

# A New, Confusing Patchwork Of Statutes Of Limitations

By **Rebecca Brazzano and Martine Wilson**

One of the tried-and-true defenses to a claim is that the statute of limitations has expired. Before COVID-19 this was a simple determination, now it is not.

As state executives and the judiciary across the United States rapidly issue orders tolling certain statutes and rules, and then extend those same orders, lawyers and clients must continuously track them. Every time we thought our analysis was done, another order dropped, and we then reviewed each of the prior orders to confirm that we have real-time information to share. That said, the information we provide here as it applies to civil statutes of limitations is up to date through April 10.



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The first item to note is there is no consistency at the state level. Given the swift pace at which these tolling orders are rolling out, the best approach appears to be the path taken first by Kansas, whose Supreme Court issued an administrative order on March 18 that “suspended until further order” all statutes of limitations deadlines.



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Connecticut followed, with Gov. Ned Lamont issuing an executive order effective March 19 suspending statutes of limitations for the duration of “this public health and civil preparedness emergency.” By extending the limitations period from a specific date to a date in the future that can be easily tracked, Kansas and Connecticut have given durability to their statutes of limitations tolling.

In contrast, the Rhode Island Supreme Court issued an order on March 17 that gives less than clear direction, offering that “[r]equests for extensions to applicable statutes of limitations necessitated by the current health crisis shall be entertained by the respective courts after thirty (30) calendar days from the date of this Order [April 16].” This order gave the state’s judges a certain degree of discretion as to whether to toll the limitations periods.

Apparently recognizing the uncertainty and further drain on individual courts that this order created, on April 8, Rhode Island issued a new order declaring “[d]ue to the availability of the electronic filing system, statutes of limitations are not tolled and shall continue to run.” Rhode Island’s orders are particularly concerning for clients, as it is unclear whether the statute of limitations were tolled from March 17 through April 16, or if the April 8 order is effective retroactively, and the statute of limitations were never tolled.

As states take differing approaches to tolling their civil statutes of limitations, litigants will be looking at jurisdiction advantages moving forward. For example, if a claim can be litigated in Rhode Island or New Jersey, a party may want the certainty of the New Jersey Supreme Court’s definitive order (described below) over the discretion and confusion provided in Rhode Island.

New Jersey has taken a unique approach. On March 27, its Supreme Court ordered that “[i]n the computation of time periods under the Rules of Court and under any statute of limitations for matters in all courts, for purposes of filing deadlines, the additional period

from March 28 through April 26, 2020 shall be deemed the same as a legal holiday, thus extending the tolling established by the [earlier] March 17 Order," making March 16 through March 27 a legal holiday. For clients and lawyers, this provides a degree of certainty; at least they know that this period is considered a legal holiday for statutes of limitations purposes.

A number of states have done nothing, which is puzzling. Equally perplexing is why there has been no movement on the federal level. Lawyers and clients are increasingly frustrated by what "governing rules" means. Currently, in the federal courts, litigants must consult the Federal Rules of Civil Procedure, then the local district and appellate courts' rules, and then individual judges add their own rules to the pile.

The randomness of the state courts' tolling start and end dates continues. In its March 22 order, the Supreme Court of Appeals of West Virginia stated:

Statutes of limitations and statutes of repose that would otherwise expire during the period between March 23, 2020 and April 10, 2020 are hereby extended until April 11, 2020. Deadlines, statutes of limitations, and statutes of repose that are not set to expire between March 23, 2020, and April 10, 2020, are not extended or tolled by this order. Proceedings previously scheduled between March 23, 2020, and April 10, 2020, are continued until a later date determined by the presiding judicial officer. The Court may extend this Order in the event the public health crisis continues.

West Virginia Gov. Jim Justice declared a state of emergency on March 16 and later issued a stay-at-home order effective March 24 at 8 p.m. Recognizing that litigants in the gap between the two directives were not shielded by the tolling of the limitations period in West Virginia, the Supreme Court of Appeals issued a new order on April 3 tolling statutes of limitations and statutes of repose that would expire between March 23 and May 1, extending the deadline to May 4.

Neighboring Virginia took yet another approach, which requires counsel to chase the limitations tolling period again and again. On March 16, the Supreme Court of Virginia stated that "[p]ursuant to Va. Code § 17.1-330, a judicial emergency was ordered; effective March 16, to April 6, 2020 (all deadlines are hereby tolled and extended, pursuant to Va. Code § 17.1-330(D), for a period of twenty-one (21) days)."

Virginia's declaration of a state of emergency was issued on March 12, but statutes of limitations were not tolled until March 16. Litigants will have to contend with the differing gaps. As April 6 approached, Virginia's Supreme Court had to again address its statutes of limitations tolling by issuing a new order on March 27 that provides an extension of the statutes of limitations tolling for the "duration of this order," from April 6 to April 26. This order excepts certain claims — too many to list here — creating even less clarity.

Georgia's tolling offers relief from March 14 through April 13, suspending, tolling, extending and "otherwise [granting] relief from any deadlines or other time schedules or filing requirements imposed by otherwise applicable statutes, rules, regulations, or court orders, whether in civil or criminal cases or administrative matters, including, but not limited to any: (1) statute of limitation."

The Georgia Supreme Court saw April 13 as fast approaching and issued another order extending the tolling to May 13. Multiple executive and judicial orders are being issued to stretch the original orders' expirations while stay-at-home orders continue in place.

Learning from its neighboring states' patchwork of expiring orders, on March 27, the Ohio Supreme Court issued an order tolling statutes of limitations in conformance with House Bill 197, which was signed into law by Gov. Mike DeWine on March 27.

It immediately tolled, retroactive to March 9, all statutes of limitations, time limitations and deadlines in the Ohio Revised Code and the Ohio Administrative Code until the expiration of Executive Order 2020-01D or July 30, 2020, whichever is sooner. Ohio's retroactive application of tolling to March 9 has a reasonable relationship to the state of emergency DeWine issued on March 10.

Per Executive Order 202.8 issued by New York Gov. Andrew Cuomo on March 20:

[A]ny specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

With April 19 approaching, Cuomo issued another executive order on April 7 tolling all dates covered by the previous executive order to May 7.

For those states that explicitly do not toll statutes of limitations in their respective orders (Alabama, Idaho and Indiana — trial courts may petition where necessary to toll "for a limited time all laws, rules, and procedures setting time limits for ... all other civil and criminal matters before all State of Indiana trial courts") and the states that do not even address statutes of limitations in their orders<sup>[1]</sup> (Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii and Illinois), while most have declared states of emergency and issued stay-at-home orders, their silence on the tolling issue is inexplicable and disadvantageous to litigants.

Advising on best practices during this pandemic is a day-to-day, and at times, hour-by-hour, challenge. While it is unclear why the approach taken by Kansas, Connecticut and Ohio has not caught on, the orders and amended orders being issued make docketing and tracking all the more painstaking.

Although we do not address the thousands of other orders being issued from state judiciaries and individual courts on scheduling issues, court closures and openings, and discovery extensions, individual judges issuing their own personal emergent COVID-19 orders is a morass that lawyers need to navigate carefully.

State supreme courts need to take a pause and consider issuing a single order governing their civil statutes of limitations that expires coextensively with their declared state of emergency plus 30 days. It is not practical to have the thousands of filings that have not been filed during the pendency of these tollings snap back and everyone filing the date that tolling expires in any particular jurisdiction.

Given that many state civil courts are effectively closed, absent extraordinary relief being sought, the judiciary is already facing a backlog of cases whose proceedings are already in the queue. Rather than burdening an already taxed system, counsel should be proactively reaching out to their current and potential adversaries and entering into simple tolling or standstill agreements as a best practice with one caveat.

A tolling agreement does not, except in very complex cases, need to be a complicated 20-page agreement. The parties can simply agree to toll the filing of claims to a specific date that is tied to the governing state of emergency that has been declared in the jurisdiction where the parties are litigating or plan to litigate. This will eliminate the need to check executive and judicial orders almost daily.

The agreement should include language stating that the defendant or potential defendant is waiving the right to challenge the claim on the grounds that the limitations period passed. In addition to buying more time and protecting litigants' rights, tolling agreements can lower litigation costs and support settlement negotiations.

Another best practice is to review existing contracts. The pandemic's consequences for supply chains and essential businesses will cause ripple effects.

Review choice of law provisions in agreements and put them in summary form where the data is readily available, which allows quick retrieval of contracts for review of relevant choice of law and force majeure clauses that will impact potential disputes moving forward. Keep in mind that some states are allowing individual trial courts to determine if a statute of limitations is tolled, and it is prudent to determine if such orders apply to potential disputes.

Finally, consider equitable tolling as a standard defense moving forward. The principle of equitable tolling is that a litigant should not be precluded from bringing a claim when, due to unexpected circumstance, it was prevented from pursuing the claim before the expiration of the statute of limitations. A litigant is entitled to equitable tolling where it has diligently pursued its claim and some extraordinary circumstance prevented a timely filing. It is important to review the relevant jurisdiction's case law regarding equitable tolling, as it varies by jurisdiction.

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[1] It is important to note that this list is not exhaustive. There are a number of other states that either do not address the statute of limitations in their respective orders, or explicitly do not toll them, but the list of states is too numerous to provide here.