

RECENT DEVELOPMENTS IN INSURANCE COVERAGE

Laura Meyer Gregory, and Alexandra B. Howard

392

Tort Trial & Insurance Practice Law Journal, Spring 2022 (57:2)

II. TOLLING STATUTES OF LIMITATION DURING THE COVID-19 PANDEMIC

Virtually all states issued various emergency orders to address safety concerns related to the COVID-19 pandemic throughout the first half of 2020, whether executive, legislative, or judicial in nature. In many states, these orders included court operations in an effort to protect the health and safety of the public. Some states' orders tolled statutes of limitations for a certain period because courts in many states were essentially shut down and attorneys were suddenly working remotely.

In a recent decision, the Massachusetts Supreme Judicial Court interpreted the application of its own COVID-19 tolling order. In *Shaw's Super-markets, Inc. v. Melendez*, the plaintiff filed suit in Massachusetts District Court against a grocery store chain alleging that on September 3, 2017, she was injured in a collision with a grocery cart caused by one of the store employees.⁶⁷ Suit was filed on September 24, 2020, which would have been after the Massachusetts three-year tort statute of limitations expired on September 3, 2020, pursuant to G.L. c. 260, § 2A.⁶⁸ The plaintiff argued, however, that pursuant to Massachusetts's COVID-19 tolling orders, her suit was timely even though the tort at issue occurred more than two years before the beginning of the pandemic and the issuance of the COVID-19 tolling orders.

The Massachusetts Supreme Judicial Court had issued a series of orders stating that all civil statutes of limitations were tolled from March 17, 2020 through June 30, 2020 due to the COVID-19 pandemic.⁶⁹ The Third

63. *Id.* at 1295.

64. *Id.*

65. *Id.* at 1301 (Newsom, J., dissenting).

66. *Id.* at 1295 n.9, 1297 (majority op.).

67. 173 N.E.3d 356, 357–58 (Mass. 2021).

68. *Id.*

69. *Id.* at 359.

Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, entered on June 24, 2020, stated: “The new date for the expiration of a statute of limitation is calculated as follows: determine how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that same number of days will remain as of July 1, 2020 in civil cases.”⁷⁰ In *Melendez*, the defendant argued that this tolling order applied only to statutes of limitations that would have expired between March 17, 2020, and June 30, 2020.⁷¹ The Supreme Judicial Court disagreed, however, holding that the order applied to “all causes of action for which the relevant limitations period ran for some period between, or through,” March 17, 2020, and June 30, 2020.⁷² As a result, the statute of limitations was extended by 106 days for any cause of action for which any portion of the limitations period was running during the period from March 17, 2020, to June 30, 2020.

The Massachusetts Supreme Judicial Court noted that in other areas of its COVID-19 orders, it specified when it intended to only extend deadlines that expired within a specified period, such as extending all deadlines set forth in statutes or court rules, standing orders, tracking orders, or guidelines that expired at any time from March 17, 2020, through June 30, 2020.⁷³ The Court also noted that the investigation required by attorneys prior to filing suit, including client interviews and gathering medical records and other evidence, has been impaired by ongoing COVID-19 restrictions, as an apparent justification for its determination.⁷⁴

It appears that this decision is the first to interpret a state’s COVID-19-related tolling orders. The Court in *Melendez* noted that states followed essentially two approaches with regard to COVID-19 tolling orders.⁷⁵ Some states, including Delaware, New Hampshire, North Carolina, Ohio, Tennessee, Texas, Vermont, and West Virginia, explicitly tolled only those statutes of limitations set to expire within a particular period.⁷⁶ Other states’ orders, like the order in Massachusetts, were drafted to apply more broadly to any pending statute of limitations. The states in this latter group include California, Connecticut, Georgia, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oklahoma, Oregon, and Virginia.⁷⁷

70. *Id.* (quoting Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic).

71. *Id.* at 359–60.

72. *Id.* at 362–63.

73. *Id.* at 361.

74. *Id.* at 360 n.3.

75. *Id.* at 361 nn.4, 5.

76. *Id.* at 361 n.4.

77. *Id.* at 361 n.5.

In *Melendez*, the Court noted that it was aware of no court in another jurisdiction that had yet been presented with the issue in *Melendez*, that is whether a statute of limitations that had begun well prior to the pandemic, but did not expire during the time period noted in the order, was extended based on a COVID-19-related tolling order.⁷⁸ In the states following the second approach where the COVID-19 tolling orders did not explicitly toll only the statutes of limitations that would expire during a particular time period, there may be future cases like *Melendez* where defendants argue that the tolling ~~orders should only apply to statutes of limitations that actually expired during the tolling period.~~ If the states with broadly drafted tolling orders follow the Massachusetts Supreme Judicial Court's approach, however, this argument is unlikely to be successful and courts will likely find that the tolling orders apply to extend all statutes of limitations.

These COVID-19 tolling orders will be an important consideration in the handling of both first-party and third-party insurance claims for the foreseeable future. First, with respect to third-party claims, i.e. claims made by third parties against insureds who seek coverage under liability policies, insurers and defense counsel will need to account for the impact of broadly applicable COVID-19 tolling orders, the impacts of which will continue for years to come. For instance, in a state with a three-year tort statute of limitations, if a claim relates to an incident that occurred on March 10, 2020, just before the pandemic began, the statute of limitations would expire on March 10, 2023, under normal circumstances. That period will be extended based on the particular state's tolling order. In Massachusetts, where the order tolled statutes from March 17, 2020, through June 30, 2020, the expiration of the statute of limitations would be extended for an additional 106 days—from March 10, 2023, to June 24, 2023. Each state's order may have a different COVID-19 tolling period and, therefore, the statutes of limitations in different states may be extended for different lengths of time.

Additionally, as noted in *Melendez*, these tolling orders take different forms in different states. Although many, like Massachusetts, are orders from the state's highest court, other states tolled statutes of limitations by executive or legislative actions. The application of these orders could involve different legal standards for determining the meaning and application of the executive order or legislation. Further, a court may be more cautious when interpreting the intent of the Governor or state legislature in issuing a COVID-19 tolling order as opposed to the court's own intent where the COVID-19 tolling order was issued by the court itself.

78. *Id.* at 362.

With regard to first-party insurance claims, the impact of COVID-19 tolling orders is less clear. Most first-party insurance policies include a suit limitation provision as part of the policy, outlining the time that an insured has to bring suit against the insurer with respect to a particular claim. For instance, in the context of first-party property insurance, such as homeowners insurance policies, the suit limitation provision of the policy often states that any suit against the insurer under the policy must be brought within two years from the date the loss at issue occurred. Insurers may argue that these suit limitation periods are contractual in nature and, therefore, are not subject to any COVID-19 orders tolling statutes of limitations. In many states, however, these contractual suit limitation periods are also incorporated in state statutes, such as statutes outlining the standard fire insurance policy provisions for a particular state. For instance, in Massachusetts, General Laws c. 175, § 99 outlines the Massachusetts Standard Form of Fire Policy and includes, in part, that “[n]o suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this commonwealth unless commenced within two years from the time the loss occurred.”⁷⁹ Outside of the context of these COVID-19 orders, the contractual suit limitation provisions are generally enforced by courts. To date, no court appears to have issued a decision in any jurisdiction analyzing whether such a provision constitutes a “statute of limitations” for purposes of any state COVID-19 tolling orders. Further, a decision to do so could be a slippery slope suggesting that all contractual suit limitation periods are subject to COVID-19 tolling orders, an impact broader than only insurance contracts. Additionally, other issues could arise in the context of timeframes outlined in first-party insurance policies and how they are impacted by the COVID-19 pandemic, such as the timeframe for an insured to make a claim for replacement cost under a property insurance policy where payment is initially made on an actual cash value basis.

For both first-party and third-party claims, attorneys and insurance professionals handling claims across multiple states will need to note that the applicable rules regarding determining the correct statute of limitations period or the application of a policy’s suit limitation period may vary and could potentially extend significantly beyond the length of time provided in the applicable statute or policy. Further, with regard to accidents reported by insureds to insurers, where no formal third-party claim or suit has yet been made, the wait for closure has now been extended. These are issues that will not be going away any time soon and are important for anyone in the legal and insurance industries to know.

79. MASS. GEN. LAWS c. 175, § 99.

the primary policy's relation-back clause applied under the excess policy as well.⁵¹ The court then determined that the primary policy's prior acts exclusion barred coverage because the underlying securities lawsuits challenged alleged omissions and misstatements that were first made before the policy period and continued to be made during the policy period.⁵²

In the other Eighth Circuit decision, the court applied Missouri law to analyze the impact of multiple endorsements that provided conflicting instructions about the policy's contractual liability exclusion.⁵³ The form policy had a contractual liability exclusion labelled exclusion "D."⁵⁴ Endorsement 11 deleted exclusion D and replaced it with a modified version of the contractual liability exclusion, which was also labelled as exclusion "D."⁵⁵ Endorsement 13 then provided that "Exclusions A., B., C. and D." were "deleted in their entirety and replaced" by new exclusions labelled A, B, and C, but the endorsement said nothing further about exclusion D.⁵⁶ The court concluded that Endorsement 13 resulted in ambiguity: it was unclear whether Endorsement 13 was meant to delete Exclusion D entirely from the policy, or whether it was meant to delete the original Exclusion D in the form policy, which would then be replaced by Endorsement 11's modified version of the exclusion.⁵⁷ Because Endorsements 11 and 13 became effective on the same date, the court was unable to give priority to one endorsement over the other.⁵⁸ Since the policy was ambiguous, the court applied Missouri law requiring ambiguities to be construed against the drafter "even if extrinsic evidence of the parties' intent is available."⁵⁹ The court accordingly held that the contractual liabilities exclusion did not bar coverage and remanded the case for further proceedings to address other disputed policy provisions.⁶⁰

The Eleventh Circuit ruled on another potentially ambiguous exclusion, the invasion-of-privacy exclusion, in *Horn v. Liberty Insurance Underwriters, Inc.*⁶¹ The underlying complaint asserted causes of action under the Telephone Consumer Protection Act based on allegations that the insured sent unsolicited text messages in violation of the act.⁶² Applying Florida law, the court held that the invasion of privacy exclusion barred coverage

51. *Id.*

52. *Id.* at 659–60.

53. *Verito Med. Sols., L.L.C. v. Allied World Specialty Ins. Co.*, 996 F.3d 912 (8th Cir. 2021).

54. *Id.* at 913–14.

55. *Id.* at 914.

56. *Id.* (quoting policy).

57. *Id.*

58. *Id.* at 914 n.1.

59. *Id.* at 915 (citing *Burns v. Smith*, 303 S.W.3d 505, 511–12 (Mo. 2010)).

60. *Id.*

61. 998 F.3d 1289 (11th Cir. 2021).

62. *Id.* at 1294–95.