



May 1, 2020

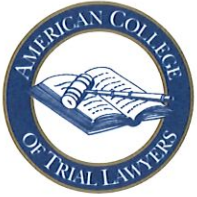
Honorable Lindsay Graham
Chairman of the Senate Judiciary Committee
290 Russell Senate Office Building
Washington, D.C. 20510

Re: Need for Legislation Addressing Authority to Toll Statutes of Limitations in
Appropriate Federal-Action Cases in Light of Coronavirus Pandemic

Dear Senator Graham:

The American College of Trial Lawyers is composed of preeminent members of the trial bar. These include advocates for both plaintiffs and defendants in civil litigation. The College endeavors to speak with a balanced voice on important issues affecting the administration of justice. One such issue is the effect of the coronavirus pandemic on the ability of parties to bring actions in federal court within the statutes of limitations and the need for federal legislation addressing that issue. The pandemic and the federal and state emergency orders arising from the pandemic pose the risk that individuals with claims arising under federal law will be unable to obtain legal services and/or file their claims within the time prescribed by the applicable statutes of limitations. There are many reasons why this could occur: among them Covid-19 related medical conditions, compliance with stay at home orders, or the need to provide medical and emergency care to those stricken with Covid-19. In many instances individuals with meritorious claims could be in the position of choosing between forfeiting their claims and maintaining their own health, obeying a governmental edict or providing needed emergency or clinical medical care to those who are infected. The College believes that federal legislation addressing this issue is needed.

At the outset we emphasize that we are not advocating federal legislation addressing the tolling of state statutes of limitations in cases filed in federal court under the court's diversity jurisdiction. We regard that as a matter for each state to address based upon the circumstances of each state. We are aware that some states – New York, Massachusetts and Texas for example – have adopted tolling provisions either by judicial order or order of the governor while others such as Pennsylvania have not. We believe that tolling provisions under state law are best

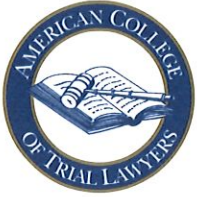


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left to the individual states based upon each state's circumstances and laws governing the enactment of such provisions. These state statutes of limitations and tolling provisions will likely be applicable in cases brought under state law in federal court based on diversity of citizenship.

Tolling federal statutes of limitations in cases brought under the court's federal question jurisdiction raises different issues. There is precedent for federal tolling provisions. In 2006 the House of Representatives passed H.R. 3729 titled as the Federal Judiciary Emergency Tolling Act, which gave federal judges the authority to waive statutes of limitations in pending federal criminal and civil cases where emergency conditions made it impracticable for the litigants or the courts to comply with federal or state time limitations. The legislation was not reported out by the Senate Judiciary Committee, however, and was never enacted. A different approach is demonstrated by the Service Members Civil Relief Act (and its predecessor the Soldiers and Sailors Relief Act of 1940) that tolls the statute of limitations during "the period of the service member's active duty" in both federal and state courts. We believe that some Chief Judges in federal jurisdictions have issued emergency local rules providing for tolling during the pandemic, while others have declined to do so. The passage of implementing legislation would provide the necessary authority for such local rules to be implemented in the nation's federal courts on a more uniform basis.

The College is of the view that tolling legislation tied in some way to each individual litigant's circumstances caused by the pandemic and not a single overriding tolling provision with a prescribed start and end date is preferable. We propose that for several reasons -- most importantly because this will be a nationwide tolling provision based on the consequences of a pandemic that will affect different parts of the country in different ways and at different times. We therefore suggest the enactment of legislation that gives federal district court judges the discretionary authority to toll statutes of limitations in individual cases whenever the plaintiff claims and is able to prove that the failure to file within the prescribed limitations period was directly caused by issues related to the coronavirus pandemic particular to that plaintiff. The legislation should also prescribe a non-exhaustive list of factors that the judge may take into account in exercising his or her discretionary authority to toll the limitations period. Those factors should include, but are not limited to, whether the plaintiff's health affected his or her ability to seek legal representation or file suit, the conditions in the plaintiff's geographical area including the existence and effective dates of stay at home or shut down orders, whether the plaintiff's employment in a field



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directly affected by the pandemic compromised his or her ability to obtain representation or file suit and, generally, whether the plaintiff exercised reasonable diligence under all of the circumstances.

We believe the enactment of such a proposal would adequately protect those potential litigants whose rights are directly prejudiced by the coronavirus pandemic while at the same time giving federal judges the ability to withhold relief for those who failed to file a timely action for reasons other than the pandemic or who failed to exercise reasonable diligence in bringing a timely action. We greatly appreciate the Judiciary Committee's consideration of this proposal and are prepared to address it in more detail or respond to questions if requested.

Sincerely,

Douglas R. Young
President