a step in the prosecution of the case.¹⁴⁹ These cases can be reconciled by considering that the former did not involve an action taken by a party, which is required, whereas the latter involved an action taken by a party.

A court order granting an extension of time for discovery did not constitute taking a step in the prosecution of the case.¹⁵⁰ However, a motion to compel discovery responses was a step in the prosecution, even though the motion was filed by the plaintiff's trustee rather than the plaintiff's attorney of record, and the motion

144. *Brister v. Manville Forest Products*, 32,386 (La. App. 2d Cir. 12/15/99), 749 So. 2d 881.

145. *Breaux v. Auto Zone, Inc.*, 00-1534 (La. App. 1st Cir. 12/15/00), 787 So. 2d 322, writ denied, 01-0172, 787 So. 2d 316 (La. 3/16/01).

146. *Id.*

147. *Sullivan v. Cabral*, 32,454 (La. App. 2d Cir. 10/ 27/99), 745 So. 2d 791, writ denied, 99-3324 (La. 1/28/00), 753 So. 2d 837.

148. *Picone v. Lyons*, 94-2428 (La. App. 4th Cir. 4/26/95), 653 So. 2d 1375, reh'g denied, writ denied, 95-1506 (La. 9/ 29/95), 660 So. 2d 852.

149. *Viesel v. Republic Ins. Co.*, 95-0244 (La. App. 4th Cir. 11/30/95), 665 So. 2d 1221, writ denied, 95-3099 (La. 2/16/96), 667 So. 2d 1058.

150. *Campbell v. Hartford Ins. Co.*, 95-1484 (La. App. 3d Cir. 4/3/96), 671 So. 2d 1133.

was technically defective.¹⁵¹ A motion to compel discovery responses from one defendant interrupted abandonment as to all solidary defendants.¹⁵²

In *Delta Development Company, Inc. v. Jurgens*, the plaintiff directed interrogatories to only one defendant, but that step interrupted abandonment as to all defendants, even though they were not solidary obligors.¹⁵³ When any party takes a formal step in the trial court, it is effective as to all parties to interrupt abandonment.¹⁵⁴ However, in yet another case, interrogatories were mailed to plaintiffs but were not mailed to all parties.¹⁵⁵ The interrogatories were null and void since they were unsigned and could not be considered a step in the prosecution or defense of the suit to prevent abandonment.¹⁵⁶

B. In the Trial Court

In order for abandonment to be interrupted, a party must take a formal action intended to hasten the suit toward judgment and that action must be taken in the trial court. As previously noted, an exception to the "in the trial court" requirement was created in the 1997 amendment of Article 561. The exception recognizes that formal discovery steps, taken outside the trial court record, will prevent a suit from abandoning. However, all other actions must be taken in the trial court.

Although some dicta in *Melancon v. Continental Gas Company* has been rejected, the case still stands for the proposition that actions taken outside the trial court will not prevent abandonment of a suit.¹⁵⁷ The plaintiff's actions taken in a related federal court proceeding did not prevent the state court proceeding from being dismissed on grounds of abandonment.¹⁵⁸ Likewise, a confession of judgment executed by the defendant and recorded in the parish mortgage records was not a step in the trial court to prevent abandonment.¹⁵⁹

Actions taken in one of two identical proceedings, where plaintiffs in each proceeding had the same counsel, did not interrupt abandonment in the other proceeding, absent an express agreement in

151. *Maddie v. Fidelity Nat. Bank*, 93-2308 (La. App. 1st Cir. 8/25/94), 641 So. 2d 1098.

152. *Rollins v. Causey*, 427 So. 2d 1291 (La. App. 2d Cir. 1983).

153. *Delta Development Co., Inc. v. Jurgens*, 456 So. 2d 145 (La. 1984).

154. *Id.*

155. *Benjamin-Jenkins v. Lawson*, 00-0958 (La. App. 4th Cir. 3/701), 781 So. 2d 893, *reh'g denied, writ denied*, 01-1546 (La. 9/14/01), 796 So. 2d 681.

156. *Id.*

157. *Melancon v. Continental Cas. Co.*, 307 So. 2d 308 (La. 1975).

158. *Id.*

159. *National Food Stores of La., Inc. v. Chustz*, 361 So. 2d 273 (La. App. 1st Cir.), *writ denied*, 362 So. 2d 1120 (1978).

the record that the decision in one would be binding in the other.¹⁶⁰ However, the separation of the plaintiff's suit against a physician and a hospital into two separate records was an administrative act by the clerk of court that did not destroy the plaintiff's essentially singular action.¹⁶¹ The plaintiff's action against the physician and hospital had the same caption. Thus, the hospital's exception of prescription to the amended complaint also interrupted abandonment in the medical malpractice lawsuit against the physician.¹⁶²

In another Louisiana appellate court decision, a manufacturer defendant filed bankruptcy after commencement of the plaintiff's wrongful death suit.¹⁶³ The court held that the actions taken by the manufacturer in the bankruptcy court did not interrupt or suspend the running of abandonment with respect to the remaining defendants in the wrongful death suit filed in state court.¹⁶⁴ The manufacturer objected to the plaintiffs' claim in the bankruptcy court and requested production of documents. The bankruptcy court modified the automatic stay to allow the plaintiff to proceed with the pending wrongful death action.¹⁶⁵

C. *In the Record*

The "in the record" requirement ensures that an examination of the record will reveal the status of the litigation without resort to extrinsic evidence and assures that there will be certainty in determining whether the action has been abandoned.¹⁶⁶ The record must contain evidence of the step or steps taken in the prosecution or defense, and generally, a step taken outside the record cannot be considered.¹⁶⁷ However, the 1997 amendment to Article 561 created an express exception to this requirement by allowing discovery to interrupt abandonment, although not filed into the record. Therefore, cases addressing the "in the record" requirement should be read in

160. *Lips v. Royal Ins. Co.*, 149 La. 359, 89 So.213 (1921).

161. *Wilkes v. Carroll*, 32,752 (La. App. 2d Cir. 4/5/00), 756 So. 2d 1257, *writ denied*, 00-1960 (La. 6/23/00), 765 So. 2d 1043.

162. *Id.*

163. *Sassau v. Louisiana Workover Serv., Inc.*, 607 So. 2d 809 (La. App. 1st Cir.), *writ denied*, 609 So. 2d 259 (1992).

164. *Id.*

165. *Id.*

166. *Willey v. Roberts*, 95-1037 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1371, *writ denied*, 96-0164 (La. 3/15/96), 669 So. 2d 422.

167. *Sliman v. Arague*, 196 La. 859, 200 So. 280 (1941); *Lewis v. City of New Orleans*, 99-0795 (La. App. 4th Cir. 11/17/99), 748 So. 2d 522; *Melancon v. Continental Cas. Co.*, 307 So. 2d 308 (La. 1975); *Richey v. Fetty*, 96-2762 (La. App. 1st Cir. 4/8/98), 715 So. 2d 1, *reh'g denied, writ denied*, 98-2184 (La. 11/13/98), 731 So. 2d 257.

light of this amendment, as well as the 1952 Deposition and Discovery Act, which eliminated the requirement that discovery be conducted under court order.

In *Burkett v. Resolution Trust Corporation*, a letter was mailed requesting service of process the day before the end of the abandonment period.¹⁶⁸ Yet, the letter was not filed into the record until the day after the abandonment period had run.¹⁶⁹ The appellate court held that the suit abandoned.¹⁷⁰ Similarly, where the plaintiff's letter to the clerk of court requesting service on the defendants and paying service costs was not filed into the record, the abandonment period was not interrupted.¹⁷¹ Additionally, where the plaintiff's counsel sent a letter to the clerk of court requesting service of process on one defendant and the clerk stamped the letter "received" rather than "filed," this action was sufficient to prevent abandonment.¹⁷² However, a letter by the plaintiff's attorney to the trial judge requesting that the case be set for trial was not a step taken in the trial court to prevent abandonment.¹⁷³

A Louisiana appellate court has also reviewed a case where a motion to set a case for trial, although submitted to the clerk of court and stamped received, was not filed into the record and was returned for failure to comply with court rules.¹⁷⁴ The motion was not resubmitted in proper form; thus, the case abandoned.¹⁷⁵

D. By a Party

The step must be taken by a party to the lawsuit in order to interrupt abandonment. The abandonment article does not distinguish which party must take a step; therefore, an action taken by any party

168. *Burkett v. Resolution Trust Corp.*, 99-1163, (La. App. 5th Cir. 2/29/00), 757 So. 2d 819.

169. *Id.*

170. *Id.*

171. *Hargis ex rel Krey v. Jefferson Parish*, 99-0971 (La. App. 4th Cir. 12/8/99), 748 So. 2d 606, *rev'd*, 00-0072 (La. 3/17/00), 755 So. 2d 891, *reh'g denied*, La. 00-0072 (La. 5/5/00), 760 So. 2d 1188.

172. *Shulver v. Slocum*, 566 So. 2d 1089 (La. App. 2d Cir.), *writ denied*, 569 So. 2d 984 (La. 1990).

173. *Tinsley v. Stafford*, 93-1668 (La. App. 1st Cir. 10/7/94), 644 So. 2d 677, *writ denied*, 94-2753 (La. 1/6/95), 648 So. 2d 933. *But compare with*, *Ellzey v. Employers Mut. Liability Ins.*, 388 So. 2d 843 (La. App. 2d Cir.), *writ denied*, 394 So. 2d 617 (La. 1980) (Letters from the plaintiff's attorney requesting that the case be set for trial, although not a formal pleading, complied with local court rules and practices and prevented abandonment, despite the fact that plaintiff failed to post jury bond.).

174. *Parson v. Daigle*, 96-2569 (La. App. 1st Cir. 12/29/97), 708 So. 2d 746.

175. *Id.*

may be sufficient to interrupt abandonment.¹⁷⁶ Steps by non-parties will not suffice. This requirement embodies the principle that the plaintiff or the defendant must clearly demonstrate, by the action taken, his intent not to treat the case as abandoned.

When a party takes a formal action in the trial court, the action is generally effective as to all parties to interrupt abandonment.¹⁷⁷ Likewise, when no step is taken during the abandonment period, abandonment is effective as to all parties.¹⁷⁸ No formal order dismissing the case on grounds of abandonment is necessary, as abandonment is self-operative.¹⁷⁹

Louisiana courts have refused to allow actions of nonparties to interrupt abandonment. For example, in *Freedlander, Incorporated, The Mortgage People v. Certain*, a process server's action in carrying out service and filing the service return into the trial court were not steps taken by a party.¹⁸⁰ Similarly, in another Louisiana appellate case, the clerk of court's issuance of citations and the sheriff's service of those citations, as a result of the plaintiff's motion to make certain persons parties, were not steps in the prosecution by the plaintiff that could interrupt the abandonment period.¹⁸¹ Louisiana courts have also held that notices of rulings filed into the record by appellate courts were not steps taken by a party to interrupt abandonment.¹⁸² However, in *American Eagle, Incorporated v. Employers' Liability Assurance Corporation, Limited*, a post trial conference called by the trial judge was a step taken by the "parties" and, therefore, interrupted the abandonment period.¹⁸³ This case may be explained by remembering that abandonment does not apply after submission of the case on the merits.

The circuit courts disagree on the issue of the effect of actions taken on served and unserved defendants and even disagree internally

176. *State ex rel Dept. of Soc. Servs. v. Ramos*, 98-0534 (La. App. 1st Cir. 4/13/99), 755 So. 2d 257, writ granted, 99-3536 (La. 2/11/00), 754 So. 2d 923, reh'g denied, 99-3536 (La. 3/24/00), 757 So. 2d 649; *Modeliste v. Sehorn*, 94-1994 (La. App. 4th Cir. 3/29/95), 653 So. 2d 753.

177. *Wilkes v. Carroll*, 32,752 (La. App. 2d Cir. 4/5/00), 756 So. 2d 1257, writ denied, 00-1960 (La. 6/23/00), 765 So. 2d 1043.

178. *Picone v. Lyons*, 94-2428 (La. App. 4th Cir. 4/26/95), 653 So. 2d 1375, reh'g denied, writ denied, 95-1506 (La. 9/29/95), 660 So. 2d 852.; *Sassau v. Louisiana Workover Serv., Inc.*, 607 So. 2d 809 (La. App. 1st Cir.), writ denied, 609 So. 2d 259 (1992).

179. *Picone*, 653 So. 2d 1375 *Sassau*, 607 So. 2d 809.

180. *Freedlander, Inc. v. Certain*, 623 So. 2d 677 (La. App. 4th Cir. 1993).

181. *Seligman v. G. A. Scott & Bro.*, 17 La. App. 486, 134 So. 771 (La. App. 2d Cir. 1931).

182. *James v. Formosa Plastics Corp.*, 01-2056 (La. 4/3/02), 813 So. 2d 335.

183. *Am. Eagle, Inc. v. Emp. Liability Assur. Corp.*, 389 So. 2d 1339 (La. App. 1st Cir. 1980), writs denied, 396 So. 2d 885, 396 So. 2d 886 (La. 1981).

within the circuits. In one case, a defendant was never served with process and another defendant was served six years after suit was filed.¹⁸⁴ The plaintiff's suit against these unserved defendants abandoned.¹⁸⁵ Yet, in another case, the plaintiff's suit did not abandon when he filed a motion within five years of filing suit to take the defendant's deposition with an attached order which was signed by the trial judge the same day.¹⁸⁶ The defendant had not been served with process or with a copy of the plaintiff's motion to take his deposition until more than five years after suit was filed.¹⁸⁷ However, the latest pronouncements seem to hold that an action taken with respect to any one defendant might be considered a step in the prosecution of all defendants, regardless of whether they have been served.¹⁸⁸

IV. EXCEPTIONS TO ABANDONMENT

Two exceptions to abandonment have been recognized since the inception of the rule in Louisiana Civil Code article 3519 (1870). The first is a plaintiff-oriented exception based on the doctrine *contra non valentum agere nulla currit prescriptio*, where the failure to prosecute is due to circumstances beyond the plaintiff's control. The second is a defendant-oriented exception based on acknowledgment, where the defendant waives the right to plead abandonment by taking an action inconsistent with an intent to treat the case as abandoned. Each exception follows well-established rules of prescription.¹⁸⁹

A. Circumstances Beyond Plaintiff's Control

The courts have recognized a plaintiff-oriented exception to abandonment where a plaintiff is prevented from taking a step in the prosecution of his case because of circumstances beyond his control. Courts have interpreted the phrase "circumstances beyond the plaintiff's control" to contemplate events creating a legal impediment which makes it impossible for the plaintiff to act on his own behalf

184. *Wicker v. Coca-Cola Bottling Co.*, 418 So. 2d 1378 (La. App. 5th Cir.), writ denied, 423 So. 2d 1148 (La. 1982). See also *Bolden v. Brazile*, 172 So. 2d 304 (La. App. 4th Cir. 1965).

185. *Wicker*, 418 So. 2d at 1378.

186. *Landry v. Thomas*, 422 So. 2d 513 (La. App. 4th Cir. 1982), writ denied, 429 So. 2d 143 (La. 1983).

187. *Id.*

188. *Guarino v. Pendleton Mem. Methodist Hosp.*, 94-1264 (La. App. 4th Cir. 2/23/95), 650 So. 2d 1243; *Sprowl v. Wohl*, 576 So. 2d 638 (La. App. 4th Cir.), writ denied, 580 So. 2d 928 (La. 1991).

189. *Melancon v. Continental Cas. Co.*, 307 So. 2d 308, 311 (La. 1975).

to take the necessary steps to prevent abandonment.¹⁹⁰ This exception has been given a very narrow scope, and only two circumstances have been found to comply. To meet the exception, the plaintiff must show either (1) he was serving in the armed forces of the United States or (2) he was confined to a mental institution.¹⁹¹ Louisiana courts have generally rejected all other excuses.

For example, Louisiana courts have stated that a plaintiff's allegations in his appellate brief regarding his mental and emotional state and "disabling depression" were not proof of circumstances beyond his control which prevented him from taking a step in prosecution sufficient to prevent his suit from abandoning.¹⁹² Likewise, a plaintiff's eight years of incarceration and the withdrawal of his counsel during that time were not considered circumstances beyond his control.¹⁹³ Here, the court stated that the plaintiff's incarceration and unsuccessful attempts to engage new counsel did not create legal impediments which prevented him from prosecuting his case.¹⁹⁴ The court noted that the plaintiff could have, but failed to, move his case toward judgment for a period of eleven years.¹⁹⁵

Likewise, in *Succession of Knox*, a Louisiana appellate court ruled that a plaintiff's inattention to her suit was her fault rather than the fault of the defendant.¹⁹⁶ The court reasoned that even though the plaintiff may have been unaware that her attorneys were not prosecuting her case and that her suit could abandon, these were not circumstances beyond her control.¹⁹⁷ Nor was her lack of notice of the ex parte motion to dismiss the suit considered relevant, since abandonment occurred by operation of law, even if no party moved for formal dismissal.¹⁹⁸

In another case, the appellate court rejected the plaintiff's excuses that one of her attorneys had been disbarred, another faced

190. *Jones v. Phelps*, 95-0607 (La. App. 1st Cir. 11/9/95), 665 So. 2d 30, 34.

191. *Aucoin v. Baton Rouge Jaycees, Inc.*, 491 So. 2d 422, 424-25 (La. App. 1st Cir. 1986); *Jones*, 95-0607 at p.6, 665 So. 2d at 34.

192. *Aucoin*, 491 So. 2d at 424-25

193. *Jones*, 95-0607 at p.6, 665 So. 2d at 34.

194. *Id.*

195. *Id.* See also *Haisty v. State through Dept. of Transp.*, 25,670 (La. App. 2d Cir. 3/30/94), 634 So. 2d 919, 922 (rejecting plaintiff's argument that withdrawal of D.O.T.D.'s counsel and failure of Attorney General to enter lawsuit as mandated by law prevented her from prosecuting her suit—no legal impediment was created); *Brown v. Edwards*, 435 So. 2d 1073, 1075-76 (La. App. 1st Cir.), writ denied, 441 So. 2d 751 (La. 1983) (rejecting plaintiffs' claim that their attorney had withdrawn prevented them from prosecuting case; litigants always have the power to discharge an attorney who neglects or refuses to act and to replace him with a new attorney); *Courtney v. Henderson*, 602 So. 2d 95, 97 (La. App. 4th Cir. 1992).

196. *Succession of Knox*, 579 So. 2d 1164 (La. App. 2d Cir. 1991).

197. *Id.*

198. *Id.*

disbarment, and her file had been destroyed in a fire at one of her attorney's offices.¹⁹⁹ The court found that these were not circumstances beyond her control that prevented her from prosecuting her case.²⁰⁰ Likewise, another appellate court rejected a plaintiff's arguments that the defendant's failure to submit pretrial inserts pursuant to the court's order prevented her from prosecuting her case, pointing out that the plaintiff could have filed a motion to compel the defendant's pretrial inserts.²⁰¹

The Louisiana Supreme Court also rejected arguments that a plaintiff was prevented from prosecuting her case against a defendant in the trial court while her appeal of a dismissal of another defendant was pending.²⁰² The court reasoned that the plaintiff's cause of action against the defendant in the trial court was not implicated in the appeal, and she was not prevented from prosecuting that action because of the pending appeal involving the other defendant.²⁰³

B. Waiver of Defendant's Right to Plead Abandonment

In *Melancon v. Continental Casualty Company*, the Louisiana Supreme Court recognized the codification of the jurisprudential exception of waiver by a defendant in Article 561.²⁰⁴ In *Melancon*, the plaintiff filed suit in state court seeking damages for personal injuries. The plaintiff won a jury verdict, and the trial court signed a judgment. However, defendants sought and were granted a new trial. Subsequently, the plaintiff filed a separate law suit in federal court challenging the constitutionality of the judicial review of fact in Louisiana.²⁰⁵ All defendants in the state court suit were joined as indispensable parties in the federal court proceeding. The plaintiff's claims were rejected by the lower federal courts, decisions ultimately affirmed by the United State Supreme Court.²⁰⁶

Thereafter, the plaintiff requested that a new trial date be set in state court, pursuant to the judge's order granting the new trial seven years earlier. The defendants moved to dismiss the state

199. *Wiley v. Roberts*, 95-1037 (La. App. 1st Cir. 12/15/95), 664 So. 2d 1371, writ denied, 96-0164 (La. 3/15/96), 669 So. 2d 422.

200. *Id.*

201. *Id.*

202. *James v. Formosa Plastics Corp.*, 01-2056 (La. 4/3/02), 813 So. 2d 335.

203. *Id.*

204. *Melancon v. Continental Cas. Co.*, 307 So. 2d 308 (La. 1975)

205. *Id.* at 309-10.

206. *Id.* at 310.

court action on grounds of abandonment.²⁰⁷ The trial court denied the motion to dismiss. However, the First Circuit reversed.²⁰⁸

The Louisiana Supreme Court stated that the plaintiff's actions in the federal court were not steps taken in the state court suit and did not serve to interrupt the abandonment period.²⁰⁹ Since the actions in the federal court were not steps in the trial court sufficient to interrupt abandonment, the plaintiff's suit could survive only if he could show one of the exceptions to the abandonment article applied.²¹⁰ The plaintiff did not argue that circumstances beyond his control prevented him from taking a step toward the prosecution of his state court action.²¹¹ Instead, he argued that the defense-oriented exception based on acknowledgment saved his state court case.²¹²

The plaintiff argued that the defendants waived the right to seek a dismissal on grounds of abandonment since they had agreed to an informal request by the federal court to delay proceeding with the state court action until the federal suit had been resolved.²¹³ The redactors' comments to Article 561 (1960) explained that the jurisprudential concept of waiver under the previous article 3519 was limited to instances where the defendant had taken a formal step in the defense of the suit within a five year period of plaintiff's inaction.²¹⁴ Under these circumstances, the defendant indicated his intent to treat the case as unabandoned and was estopped from pleading abandonment.²¹⁵

The *Melancon* court reasoned that the waiver exception in Article 561 differed from its source article in La.C.C. article 3519 (1870) in two respects:

1. Article 561 expressly declared that abandonment is self operative; and,
2. Article 561 provided that failure by the parties (without distinction as to which party must act) to take a step in the prosecution or defense resulted in abandonment.

207. *Id.*

208. *Melancon v. Continental Cas. Co.*, 295 So. 2d 883 (La. App. 1st Cir. 1974).

209. *Melancon*, 307 So. 2d at 310.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. See La. Code Civ. P. Art. 561, comment (c) (1960); *Melancon v. Continental Gas Co.*, 307 So. 2d at 311.

215. *Melancon*, 307 So. 2d at 311-12, citing *Green v. Small*, 227 La. 401, 79 So. 2d 497 (1955); *Geisenberger v. Cotton*, 116 La. 651, 40 So. 929 (1906).

The Louisiana Supreme Court interpreted this language as codifying the defense-oriented waiver exception.²¹⁶ Further, the *Melancon* court stated that Article 561:

incorporated the waiver exception only to the extent that a formal step taken by a defendant in his defense interrupts the five-year abandonment period and commences it running anew. Clearly, under the present version of article 561, formal action taken by the defendant after the expiration of five years' inactivity will not preclude a later plea of abandonment by him.²¹⁷

However, this dicta was criticized and finally rejected by later Louisiana Supreme Court decisions.²¹⁸

In *Melancon*, the Louisiana Supreme Court rejected the plaintiff's argument that the defendants' informal agreement in federal court waived their right to plead abandonment in state court. The court noted that the traditional meaning of "steps in the prosecution or defense" of a suit required a formal action before the court which was intended to hasten judgment.²¹⁹ The policy behind the Article 561 prevented protracted litigation. However, a determination that a plaintiff is not seriously pursuing his claim so as to subject his suit to abandonment must be certain. Therefore, any step toward the prosecution or defense of the action must appear in the court record so that examination of the record "reveal[s] the status of the litigation with certainty and without resort to extrinsic evidence."²²⁰ Furthermore, no contradictory hearing is required and extrinsic evidence is not permitted. Any party or other interested person may file an ex parte motion to dismiss on grounds of abandonment.²²¹ Thus, since neither the plaintiff nor the defendant had taken any action in the state trial court which served to interrupt the abandonment period, the state court action in *Melancon* had abandoned.²²²

Some dicta in *Melancon* was later rejected by the Louisiana Supreme Court in *Clark v. State Farm Mutual Automobile Insurance*

216. *Clark v. State Farm Mut. Auto. Ins. Co.*, 33,960 (La. App. 2d Cir. 9/27/00), 769 So. 2d 176, *rev'd*, 00-3010 (La. 5/15/01), 785 So. 2d 779, citing *Melancon v. Continental Cas. Co.*, 307 So. 2d 308, 312 (La. 1975).

217. *Melancon*, 307 So. 2d at 312, n.2.

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

219. *Melancon*, 307 So. 2d at 312.

220. *Id.*

221. *Id.*

222. *Id.* at 313.

Company.²²³ The *Clark* court noted that a number of Louisiana cases had held a defendant's action after the abandonment period had accrued constituted a waiver of the right to plead abandonment.²²⁴ Examples included a defendant's submission of an abandoned case for decision, agreeing to a trial setting, seeking security for costs, and provoking or responding to discovery.²²⁵ In some cases, a pleading by a defendant going to the merits of the case, even if filed after the five year abandonment period had accrued, acted as a waiver of the defendant's right to seek a dismissal on the basis of abandonment.²²⁶ Likewise, in *Chevron Oil Company v. Traigle*, the Louisiana Supreme Court held that joining in a motion for summary judgment and submitting the case for decision on the merits after the abandonment period accrued waived the defendant's right to assert the defense of abandonment.²²⁷

The *Clark* court also rejected the *Melancon* court's dicta refusing to permit the use of extrinsic evidence to prove interruption of abandonment as incorrect and inconsistent with Louisiana jurisprudence.²²⁸ The Louisiana Supreme Court recognized that an order dismissing a suit for abandonment could be set aside upon a showing that a cause outside the record prevented the accrual of the abandonment period—one cause which could be the waiver exception.²²⁹

Despite the later rejection of much of the dicta in *Melancon*, the case still stands for the proposition that a step must be taken *in the trial court* to interrupt abandonment. Actions in federal court, even though involving the same parties and same cause of action, will not suffice.²³⁰

The latest pronouncement by the Louisiana Supreme Court on the waiver exception came in *Clark v. State Farm Mutual Automobile*

223. *Clark v. State Farm Mut. Auto. Ins. Co.*, 00-3010 (La. 5/15/01), 785 So. 2d 779, 789 n.15.

224. *Middleton v. Middleton*, 526 So. 2d 859 (La. App. 2d Cir. 1988); *Melancon v. Continental Cas. Co.*, 307 So. 2d 308, 312 (La. 1975); *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 533 (La. 1983).

225. *Clark*, 00-3010 (La. 5/15/01), 785 So. 2d 779, 789.

226. *State ex rel. Shields, Inc. v. Southport Petroleum Corp.*, 230 La. 199, 88 So. 2d 25 (1956); *Continental Supply Co. v. Fisher Oil Co.*, 156 La. 101, 100 So. 64 (1924).

227. *Chevron Oil Co. v. Traigle*, 436 So. 2d 530 (La. 1983).

228. *Clark*, 00-3010, 785 So. 2d 779, 789.

229. *Clark*, 00-3010, 785 So. 2d at 789, citing *Chevron Oil Co.*, 436 So. 2d 530 and *DeClouet*, 176 So. 2d at 476.

230. *But compare with Johnson v. Berg Mech. Indus.*, 35,290 (La. App. 2nd Cir. 12/19/01), 803 So. 2d 1067, writ denied, 02-0240 (La. 4/26/02), 814 So. 2d 556 (depositions taken in worker's compensation proceeding were steps in prosecution that interrupted abandonment of state court tort suit).

Insurance Company.²³¹ In *Clark*, the plaintiff sued for injuries sustained in an automobile accident. Clark was a guest passenger in the vehicle. Both he and the driver were insured by State Farm. Clark filed suit against State Farm on January 16, 1996. Because of on-going settlement negotiations, the plaintiff withheld service but provided State Farm with a courtesy copy of the petition and copies of his medical records.²³² State Farm made an unconditional tender of \$3,000 to Clark on October 14, 1996, in compliance with its obligations under the uninsured motorist policies and La. R.S. 22:658A(1). Clark accepted the tender by cashing the check. No other action was taken until June 15, 1999, when Clark filed a copy of the tender check and correspondence into the record and requested that State Farm be served with the petition. State Farm filed an ex parte motion to dismiss on grounds of abandonment.²³³ The trial court signed the ex parte order of dismissal, and plaintiff filed a motion to set aside the order. The trial court set aside the order dismissing State Farm, reasoning that the unconditional tender was a step in the defense of the case which interrupted the abandonment period.²³⁴

The appellate court reversed, stating the tender by State Farm was part of the settlement negotiation process, which has been held not to be a step in the prosecution or defense sufficient to interrupt abandonment.²³⁵ The appellate court considered the unconditional tender to be neither a formal step nor a step designed to hasten the matter to trial.²³⁶ The appellate court also noted that the unconditional tender was not even made part of the record until after the suit had abandoned by operation of law.²³⁷

The appellate court also rejected the plaintiff's argument that the unconditional tender was a mode of formal discovery, exempted from the "on the record" requirement in Article 561(B). The appellate court stated that the tender of an undisputed sum is a form of negotiation rather than a form of discovery.²³⁸ Relying on *Chevron Oil Co. v. Traigle*,²³⁹ the appellate court stated that steps in settlement negotiations were not transformed into formal steps in the prosecution

231. *Clark*, 00-3010, 785 So. 2d at 779.

232. *Id.*, 785 So. 2d at 781.

233. *Id.*, 785 So. 2d at 781-82.

234. *Id.*, 785 So. 2d at 782.

235. *Id.*, citing *Newson v. Bailey*, 88 So. 2d 391 (La. App. 2d Cir. 1956).

236. *Clark*, 00-3010, 785 So. 2d at 782.

237. *Id.*, 785 So. 2d at 783.

238. *Id.*, 785 So. 2d at 783.

239. *Chevron Oil Co. v. Traigle*, 436 So. 2d 530 (La. 1983) (Correspondence filed into the record evidencing settlement negotiations was not a step in the prosecution or defense of the suit.).

or defense of a suit merely by filing evidence of the negotiations into the record.²⁴⁰ The appellate court further noted that the plaintiff was not prevented from taking steps toward the prosecution of his case designed to hasten the suit to judgment, even though he was involved in settlement negotiations.²⁴¹

In *Clark*, the Louisiana Supreme Court also noted an inherent distinction between post-abandonment actions taken by a plaintiff and by a defendant. While a plaintiff's actions taken after a suit has abandoned cannot revive the action, a defendant's actions taken after abandonment can serve to waive his right to plead abandonment.²⁴² Furthermore, waiver requires a "definite action" by a defendant.²⁴³ In order to determine the qualitative effect of the step or steps taken by a defendant, courts must perform a case-by-case analysis to ascertain whether the defendant's actions constitute a definite action resulting in waiver of the right to plead abandonment.²⁴⁴

The qualitative effect of State Farm's action in making the unconditional tender was to avoid penalties and attorneys fees should it ultimately be proven that State Farm owed coverage under the policy. Therefore, the action protected State Farm from certain liability exposure at the conclusion of the case.²⁴⁵ The Louisiana Supreme Court found no distinction between a defendant's conduct occurring before rather than after the case has abandoned.²⁴⁶ The Louisiana Supreme Court reasoned that a defendant's conduct, which would constitute acknowledgment if taken after the abandonment period accrued, could be established by evidence outside the record to be a pre-abandonment waiver based on acknowledgment. This conduct would also serve to start the abandonment period running anew.²⁴⁷ Thus, State Farm's unconditional tender served as a pre-abandonment waiver which interrupted the abandonment period, causing the period to start running anew.²⁴⁸

The Louisiana Supreme Court rejected the appellate court's characterization of the unconditional tender as merely a step in

240. *Clark*, 00-3010, 785 So. 2d at 783.

241. *Id.*, 785 So. 2d at 783.

242. *Id.*, 785 So. 2d at 789.

243. *Id.*, 785 So. 2d at 789, citing *Middleton v. Middleton*, 526 So. 2d 859, 860 (La. App. 2d Cir. 1988).

244. *Clark*, 00-3010, 785 So. 2d at 792, citing *Middleton*, 526 So. 2d at 860-61.

245. *Clark*, 00-3010, 785 So. 2d at 792.

246. *Id.*, 785 So. 2d at 792.

247. *Id.*, 785 So. 2d at 792.

248. *Id.*, 785 So. 2d at 792.

informal settlement negotiations.²⁴⁹ The court noted that acknowledgment is a "simple admission of liability resulting in the interruption of prescription that has commenced to run, but not accrued, and may be made on an *informal* basis."²⁵⁰ The court further noted that a tacit acknowledgment could occur when a debtor makes an unconditional offer of payment.²⁵¹ Therefore, the Louisiana Supreme Court held State Farm's unconditional tender to be an acknowledgment for purposes of abandonment.²⁵²

V. SUBMISSION OF CASE FOR DECISION ON THE MERITS

The abandonment article does not apply to cases which have been submitted for a decision on the merits. The reasoning is that once a case is submitted, its disposition has been removed from the control of the parties. The goal of hasty resolution of disputes would not be served by allowing a defendant to dismiss a suit for abandonment after it has been submitted for decision on the merits.²⁵³ In *Chevron Oil Co. v. Traigle*, the plaintiff's suit was abandoned; however, defendant waived the right to have the suit dismissed on grounds of abandonment since it had joined in a motion for summary judgment and submitted the case for decision. By filing the motion for summary judgment, the defendant consented to have the case resolved on the merits.²⁵⁴

In *Bryant v. Travelers Ins. Co.*,²⁵⁵ the Louisiana Supreme Court held that abandonment was inapplicable to a case which had been submitted for decision on the merits. In *Bryant*, a trial was held on the plaintiff's claims for wrongful death and injury, after which the judge granted the plaintiffs approximately two months within which to submit their trial brief. The defendants would have ten days thereafter to submit their brief, whereupon the court would take the matter under advisement. The plaintiffs' trial brief was not filed until

249. *Id.*, 785 So. 2d at 791, noting that La. R.S. 22:658(A)(1) (2000) required a tender to be unconditional and therefore, by definition, could not be a settlement offer.

250. *Id.*, 785 So. 2d at 792, citing *Lima v. Schmidt*, 595 So. 2d 624, 625 (La. 1992).

251. *Clark*, 00-3010, 785 So. 2d at 792; *Lima*, 595 So. 2d at 634.

252. *Clark*, 00-3010, 785 So. 2d at 792. See also *Sterling v. Ins. Co. of Pennsylvania*, 572 So. 2d 835, 837 (La. App. 4th Cir. 1991). Defendants continued the trial date indefinitely, voluntarily acknowledged their obligation, and made monthly payments for over five years for compensation and medical; such actions were inconsistent with an intent to treat the case as abandoned. *Sterling*, 572 So. 2d 837.

253. *Chevron Oil Co. v. Traigle*, 436 So. 2d 530, 535 (La. 1983).

254. *Id.* at 534.

255. *Bryant v. Travelers Ins. Co.*, 288 So. 2d 606 (La. 1974).

more than five years after the deadline set by the court.²⁵⁶ The judge who heard the case at trial had retired, and his replacement heard the defendant's motion to dismiss the suit for abandonment. The judge ruled the case had been submitted for decision and denied the motion to dismiss.²⁵⁷ The appellate court reversed, interpreting the original order's language to mean that the case would not be submitted until the briefs were filed. Therefore, the suit had abandoned.²⁵⁸

However, the Louisiana Supreme Court found the original order's language to be ambiguous. To avoid a remand of the case, the parties stipulated that the record should be expanded to include the trial court rules and the transcript of the show cause hearing held in the trial court.²⁵⁹ The trial court rule stated that cases were considered submitted for decision even if no trial briefs were ever filed. On that basis, the Louisiana Supreme Court ruled that the case had been submitted and taken under advisement, and no delays in decision could be attributed to the plaintiff. Thus, the trial court was correct to deny defendant's motion to dismiss on grounds of abandonment.²⁶⁰

Richard v. Fetty addressed the *res nova* issue of whether a partial abandonment was possible.²⁶¹ The plaintiff sued multiple defendants and, after one defendant failed to answer, the plaintiff obtained a default judgment against that defendant. The plaintiff took no further

256. *Id.* at 607.

257. *Id.*

258. *Id.* at 608. See also *Burke v. State Farm Mut. Auto. Ins. Co.*, 234 So. 2d 432 (La. App. 1st Cir. 1970); *LeBlanc v. Thibodaux*, 162 So. 2d 753 (La. App. 1st Cir. 1964).

259. *Bryant*, 288 So. 2d. at 609.

260. *Id.* at 609-10.

See also *Bryant*, 288 So. 2d at 611 n. 1, citing a line of cases holding that the abandonment article was inapplicable once a case had been submitted for decision: *Barton v. Burbank*, 133 La. 997, 71 So. 134 (1916); *Sanders v. Luke*, 91 So. 2d 156 (La. App. 1st Cir. 1957); *Landry v. Dore*, 149 So. 321 (La. App. 1st Cir. 1933); *Washington v. Harvey*, 124 So. 2d 240 (La. App. 2d Cir. 1960) (After trial, plaintiff submitted trial brief but defendants did not. Defendants' failure was not chargeable to plaintiff, and the case was deemed to have been submitted on the merits. Therefore, the abandonment article did not apply.).

See also *Collins v. Methvin*, 625 So. 2d 313 (La. App. 3d Cir. 1993) (The trial court erred in dismissing for abandonment of a suit which had been tried but where the judgment was not signed until eight years later because the file was missing. The abandonment article did not apply after the case was submitted for decision and plaintiff could not be penalized for the court's delay in signing the order of judgment.).

But compare with *Putch v. Straughan*, 397 So. 2d 38, 40 (La. App. 2d Cir. 1981), *reh'g denied, writ denied*, 401 So. 2d 976 (La. 1981) (Where case was tried but continued for argument, it had not been submitted for decision. Plaintiff's failure to request that the trial judge fix the date for argument within five years after the continuance caused his suit to abandon by operation of law.).

261. *Richey v. Fetty*, 96-2762 (La. App. 1st Cir. 4/8/98), 715 So. 2d 1.

steps for over five years. The non-defaulted defendants filed a motion to dismiss on grounds of abandonment. In opposition, the plaintiff argued the case had been prosecuted to judgment as to one of the solidary defendants. Therefore, the plaintiff argued that abandonment was inapplicable to the case, including the remaining defendants.²⁶² The defendants argued that abandonment would continue to apply as long as the plaintiff had necessary steps in the prosecution of the case to take against the remaining defendants. Otherwise, the litigation could continue indefinitely, without plaintiff being required to take any step, after obtaining a default judgment against one defendant.²⁶³

The appellate court agreed with the defendants and reasoned that once judgment has been rendered against one or more defendants in one of the cumulated actions, the plaintiff's litigation right is merged with the judgment and that action is removed from the remaining cumulated actions.²⁶⁴ The appellate court found that, considering Louisiana's liberal rules on cumulation of actions and joinder of parties²⁶⁵ and considering the purpose of the abandonment article to hasten suits to judgment, it would be unreasonable to conclude that a judgment against one defendant in a cumulated action rendered the rule of abandonment inapplicable as to the remaining defendants.²⁶⁶

The defendants' position as solidary obligors made no difference. The plaintiff could have sued each of the solidary defendants in separate suits. A judgment in one suit would not preclude abandonment in the other cases.²⁶⁷ The court held that the plaintiff was obligated to take steps in the prosecution of the remaining actions against the remaining defendants and failure to do so within five years of the default judgment resulted in the abandonment of those actions.²⁶⁸

The Louisiana Supreme Court's decision in *James v. Formosa Plastics Corp. Louisiana*²⁶⁹ is consistent with the principle expressed in *Richey v. Fetty*. In *James*, the Louisiana Supreme Court held that

262. *Id.*, 715 So. 2d at 3-4.

263. *Id.*, 715 So. 2d at 4-5.

264. *Id.*, 715 So. 2d at 6.

265. See *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1239 (La. 1993).

266. *Richey*, 96-2762 (La. App. 1st Cir. 4/8/98), 715 So. 2d at 6.

267. *Id.*, 715 So. 2d at 7. See also *Tucker v. New Orleans Laundries, Inc.*, 145 So. 2d 365, 373 (La. App. 4th Cir. 1962) (Dismissal by judgment of indispensable party did not preclude plaintiff from taking further action against remaining defendants pending appeal of the judgment. The fourth circuit stated: "We fail to see how the rendition of a judgment against one defendant, followed by an appeal to which other defendants are not parties, would prevent the plaintiff from proceeding against another defendant in the case." *Id.*).

268. *Richey*, 96-2762 (La. App. 1st Cir. 4/8/98), 715 So. 2d at 7.

269. *James v. Formosa Plastics Corp.*, 01-2056 (La. 4/3/02), 813 So. 2d 335.

a plaintiff was obligated to take steps in the trial court in the prosecution of her case against Formosa Plastics Corporation Louisiana even while her appeal against another defendant was pending. The plaintiff's failure to do so caused her case against Formosa to abandon.

VI. ABANDONMENT OF CUMULATED ACTIONS

James confirmed the principle of partial abandonment as first stated *Richey v. Fetty*. Yet, *James* also resolved another important *res nova* issue: whether the abandonment period was interrupted as to the plaintiff's action against one defendant while the plaintiff was pursuing the dismissal of a co-defendant on grounds of prescription on appeal. Formosa's motion for dismissal was filed in the trial court on June 1, 1999—over three years after any party had taken any action in the trial court, including the filing of the plaintiff's motion for devolutive appeal. Depositions taken in January 1996 were the last actions taken by a party at the trial court level.

Meanwhile, the dismissal of the co-defendant was on appeal. The First Circuit Court of Appeal affirmed the dismissal by the trial court on April 4, 1996. The plaintiff applied for a writ of *certiorari* to the Louisiana Supreme Court on May 2, 1996 and the co-defendant filed its opposition on May 17, 1996. The Louisiana Supreme Court denied the writ on November 22, 1996. Thus, the only activity which took place during the non-prosecution period was the Louisiana Supreme Court's writ denial—an action taken by a court, not a party, and an action taken at the appellate level, not the trial court level.

The trial court granted Formosa's motion for dismissal on grounds of abandonment. The First Circuit Court of Appeal reversed. In a 3-2 decision and over vigorous dissent, the First Circuit held that the three year abandonment period may not accrue as to one defendant in a cumulated action while an appeal involving another defendant is pending, even though no stay of the trial court proceeding had issued.

In a unanimous decision, the Louisiana Supreme Court reversed. The court relied on Louisiana Code of Civil Procedure article 2088 and its clear explanation of the division of jurisdiction when an appeal involving only one defendant in a multi-defendant lawsuit is taken. The article provides that “[t]he jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested . . .” and “the trial court has jurisdiction in the case only over those matters not reviewable.” Citing *Walker v. Jones*,²⁷⁰ the Louisiana Supreme Court noted that the article expressly provided that the trial

270. *Walker v. Jones*, 257 La. 404, 242 So. 2d 559 (1970).

court retained jurisdiction as to parties and issues which are not the subject of the judgment on appeal.

The trial court's judgment granting the co-defendant's prescription exception was the only issue on appeal. The judgment did not involve the plaintiff's action against Formosa and, therefore, that action remained before the trial court and remained subject to abandonment. As emphasized by Justice Fitzsimmons in his dissenting opinion to the first circuit opinion, just because an "action" as to one defendant may be cumulated with an "action" as to another does not mean that the two are forever inextricably entwined.²⁷¹

VII. CONCLUSION

The history of the abandonment article may be traced from its roots in the Louisiana Civil Code of 1870, through its transfer to the Louisiana Code of Civil Procedure in 1960, and finally to its current form following its last amendment in 1997. The 1997 amendment finally incorporated changes which had been recommended by legal scholars for decades. The evolution of the abandonment article may be traced through the hundreds of reported cases dating from the article's inception in 1870 through the present day. The reported cases all address some aspect of the article's interpretation or application. Abandonment has been legislatively expanded from its original application to plaintiffs to include all parties. Jurisprudential exceptions to abandonment have been created which track those created for prescription. The exceptions, based on the doctrines of *contra non valentem* and acknowledgment, target both plaintiffs and defendants. The abandonment period has been shortened from five years to three years. Steps deemed sufficient to interrupt abandonment have been somewhat relaxed. Formal actions taken in the trial court on the record are generally required to interrupt abandonment; however, discovery authorized by the Code of the Civil Procedure, though not filed into the record, will now suffice as well.

Despite all these changes, the core purpose underpinning the original abandonment article remains constant even today—that once a suit has been filed, it must not be allowed to linger indefinitely without being moved toward final resolution. As in 1870, when the principle of abandonment was first created, today's plaintiff must take some step designed to hasten the suit to judgment within the time period prescribed by law from the last step taken by any party in the prosecution or defense of the suit. The test for whether abandonment is interrupted is still whether the step taken demonstrates an intent not

271. *James v. Formosa Plastics Corp.*, 00-0148 (La. App. 1st Cir. 4/25/01), 808 So. 2d 572, 575.

to treat the suit as abandoned. Although the abandonment article has been the subject of several legislative amendments and a myriad of interpretations and applications by the courts, the basic precept for which the principle of abandonment was created and on which it is grounded remains true today.

