

## NO DELAY DAMAGES WITHOUT RECITING THE NOTICE-TO-DEFEND MAGIC SPELL

By: Edward M. Koch and Marc L. Penchansky

*Client Alert*

11.8.24

*Update: On January 6, 2025, the Superior Court withdrew the opinion discussed below. The Court will now hear the appeal en banc. An en banc rehearing means that the panel will consist of more than the usual three judges but not more than nine commissioned Superior Court judges. The Superior Court has not yet scheduled the en banc hearing. We will further update this article when the Superior Court issues its opinion.*

Pennsylvania law allows verdict winners in cases involving property damage, bodily injury, or death to request delay damages from the liable defendants. Delay damages are awarded for the period starting one year after initial service of process until the date of decision, award, or verdict. This week, the Superior Court considered whether a procedural mistake in requesting delay damages forfeits the right to delay damages.

Rule 238(c) of the Pennsylvania Rules of Civil Procedure requires the requesting party to include a very specific notice to defend at the beginning of the motion for delay damages. That notice informs the liable party that it must file a written answer to the delay-damages motion within 20 days. The lawyer representing the verdict winners in a lawsuit concerning a motor vehicle accident did not do that. As a result, the trial court denied plaintiffs' motion for delay damages. The Superior Court, when considering this question of first impression, affirmed. *In re Arreguin*, Pa. Super. LEXIS 481 (Pa. Super. Nov. 5, 2024).

The Superior Court recognized that Rule 238(c) states that the verdict winner "shall begin" the motion for delay damages "with the . . . notice. . . ." The Superior Court found that the use of "shall" made mandatory both the notice to defend and its placement at the beginning of the motion. The Superior Court also found persuasive other judicial opinions that interpreted similar Rules of Civil Procedure to require a notice to defend for petitions and complaints to trigger a duty to answer.

Judge Stabile dissented. He contended that the Rules made delay damages mandatory when requested by a plaintiff and that could not be undermined by the failure to appropriately include a notice to defend. While Judge Stabile was the lone dissenter, the inevitable nature of delay damages may have lulled some attorneys not to check that the verdict winner properly sought delay damages. Delay damages are often a substantial amount of an award. Attorneys are now on notice that a procedural slip-up may take delay damages off the table.

If you have any questions or need more information, contact Edward M. Koch (koche@whiteandwilliams.com; 215.864.6319) or Marc L. Penchansky (penchanskym@whiteandwilliams.com; 215.864.6279). Or, for more information, contact a member of our Appellate or Insurance Coverage and Bad Faith Practice.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.