

The devil in the details: Using abandoned claims as a sword and a shield

By Carolyn O. Boucek

As the legal profession evolves, attorneys are forced to wear an increasing number of hats: Counselor, advocate, listener, peacemaker, and warmaker, among many others, depending on their clients' needs. As innovations in technology and information management demand an increase in efficiency, attorneys everywhere are looking to advocate for their clients better, faster and cheaper. While there is no substitute for hard work, deep thinking, diligence, and careful preparation, awareness and avoidance of potential pitfalls can help optimize outcomes and increase efficiency.

One simple way litigators can increase their efficiency is by paying close attention to responsive papers such as pleadings, motions, briefs and even appeals to identify abandoned claims, i.e. claims that their opponents launched but stopped pursuing. Pleadings often cast a wide net, including all possible claims and defenses – some of which may be abandoned later. Aware of the possibility of abandoned claims, detail-oriented attorneys have an opportunity to extinguish some of their opponents' claims without the cost required to address them on the merits while also safeguarding their clients from inadvertent concessions.

Forms of abandonment

Abandoned claims are more commonly addressed in federal courts, though Pennsylvania courts also acknowledge the issue.¹

Parties can abandon claims in one of two ways: explicitly and implicitly. Explicit abandonment occurs when a party affirmatively states its immediate intention to abandon a claim before the court. By contrast, implicit abandonment occurs when a court, viewing party's papers and circumstances as a whole, fairly draws an inference that the party intended to abandon its claims or defenses.

Typically, implicit abandonment occurs when a party fails to address a challenge to its claims or defenses in its responding papers. Unlike explicit abandonment, implicit abandonment does not rest on the party's intent; rather, a party can implicitly abandon claims through its failure to respond to its opponent's challenges. If the party responds to less than all of the challenges to its claims or defenses, that party will be deemed to concede those un-answered challenges, resulting in abandoning some of the claims.

Procedurally, parties can abandon a claim at almost any point during a proceeding where they are required to assert claims or respond to their opponents' challenges. For instance, parties can abandon claims as a result of failing to address all of the

challenges to them as early as a motion to dismiss. Abandonment can also occur later in litigation at the summary judgment stage or even during the appeals process.

Accordingly, astute attorneys should keep abandonment in mind during all stages of litigation to avoid extinguishing a claim or defense.

Abandonment in Pennsylvania

The Pennsylvania Supreme Court applied explicit abandonment in *City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh*. That case involved two individuals' appeal of a zoning decision regarding property. After appealing the case to the Pennsylvania Commonwealth Court, the appellants' counsel filed a praecipe stating that the appeal was "withdrawn, discontinued and ended."² The Pennsylvania Supreme Court ultimately determined that the appellants abandoned their appeal when they filed the praecipe to withdraw.

Pennsylvania also recognizes implicit abandonment. In 2005, the Pennsylvania Supreme Court held that the plaintiff in *Continental Insurance* abandoned its fraudulent conveyance and civil conspiracy claims by including them in its initial complaint but failing to include them in its amended complaint. The Superior Court of Pennsylvania followed suit in 2017 in deciding *Pollock v. National Football*

League, holding that the plaintiffs abandoned claims they included in the initial complaint by failing to include those claims in the amended complaint.

Strategic and tactical use of abandonment

Though abandonment is more often discussed in federal courts, attorneys practicing in Pennsylvania must keep the issue in mind should the Pennsylvania courts adopt the doctrine with increased frequency.

Abandonment is both a sword and a shield. Inadvertently abandoning claims or defenses can spell ruin for one party and decisive victory for the other. Keeping abandonment in mind can help perceptive litigators avoid abandoning their own claims and defenses inadvertently while identifying when their opponents abandon claims by failing to respond.

Occasionally, as litigation unfolds certain arguments become impractical for a myriad of reasons. In those cases, counsel can strategically abandon weaker claims to improve their client's overall chances of success. Especially in jurisdictions that impose a page limit on papers it could be appealing to strike a section of a brief on one issue to make space for a complex weighty issue. However, attorneys who do so run the risk of

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their clients before Thanksgiving. It is seldom that a client gets a call on a delinquent bill and writes a check that day; the action by a willing client takes at least several weeks until you receive payment. The time between Thanksgiving and year-end will be for the billing attorney to follow up on the

promised payments and contact the clients who weren’t available on the initial calls. Remember, “holiday time” for your clients tends to extend from Thanksgiving through the first week of January, so all activities, like paying bills, move more slowly.

- Track payments by prioritized clients. Your accounting department (or a central person) must track payments by the prioritized clients every week and list each payment next to those clients’ A/R, preferably on a spreadsheet. By seeing the receipts, you will be able to compare the total collected to the original A/R for each client. It also serves to keep the billing attorneys informed of their progress and whether their clients who committed to pay actually pay.

- Individual accountability. Every week, a member of the executive committee must meet, or discuss, with designated billing attorneys on the actions taken in the past week to contact their clients and the results. The report of that attorney’s prioritized clients with the A/R and payments received each week will be the ultimate test of effectiveness. Finish the meeting with the billing attorney describing the actions planned for the upcoming week. Continue this process through year-end. For every attorney who is exceeding expectations with her or his results, you may consider rewarding that person by canceling that week’s meeting!

Finally, document your disciplined procedure in writing and adopt it as an established firm procedure. Beginning with the following year, start to remind the partners in August that the collection push will begin with October billing. Only good results can come from making the procedure more predictable! ■

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abandoning those claims and should do so only after carefully considering the overall strategy and in conformance with the applicable rules of professional conduct. ■

¹ See *Jackson v. Fed. Express*, 766 F.3d 189, 197 (2d Cir. 2014); *Jordan v. Stanziola*, 96 Fed. Appx. 839, 841 n. 2 (3d Cir. 2004); *GNC Franchising LLC v. Khan*, Civil Action Nos. 05-1341, 06-00283, 2008 U.S. Dist. LEXIS 16046 (W.D. Pa. March 3, 2008) (abandoning a claim by failing to address it in response to a motion for summary judgment); *Evans v. Nine West Group, Inc.*, Case No. 00-4850, 2002 U.S. Dist. LEXIS 6427, at *12-13 (E.D. Pa. April 15, 2002); see also, *Meyer, Darraugh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1256 (Pa. 2016); *Lance v. Wyeth*, 85 A.3d 434, 465 (Pa. 2014) (Eakin, J., dissenting); *Cont’l Ins. Co v. Schneider, Inc.*, 873 A.2d 1286, 1288 n. 4 (Pa. 2005); *City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh*, 599 A.2d 896 (Pa. 1989); *Pollock v. Nat’l Football League*, 171 A.3d 773, 782 (Pa. Super. Ct. June 21, 2017); *Commonwealth v. Burton*, 121 A.3d 1063, 1067 n. 1 (Pa. Super. Ct. 2015).

² *City of Pittsburgh v. Zoning Bd. of Adjustment of City of Pittsburgh*, 599 A.2d 896, 899 (Pa. 1989).

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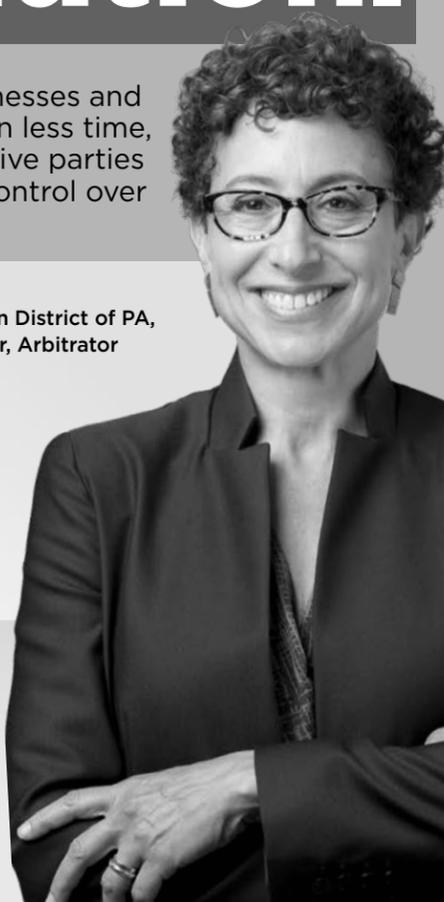
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