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Anticipating Case and Claim Deadlines in the Age of COVID-19

While lawyers and clients hunker down at home as state and federal courts in numerous jurisdictions restrict access and limit their own activities, case and claim initiation deadlines are approaching. Authorities in numerous states have taken steps, including executive orders, to mitigate this problem, but these solutions are neither universal nor uniform, and importantly, none is a comprehensive panacea. Case and claim initiation deadlines in the age of COVID-19 continue to require attention.

Statutory Time Limitations

Both because courts in many places are understaffed, under siege and overwhelmed and because litigants and lawyers are displaced and disconnected, numerous government authorities have taken steps to ease deadlines. In New York, which is hardest hit by COVID-19, Gov. Andrew Cuomo issued Executive Order 202.8, which tolls any specific time limit under the procedural laws of New York or any other statute, rule or regulation for the commencement, filing or service of any legal action from March 20 through April 19. (It is extremely likely that this arrangement will be extended.) This tolling order has the effect of adding an additional day to limitation periods for each day the order is in effect, which provides maximum protection to potential claimants –assuming, of course, that New York law applies and the order survives any challenges that may be made someday. Claimants with potential claims governed by the laws of other states but subject to New York forum-selection clauses may take less solace from Cuomo's order.

Moreover, not all states have taken the same generous approach. In neighboring New Jersey, for example, by order of the court, all days from March 16 through April 26 (also likely to be extended) are deemed a legal holiday, thus extending until April 27 any limitation periods that would otherwise have expired. Because this order was issued by the New Jersey Supreme Court, not the governor, challenges that the order is invalid or unenforceable seem unlikely. This order obviously benefits litigants bringing claims in the New Jersey state courts (including, potentially, forum shoppers who seek to bring claims that have expired in their home states). But, as a procedural rule applicable only to the state courts in New Jersey, the order may push tardy litigants to commence suit in the state courts rather than take advantage of otherwise available federal courts. The order provides no help, moreover, to litigants required to litigate elsewhere, including by forum-selection clauses and jurisdiction and venue limitations. Further, even for litigants who may benefit, the New Jersey order creates some risks not present in the New York approach. In particular, whereas the New York order creates day-for-day extensions, the New Jersey order causes all deadlines that would otherwise have expired over a period of weeks to expire at once. When the order lifts, there may be a run on the courts and their sometimes-fragile infrastructure; claimants should not wait until the last minute to file tardy claims lest an overwhelmed system bar them at the courthouse door when the order ends.

Massachusetts took yet a third approach. By order of the Supreme Judicial Court, all deadlines set forth in statutes or court rules that would expire between March 16 and May 4 are tolled until May 4. This order has the benefit of day-for-day tolling, as in New York, and the virtue of being a court order, as in New Jersey, but as in New Jersey, it may not protect litigants who must or prefer to bring claims outside the state courts. Moreover, unlike the New York order, the Massachusetts order, like the New Jersey order, provides no benefit to potential claimants whose claims will expire immediately after the expiration of the order; that is, the Massachusetts order, by its terms, applies only to deadlines that would otherwise have expired while the order was in effect.

Finally, to complete our recitation of the orders extant within the geographic footprint where Day Pitney has offices, we turn to the executive order issued by Connecticut's Gov. Ned Lamont. (No orders have yet been issued in either Washington, D.C., or Florida to relieve potential claimants of limitation deadlines.) Lamont's Executive Order No. 7G works to "suspend" all "time requirements, statutes of limitation, or other limitations or deadlines relating to service of process, court proceedings or court filings." This order (assuming it survives any subsequent challenges), like Cuomo's order, may provide protection to litigants who choose to pursue claims governed by Connecticut law in fora other than the Connecticut state courts, but it creates some unique risks and uncertainties of its own. In particular, Lamont eschewed the well-understood legal term "toll" in favor of the plain English "suspend," but in consequence, the effect of his order may be open to interpretation. His order was entered on March 19. If one supposes – optimistically, we fear – the order will be lifted after 30 days, on April 18, does a limitation period that would otherwise have expired on April 1 now expire on April 19 (the day after the suspension ends) or instead on May 1 (the clock having been held in suspense for 30 days)? The deadline is not entirely clear and may become the subject of litigation.

Prudent claimants will wish to avoid all these dilemmas, risks and limitations. One way to do so is by moving forward with their claims. While all these orders allow delay, none require it, and all courts except New York state courts presently accept all electronic filings. However, for those potential claimants who are unable or unwilling to move forward now, including due to difficulties raised by social distancing or financial concerns raised more broadly by the pandemic, there are other solutions. In particular, potential claimants may seek to enter private tolling agreements that better mitigate such risks and uncertainties.

Those who choose instead to rely on government orders must be vigilant. A litigant in New York who had 30 days to bring a claim when the governor's executive order went into effect can rely on having 30 days to bring that claim when the order is lifted, but a litigant who was up against the deadline when New York paused will want to monitor closely when the order is lifted to be sure the imminent new deadline does not slip past. The same is true in Massachusetts. A litigant in New Jersey who had 30 days to bring a claim will wish to follow closely any further extensions of the artificial "holiday" to be sure not to miss the arrival of an immediate deadline after the end of the last extension. And litigants in Connecticut may wish to act like those in New Jersey, just in case suspend does not mean toll. Prudent litigants who cannot enter private tolling agreements may prefer not to take advantage of extended deadlines and certainly will prefer not to wait until these extensions expire.

Contractual Time Limitations

Speaking of private tolling arrangements, not all case or claim initiation deadlines are statutory. Though numerous government authorities have suspended, extended, tolled or paused statutory and court rule-based time limitations, contractual time limitations (including, potentially, contractual limitations on noncontractual claims) have not been suspended, extended, tolled or otherwise paused by any governor or court, and they continue to approach. These private limitations are commonly found in agreements and may bar the courthouse door as effectively as any statute or rule. See, e.g., *Anderson v. Allstate Ins. Co.*, 171 A.D.3d 1331, 97 N.Y.S.3d 800 (N.Y. App. Div. Apr. 11, 2019) (Although the statute of limitations applicable to a breach of contract cause of action is ordinarily six years, it is well settled that parties to a contract may agree, in writing, that any suit be commenced within a shorter period of time.) (citations omitted). One should not assume that all claims will be saved, therefore, even by the best-crafted extensions of public deadlines.

Nor should contracting parties blithely assume their claims will be saved by various contractual doctrines that have recently become much discussed, such as force majeure and the doctrines of impracticability and impossibility. Force majeure clauses, even if written broadly enough to include pandemic or quarantine, generally operate only to forgive obligations a party is prevented from performing, and they require efforts at mitigation. Likewise, the doctrines of impracticability and impossibility may excuse or delay performance if an event causes performance to become substantially more difficult, complex, or challenging, or no longer possible. However, none of those contractual doctrines or any other is likely to save claims that litigants allow to go stale because of the pandemic. Though hurdles are higher in some jurisdictions than in others, only the New York state courts in the U.S. epicenter of the pandemic will not permit new case filings, and this may change before Cuomo's order is lifted. Because electronic filing in most jurisdictions facilitates the commencement of litigation within contractual deadlines (though the litigation may not proceed for some time thereafter), claimants should not be lulled by the extension of public deadlines into ignoring private ones. Moreover, many contractual provisions do not require court filings but simply require the party to notify its counterparty of the claim, with the failure to so notify within the

contractually set period forever barring the claim. And notice is often allowed by regular mail, overnight delivery or even e-mail, none of which is prevented or made impossible or impracticable by the present pandemic.

Of course, in Connecticut state courts, cases are commenced by service of process, not filing. In a time of social distancing, serving the summons and complaint may prove challenging. Nonetheless, many defendants can be served by mail or abode service, which does not require proximity. Moreover, absent strict forum selection, venue or personal jurisdiction constraints, it may be practicable simply to commence litigation instead in a court with fewer impediments. For example, if there is diversity or federal question jurisdiction, one may commence suit by filing in federal court. Similarly, a contract underlying a dispute may authorize service of process by mail or another type of delivery service that does not violate social distancing guidelines.

For all these reasons, potential claimants should exercise great care before assuming a contractual case initiation deadline will be excused. This does not necessarily mean, however, that parties with looming deadlines must commence suit right away. Just as privately ordered arrangements may impose time limitations, privately ordered arrangements may alleviate them. In the age of pandemic, adverse parties may share a common interest in avoiding or delaying litigation. Contractual tolling arrangements again may do the trick. What is necessary in all events is for parties with potential claims to review their contracts to be sure they do not sleep on their rights.

Be Proactive

In sum, whether considering public or private case initiation deadlines, the best advice to potential claimants is to be thoughtful, deliberate and proactive. Do not wait to address looming deadlines until government authorities start lifting their orders. While the courts are open, cases may be filed. If cases must linger thereafter, let them linger, secure in the knowledge that the case was initiated on time. If it is necessary to take advantage of the opportunity for delay, then consider a private tolling agreement so the case can be pursued on a well-defined timeline when things return to normalcy. And if a tolling agreement is not forthcoming, remain vigilant. Emergency orders will be lifted someday, and claimants must not be caught flatfooted.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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