

CHAPTER 10:

STATUTES OF LIMITATIONS AND LACHES

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I. INTRODUCTION

As in other types of civil cases, a plaintiff's delay in bringing an election-related lawsuit may result in the court's refusal to hear the case because the statute of limitations period has expired. The plaintiff's delay may prevent the court from granting relief if laches applies because the delay prejudiced another party. The refusal to hear a case or grant relief stems from the concern that electoral integrity and finality suffer when challenges are filed an inordinate amount of time after the election.¹ Because untimely pre-election lawsuits can also have a deleterious effect on the forthcoming election, statute of limitations periods or laches may affect these lawsuits as well. Less commonly, waiver and estoppel also act to limit elections-related claims.

II. STATUTES OF LIMITATIONS

Elections abound with deadlines, including those for filing candidacy and ballot measure qualification petitions, registering to vote, applying for an absentee ballot, or challenging a candidate's or voter's qualifications. Deadlines also guide election officials' actions, such as when they specify the date or time frame in which officials must ascertain and declare the sufficiency of a candidacy or ballot measure petition, fix the ballot order, or mail absentee

¹ Clark v. City of Trenton, 591 S.W.2d 257, 259 (Mo. Ct. App. 1979).

ballots. Election deadlines may be expressed as fixed calendar dates or as a fixed number of days before or after a specified pre- or post-election event.²

Generally strictly construed and applied, these election deadlines may act as statutes of limitations periods. When the deadline or limitations period governs candidates and voters, their failure to complete the specified action at or within the allotted time usually limits their right to sue,³ not merely the right to receive a remedy. In addition, because statutes of limitations are legislatively determined, courts usually lack authority to modify them.⁴ Thus, an untimely filed election-related challenge may deprive the trial court of jurisdiction under both statute and case law.⁵ Failure to file within the limitations period deprives the court of equitable, as well as legal, remedies.⁶

A. STATUTORY PERIODS

Statute of limitations periods vary by state. They may be as short as a few days to as long as a month.⁷ They may also vary within a state based on whether the election is a primary, general, run-off, or special election. Even with an identical limitations period, the statute's operation may affect different contested offices in the same election differently because the triggering event, perhaps the date the winner was certified, may have occurred earlier for some offices than others.⁸

² For example, a deadline might be expressed as "June 15," "the Tuesday after the first Monday in November," or as "within 10 days after the election."

³ Cooper v. Dix, 771 P.2d 614, 616-17 (Okla. 1989)

⁴ Cook v. Brown, 909 So. 2d 1075, 1077 (Miss. 2005) (finding the court cannot change the time in which contested ballots may be viewed because setting the period is a legislative function). See also (Donn v. McCuen, 797 S.W.2d 455 (Ark. 1990) (noting, in a mandamus lawsuit seeking to add a prospective candidate's name to the ballot, that election law provisions are mandatory when enforcement is pursued before the election, hence the late-filed request was denied). Under unique circumstances, courts are sometimes able to extend the statutes of limitations period or allow late-filed challenges. See *In re Wilbourn*, 590 So.2d 1381, 1386 (Miss. 1991) (establishing a ten-day contest filing period beginning when the court certified the election returns because the statutory contest period expired during the time a temporary restraining order prevented the canvassing board from certifying a winner and transmitting the results to the state); Thomas v. York County Bd. of Elections, 59 Pa. D. & C.2d 377, 379 (Ct. Com. Pl. 1972) (granting *nunc pro tunc* petition where erroneously announced winner did not learn that he did not win in sufficient time to file a timely challenge); Petrafeso v. McFarlin, 207 N.W.2d 343, 346 (Minn. 1973) (refusing to allow clerk's error to defeat challenger who filed within the limitations period).

⁵ Mayor and Council of City of Wadley v. Hall, 410 S.E.2d 105, 106 (Ga. 1991); see also, Forbes v. Bell, 816 S.W.2d 716, 718-19 (Tenn. 1916).

⁶ *Mayor and Council of City of Wadley*, 410 S.E.2d at 106 (finding no equitable remedy available as an alternative because a statutory remedy was available at law and his inability to qualify for it was due to his own delay).

⁷ Henderson v. Maley, 806 P.2d 626 (Okla. 1991) (contest filing deadline is 5 p.m. the Friday following the election.); *Mayor and Council of City of Wadley*, 410 S.E.2d 105 (five days); *In re Contest of Election For Offices of Governor and Lieutenant Governor Held at Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 172 (Ill. 1983) (fifteen days after the results are officially proclaimed).

⁸ E.g., in an election with both local and statewide offices, the local results may be certified before the statewide results. Thus the recount or contest statute of limitations period for local offices would expire

B. TRIGGERING EVENTS

When the statute of limitations is not triggered on a fixed date, the court may be required to determine if the action was timely filed. For example, if the limitations statute references the “canvass” date, the court may need to determine which of multiple canvassing dates to use because without additional statutory elaboration or interpretation, “canvass” could refer to:

- the election day canvass,
- the county board of elections’ canvass,
- the date the clerk files the county board’s abstract with state election officials,
- the date the Secretary of State receives or takes action on the abstract,
- the date the state board of elections canvassed the abstracts, or
- the Secretary of State’s certification of the nominations.⁹

Defendants who wish to benefit from the supposed expiration of the statute of limitations period bear the burden of proving the action was untimely. In the absence of proof, courts presume that all statutorily-required actions were completed within the allowable time frame.¹⁰

C. IMPACT ON AMENDMENTS AND COUNTERCLAIMS

In election-related cases, a court’s discretion to allow late-filed lawsuits may be more limited than with general civil cases. For example, courts may lack discretion to allow amended complaints or the filing of exhibits once the limitations period has run.¹¹ Some states allow amendments if they are limited to technical corrections and do not state new charges. In other states, courts may have discretion to permit amendments that flesh out previous charges.¹²

before the limitations period for statewide offices, assuming an equally long limitations period for both offices. See *Noble v. Ada County Elections Bd.*, 20 P.3d 679 (Idaho 2000) (holding that state board of elections meeting was the canvass date for a state senate seat because a senatorial district could be larger than an individual county in which case the canvass would not be complete until all the constituent county results were aggregated at the state-level meeting); *Pullen v. Mulligan*, 561 N.E.2d 585, 589-90 (Ill. 1990) (holding that limitations period based on state board of elections canvass and certification of statewide results in election challenge involving a state legislative seat).

⁹ Likewise, when the statute of limitations accrues on Election Day, the court may need to determine what events constitute the “election,” because the “election” could be 1) the actual voting day, 2) the day the canvassing board certifies the results, 3) the day the results are amended, or 4) the day a recount board completes its certification. See *Wills v. Iron County Bd. of Canvassers*, 455 N.W.2d 405, 408 (Mich. Ct. App. 1990) (holding that “election” referred to the date the board of county canvassers certified the election because canvassing and certification are necessary election components without which an election cannot be deemed to be completed).

¹⁰ *Noble*, 20 P.3d at 683 (deciding that because the contestee failed to provide the actual canvassing date, the canvass was assumed to have occurred on the last date allowed under governing statutes, which in turn meant the contestant filed suit on the last day of the limitations period).

¹¹ *Forbes v. Bell*, 816 S.W.2d 716, 718 (Tenn. 1916).

¹² *Id.* at 718. See also, *Mayor and Council of City of Wadley*, 410 S.E.2d at 108 (Bell, J., concurring) (deciding that ability to file a skeletal petition and supplement combined with a policy of expediting election contests means the strict five-day limitations period will not be tolled).

In general, the running of an election contest limitations period does not bar the contestee from filing an answer or a cross-petition--if the state permits them--because, as the purported winner, the contestee had no reason to file within the original limitation period.¹³ A contestee's ability to file a response, however, is frequently narrowly construed. For example, one court held that express statutory authorization that permitted contestees to file a cross-petition on the date of the hearing that alleged electoral *fraud* did not impliedly authorize the contestee to file a cross-petition on the hearing date that alleged electoral *irregularities*.¹⁴

III. LACHES

Driven by policy preferences that strongly favor not just pre-election resolution but *early* pre-election resolution of election-related disputes,¹⁵ courts may apply laches to election-related lawsuits filed during all stages of the election cycle. Laches is an equitable doctrine (sometimes called an equitable defense) that courts use at the defendant's request to dismiss lawsuits where the plaintiff's delay in bringing the lawsuit prejudiced another party. In an election context, prejudice may occur when election deadlines pass. Whether or not laches is characterized as an affirmative defense, it is not waived if not asserted at the initial stages of the election-related challenge, and may be raised for the first time on appeal.¹⁶

Because the application of laches is a question of fact, the trial court determines if it applies.¹⁷ When laches applies, the merits of the underlying claim are not addressed.¹⁸ Laches may also foreclose requests for extraordinary relief. Common applications of laches include the following:

- to *pre-election* challenges that the court determines should have been filed *earlier* and,
- to *post-election* challenges that the court determines should have been raised *pre-election*.

Challengers who wish to avoid laches must demonstrate that they acted with the utmost diligence.¹⁹

¹³ *Nagel v. Kindy*, 591 N.E.2d 516, 519 (Ill. App. Ct. 1992); *but see, Henderson v. Maley*, 806 P.2d 626, 634 (Okl. 1991) (holding that lack of legislative authorization for a hearing date-filed cross-petition bars the same when the original limitations period has expired).

¹⁴ *See, Nagel*, 591 N.E.2d 516.

¹⁵ *See, State ex rel. Vickers v. Summit County Council*, 777 N.E.2d 830, 832-33 (Ohio 2002) (per curiam). (noting that a "requirement that expedited election cases be filed with the required promptness is not simply a technical nicety."); *Koter v. Cosgrove*, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) (noting that our system of government depends on the prompt resolution of election contests and timely certification of a winner so the government can continue to efficiently operate).

¹⁶ *State ex rel. Hill Communities, Inc. v. Clermont County Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam) (holding that laches is not waived if not raised in earlier court proceedings).

¹⁷ *Landwersiek v. Dunivan*, 147 S.W.3d 141, 148 (Mo. Ct. App. 2004).

¹⁸ *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

¹⁹ *Summit County Council*, 777 N.E.2d at 832.

A. LACHES' ELEMENTS

The most salient feature of laches is the unity of 1) delay and 2) prejudice. Mere delay is not sufficient to trigger laches; instead, the delay must substantially disadvantage and prejudice the defendant,²⁰ or another individual or entity. Because of the number of interdependent deadlines involved in election administration, and because elections are date-fixed events that are rarely rescheduled, prejudicial delays are commonly easily found in election lawsuits. Courts that analyze laches claims frequently outline the delay and review the extent to which the evidence supports that prejudice ensued.²¹

1. Delay

The plaintiff's delay in filing the lawsuit must reflect a "want of due diligence."²² A plaintiff's unreasonable or inexcusable delay in suing satisfies the delay requirement.²³ The court evaluates the reasonableness of the plaintiff's delay by reviewing the reasons for the delay, the relief requested, and whether the defendant, a third party, or the general public suffered prejudice because of the delay.²⁴

This mix of considerations, as well as state precedent in laches' application, gives rise to great variability in the amount of delay that may occur between injury and lawsuit before laches applies. For example, one court noted that courts in its state had applied laches in election cases when the plaintiff delayed filing a lawsuit for nine days.²⁵ Delays that allow deadlines to pass are especially likely to be declared unreasonable and to support laches.²⁶ Although written opinions sometime suggest that laches is inapplicable if the petitioner justifies his apparent lack of diligence,²⁷ acceptable justifications are unlikely to arise in practice. Finally, the petitioner's delay is not automatically excused by others' delay, especially if the petitioner contributed to the overall delay.²⁸

²⁰ *Landwersiek*, 147 S.W.3d at 147.

²¹ See *Blankenship v. Blackwell*, 817 N.E.2d 382 (Ohio 2004) (per curiam).

²² See *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998).

²³ See *Thirty Voters of County of Kauai v. Doi*, 599 P.2d 286 (Haw. 1979) (per curiam) (holding that constructive notice of complained-of change to ballot language was received when the sample ballot was published).

²⁴ Note that laches recognizes an expanded universe of individuals who the plaintiff's delay may prejudice.

²⁵ See *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1138 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

²⁶ *State ex rel. White v. Franklin County Bd. of Elections*, 600 N.E.2d 656, 659 (Ohio 1992) (per curiam) (citing events that happened during the delay and gave rise to laches, such as absentee ballots put into use, ballots printed or the form certified, and replacement nominee deadline passed).

²⁷ *State ex rel. Hill Communities, Inc. v. Clermont County Bd. of Elections*, 746 N.E.2d 1115, 1118 (Ohio 2001) (per curiam) (applying laches because while the plaintiff requested expedited consideration of his challenge to the sufficiency of ballot measure petitions, he himself did not act expeditiously).

²⁸ *Newell*, 757 N.E.2d at 1138 (postponing hearing on challenges to qualifying signatures for ballot measure in part because the realtor did not specify all the signatures he was challenging during the initial hearing).

2. Prejudice

Without a showing of prejudice, laches is unavailable.²⁹ Prejudice arises when a party is harmed because of its reliance on the plaintiff's delay.³⁰ Prejudice may occur if hearing the lawsuit negatively impacts statutory election deadlines such as those governing the mailing of absentee ballots, especially if those deadlines will be missed.³¹ Another court found that laches did not apply to save the election of a candidate who moved outside the district line based on incorrect boundary information he received because the late challenge did not prejudice the candidate due to his ineligibility.³²

The universe of parties potentially prejudiced by the plaintiff's delay is not limited to the named defendant.³³ Even if they are not parties to the lawsuit, prejudice may arise if the board of elections, the electorate, or the local citizenry is harmed by the delay.³⁴ These parties may be harmed by lawsuits that are not filed until after the election when the plaintiff could have filed them beforehand. Laches has been used to dismiss cases when the plaintiff's delay prejudiced the following groups:

- absentee voters,
- counties that were facing absentee ballot mailing deadlines,
- state elections officials, who had insufficient time to prepare their defense,
- potential future petitioners, who would lack the time to challenge any remedy, and
- the state at-large, because its election preparations might be thrown into turmoil.³⁵

²⁹ See *Landwersiek v. Dunivan*, 147 S.W.3d 141, 145 (Mo. Ct. App. 2004) (declaring that no laches were possible without a showing that ordering a new election or recount would prejudice any of the candidates); *Melendez v. O'Connor*, 654 N.W.2d 114, 117 (Minn. 2002) (per curiam) (finding that, regardless of any unreasonable filing delay, there was no prejudice to the candidate or his supporters in not permitting defendant's name on the ballot because he was ineligible due to inability to meet the residency requirements); *Polly v. Navarro*, 457 So.2d 1140 (Fla. Dist. Ct. App. 1985) (denying laches because illegal candidacy was not harmed by challenge filed seventy-four days after candidate filed his petitions).

³⁰ *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998) (denying laches to defendants who experienced no prejudice due to the petitioner's delay because defendants had begun spending time and money in preparation for the election as soon as they knew an election would occur and did not do so solely because of the petitioner's delay filing suit).

³¹ *Newell*, 757 N.E.2d at 1140 (noting in particular that statutory deadlines to mail absentee and military ballots would be missed if the case is heard).

³² *Melendez v. O'Connor*, 654 N.W.2d 114 (Minn. 2002) (per curiam) (finding an intention to comply with residency requirements was not equivalent to actual compliance).

³³ *Ross v. State Bd. of Elections*, 876 A.2d 692, 706 (Md. 2005).

³⁴ *Id.*

³⁵ *Blankenship v. Blackwell*, 817 N.E.2d 382, 387 (Ohio 2004) (per curiam) (denying writ of mandamus to county boards of elections to compel certain actions to further third party presidential candidate's access to the ballot on laches and other grounds).

B. APPLYING LACHES

The passage of time that might not constitute a delay in a general civil case can trigger a laches bar in an elections case, especially if state election statutes specify expedited procedural schedules. Thus, even pre-election lawsuits should be expeditiously pursued and are vulnerable to laches if they are not. Laches is also commonly used to dispose of post-election challenges, especially when the court concludes that a pre-election challenge was appropriate. Laches can also apply to lawsuits requesting extraordinary relief.³⁶ Courts sometimes refuse to apply laches if its operation would permit constitutional violations to stand.³⁷

1. Pre-Election Challenges

A smooth and successful election requires many interdependent steps that must occur in a precise order. Delays or missed deadlines, including those resulting from election-related challenges, might disrupt later stages of the election preparation.³⁸ As the election draws near and election officials make more irrevocable decisions and commit substantial resources towards it, the state's interest in proceeding with the election increases.³⁹ As a result, laches may bar even pre-election challenges when the potential relief would prejudice a later election-related step,⁴⁰ such as holding the election in a timely manner. Thus, filing a pre-election lawsuit is not necessarily sufficient to avoid the application of laches and the closer the impending election, the quicker the plaintiff must act.⁴¹

³⁶ *State ex rel. White v. Franklin County Bd. of Elections*, 600 N.E.2d 656, 659 (Ohio 1992) (per curiam); see *ANTINEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES* 301, (laches may bar a writ of mandamus), 501 (stating that laches bars a writ of prohibition.), 598-99 (laches bars a petition for quo warranto brought by a private party, but ordinarily does not bar quo warranto brought by the government).

³⁷ *Sprague v. Casey*, 550 A.2d 184, 188 (Pa. 1998) (finding that laches did not bar a lawsuit that challenged a judicial election that was scheduled at the same time as a general election in violation of the state constitution).

³⁸ *State ex rel. Newell v. Tuscarawas County Bd. of Elections*, 757 N.E.2d 1135, 1140 (Ohio 2001) (Douglas, J., dissenting) (per curiam).

³⁹ *Ross v. State Bd. of Elections*, 876 A.2d 692, 705 (Md. Ct. App. 2005); see *Campaign to Elect Larry Carver Sheriff v. Campaign to Elect Anthony Stankiewicz Sheriff*, 804 N.E.2d 419 (Ohio 2004) (holding that laches was appropriate where the statutory deadline to mail absentee ballots had passed before the elections board was named as a party).

⁴⁰ See *Evans v. State Election Bd. of State of Okla.*, 804 P.2d 1125, 1127 (Okla. 1991) (deciding that suit seeking extraordinary relief to reinstate candidate's name on the ballot lacked diligence and was barred by laches when it was filed ten days after the name was removed from the ballot); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (en banc) (holding that laches apply to recall election where although voting equipment had been previously decertified, election had effectively begun with mailing of absentee ballots and halting it would be unprecedented); *Winters v. Kiffmeyer*, 650 N.W.2d 167, 170 (Minn. 2002) (finding that although office should be on the ballot, filing the action mid-way through the nominating petition acceptance period prejudiced the current office holder and other potential candidates, and, combined with the significant effect of ordering an election, meant laches was appropriate).

⁴¹ In addition, state law or court practice rules govern the availability of expedited procedural schedules for election lawsuits. See *State ex rel. Willke v. Taft*, 107 Ohio St. 3d 1, 2005-Ohio-5303, 836 N.E.2d 536 (Ohio 2005) (finding that state supreme court practice rules made the challenge an expedited case).

2. Post-election Challenges

The availability of post-election relief for election law violations may be restricted.⁴² Lawsuits filed after an election are particularly scrutinized when the basis for the challenge was known or discoverable pre-election. Because of public policy preferences for expeditious challenges rather than last minute ambushes by candidates who wait to see if they win the election before they sue, plaintiffs generally cannot disregard pre-election remedies in favor of post-election lawsuits.⁴³ For example, a losing candidate's challenge to the winning candidate's qualifications was precluded by laches because the petitioner knew his opponent had failed to file the required necessary campaign finance documents—and thus should have had been disqualified—before the election, but waited until three days after the election to sue to have her disqualified.⁴⁴ In another case, laches prevented a post-election challenge to a candidate who was otherwise qualified for office except for improper nomination papers.⁴⁵ Finally, laches barred a post-election lawsuit seeking to overturn the election results because ballot measure choices were changed from "yes" and "no" to "for" and "against" because they could have been challenged and corrected before the election.⁴⁶

Expedited schedules, whether triggered automatically or available only upon request, can either benefit or harm the relator's case. Expedited processes benefit a relator if they allow the lawsuit to be heard when the normal court calendar could not accommodate it before the election. Expedited processes harm the relator's case if they provide the prejudice necessary to trigger laches. See *State ex rel. Comm. for the Charter Amendment, City Trash Collection v. City of Westlake*, 97 Ohio St. 3d. 100, 2002-Ohio-5302, 776 N.E.2d 1041, at ¶¶ 19-20 (Ohio 2002) (deciding that laches was inapplicable because statutorily-mandated expedited briefing and evidence presentations concluded before the absentee ballot printing and mailing deadline passed); *Campaign to Elect Larry Carver Sheriff*, 804 N.E.2d at 422 (finding that because late pre-election filing made it unlikely the expedited briefing schedule mandated by statute could be met before the election, providing more impetus for a laches determination.); *White*, 600 N.E.2d at 659 (finding that there was a prejudicial delay present when after the expedited briefing schedule was completed, insufficient time was available for the board of elections to make any necessary changes to absentee ballots by the statutory deadline).

⁴² *McKinney v. Super. Court*, 21 Cal. Rpt. 3d 773, 777 (Ct. App. 2004).

⁴³ *Id.* at 776 (noting the trial court dismissed the plaintiff's initial lawsuit for laches and denying the petition because the petitioner had "short-circuited" the appeals process by bringing a writ petition rather than an appeal).

⁴⁴ *Ross*, 876 A.2d at 694.

⁴⁵ *Thurston v. State Bd. of Elections*, 392 N.E.2d 1349 (III. 1979).

⁴⁶ *Thirty Voters of County of Kauai v. Doi*, 599 P.2d 286, 288 (Haw. 1979) (per curiam) (discussing ballot measure voting choices changed from "yes" and "no" to "for" and "against"); *Lewis v. Cayetano*, 823 P.2d 738 (Haw. 1992) (noting that when it became apparent that election officials were not going to correct the ballot irregularities the plaintiff was obligated to file a pre-election lawsuit).

3. Appeals

Defendants may raise a laches bar for the first time during an appeal. Laches operates differently from challenges to the timeliness of an appeal because even timely appeals can be barred by laches.⁴⁷

4. Interplay with Statutes of Limitations

Because laches considers prejudice as well as delay, its operation sometimes shortens the time in which a suit is considered timely, regardless of whether the limitations period has run. In addition, courts sometimes substitute laches for absent or inapplicable limitations periods.⁴⁸

⁴⁷Ellis v. Swensen, 16 P.3d 1233, 1239 (Utah 2000) (applying laches where appeal was filed the thirty day appeals limitations period ended on a Sunday and appeal was filed the following Monday on the grounds that the full appeals period was not guaranteed for election cases).

⁴⁸ Koter v. Cosgrove, 844 A.2d 29, 33 (Pa. Commw. Ct. 2004) (en banc) (holding that equity operates to void a ballot measure election when a legal requirement was ignored or disregarded even though the state election code limited election challenges to elective offices and omitted ballot measure challenges, and while equity did not carry forward the election code's tight statute of limitations period, laches did apply).