**TO:** **HB 197 Task Force**
**FROM:** **Paul W. Flowers, Esq. and Louis E. Grube, Esq.**
**RE:** **Preliminary Review of Coronavirus Tolling**

The following is a summary of our initial thoughts and concerns with Section 22 of H.B. 197 and the Ohio Supreme Court's Administrative Order of March 27, 2020, 2020-Ohio-1166. The legislation is concerned primarily with deadlines imposed by statute, while the Administrative Order focuses on those set forth in state judicial rules. The Supreme Court's directive does not, however, apply to local rules of court. Please keep in mind that these are just our initial impressions, which may need to be refined following further research and reflection.

**(1) The Duration of Tolling.**

The exact length that the specified deadlines are tolled is unclear to us from this legislation, which is concerning. Division (A) begins by stating:

> The following that are set to expire between March 9, 2020, and July 30, 2020, shall be tolled: * * *

Subsection (C) provides, however:

> Division (A) of this section expires on the date the period of emergency ends or July 30, 2020, whichever is sooner.

Instead of providing a defined period of tolling (*i.e.*, 60 days from the end of the emergency period), it appears that the extended cut-off is set by Division (C) and is thus variable, as the period of emergency could end "sooner" than July 30, 2020. If a civil complaint is due on June 30 and a declaration is issued on July 1 that the state of emergency is over, the action would arguably have to be commenced no later than July 2 on the grounds that the deadline was tolled just 1 day. The obvious response would be that the tolling period was actually 114 days (March 9 to July 1), but a disputed issue would at least be created that would have to be litigated.

Another way to read this is that Division (C) merely modifies the window created by Division

(A). The announcement that the state of emergency was over on July 1 would thus effectively revise Division (A) to read:

> The following that are set to expire between March 9, 2020, and July 1, 2020, shall be tolled: * * *

There would thus be no tolling available at all for anything due on or after July 2, and the original deadlines would apply. A complaint due on July 2 would have to be filed on July 2. And it is not apparent whether a complaint due on the date of announcement (July 1) would receive the benefit of 114 days of tolling, or just 1. The answer depends on whether the running of the statute of limitations is suspended (114 days), or just the deadline is extended (1 day).

The Supreme Court's Administrative Order is not as ambiguous. It states simply in pertinent part:

> (D) The time requirements imposed by the rules of the Court and set to expire during the term of this order shall be tolled.
>
> (E) Upon the expiration of this order, all time requirements tolled by this order shall resume.

True tolling has thus been established, where the clock is suspended during the period and resumed once it is over. This language thus avoids an interpretation that requires everything to be immediately due on July 31, 2020, or the day after the state of emergency is lifted, whichever is sooner.

But as with H.B. 197, the "whichever is sooner" proviso in Subsection (A) is concerning. Only those deadlines "set to expire during the term of this order" are tolled under Subsection (D). If a judicial filing is due on July 2, and the state of emergency is lifted on July 1, it remains due on July 2. It is thus impossible to count on any future deadlines being tolled under both H.B. 197 and the Administrative Order.

**(2) The Accrual of a Cause of Action Against a "Person"**

Only the following statutes of limitation in civil actions are tolled under Subdivision (b) of Section 22, H.B. 197, which states:

> When a civil cause of action accrues against a person, notwithstanding any other provision of law to the contrary, the period of limitation for commencement of the action as provided under any section in Chapter 2305. of the Revised Code, or under any other provision of the Revised Code that applies to the cause of action;

It seems that it would have been relatively simple to suspend the running of all statutes of limitations during the period of emergency, but this clause requires that the claim "accrues against a person[.]" Under standard rules of construction, courts will be obliged to afford these terms some positive effect. *Burkhart v. H.J. Heinz Co.*, 140 Ohio St.3d 429, 438, 2014-Ohio-3766, 19 N.E.3d 877, ¶ 31 ("It is a basic rule of construction that a court will give effect to each term and avoid a construction that renders any provision meaningless, inoperative, or superfluous.")

A specific definition of "person" does not appear in Section 22, but R.C. 1.59(C) generally provides that the term "includes an individual, corporation, business trust, estate, trust, partnership, and association." *See Moss v. Std. Drug Co.*, 159 Ohio St. 464, 468, 112 N.E.2d 542, 544 (1953) (holding that "person" includes a corporation for purposes of statutes of limitations defense). While tolling thus appears to be available against all types of defendants, it is debatable what is intended by the "civil cause of action accrues" proviso. Presumably, the deadline for filing would not even start until this condition is satisfied. *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 692 N.E.2d 581, 582 (1998) ("Ordinarily, a cause of action accrues and the statute of limitations begins to run at the time the wrongful act was committed."), *citing Kunz v. Buckeye Union Ins. Co.*, 1 Ohio St.3d 79, 437 N.E.2d 1194 (1982). Perhaps the answer is that if a claim has not yet accrued there is no need for tolling, and hence the limiting language. But that was already very obvious, and thus

the "civil cause of action accrues" language does not seem to accomplish anything.

**(3) Applicability to Statutes of Repose**

It is at least questionable whether anything in Section 22 will suspend the running of a statute of repose. *R.C. 2305.10(C)(1)* (products liability), *R.C. 2305.113(C)(1)* (medical malpractice), *R.C. 2305.131(A)(1)* (improvements to real property). There are no specific references to such time bars in H.B. 197. And while there is a catch-all for "[a]ny other criminal, civil, or administrative time limitation under the Revised Code" that would seemingly reach a statue of repose, Section 22 appears to be primarily concerned with statutes of limitations. The Supreme Court has recognized that statues of repose are not synonymous with statutes of limitations, as both have different applications. *Antoon v. Cleveland Clinic Found.*, 148 Ohio St.3d 483, 487, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 11; *see also Union Local School Dist. Bd. Of Edn. v. Grae-Con Constr., Inc.*, 2019-Ohio-4877, 137 N.E.3d 122, 127-128, ¶ 14-15 (7th Dist.). Since one could surmise in theory from the absence of explicit references to statutes of repose in the enactment that such deadlines were not meant to be extended, it is probably unwise to cavalierly consider them to be tolled under any and all circumstances by H.B. 197.

**(4) Separation of Powers Issues**

The statutory provisions purporting to modify the deadlines imposed by judicial rules are problematic. Examples are Division (A)(7) (discovery) and (A)(8) (service). As an aside, that concern would appear to be mooted by the Supreme Court's Administrative Order, 2020-Ohio-1166. In more succinct terms, that directive tolls the same state court rule deadlines.

The Ohio rules of court are generally "matters of practice and procedure within the rule-making authority of [the Supreme Court] under Section 5, Article IV of the Ohio Constitution." *Alexander v. Buckeye Pipe Line Co.*, 49 Ohio St.2d 158, 160, 359 N.E.2d 702, 703 (1977) (Citation

omitted). The legislature may not alter these judicial standards. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 491, 715 N.E.2d 1062 (1999). Prior legislative efforts to override procedural rules have been held to be invalid. *Rockey v. 84 Lumber Co.*, 66 Ohio St.3d 221, 611 N.E.2d 789 (1993); *Hiatt v. S. Health Facilities, Inc.*, 68 Ohio St.3d 236, 626 N.E.2d 71 (1994); *Hobbs v. Lopez*, 96 Ohio App.3d 670, 645 N.E.2d 1261 (4th Dist.1994). A potential question thus exists over whether deadlines imposed by court rules and orders and can be unilaterally tolled by the General Assembly.

**(5) Limitations of the Supreme Court's Order**

It should be noted that while Subsection (B) of the Ohio Supreme Court's Administrative Order of March 27, 2020, 2020-Ohio-1166, broadly defines "Rules of the Court" to reach all statewide rules, local rules have not been included in this directive. The deadlines set in local appellate and trial courts that would otherwise expire during the emergency period will still be tolled if imposed by statewide rules, such as the Ohio Rules of Appellate Procedure or the Ohio Rules of Civil Procedure.

But under Subsection (G), a trial court's specific order issued on or after March 9, 2020 will supersede the Supreme Court's tolling order. This will be a problem where otherwise routine case management orders were promulgated after that date, as those deadlines may not be automatically tolled. Concerned parties should request a further tolling order from the trial court in such instances.

**(6) Retroactivity**

Understandably, Division (B) of H.B. 197 memorializes the legislative intention that the Section 22 enactments are retroactive "to the date of the emergency declared by Executive Order 2020-01D, issued on March 9, 2020. However, Section 28, Article II, of the Ohio Constitution is

directed against the adoption of *ex post facto* laws:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state. (Emphasis added.)

Over one century ago, the Supreme Court of Ohio held:

> A statute which imposes a new or additional burden, duty, obligation, or liability as to past transactions is retroactive, and in conflict with that part of section 28, art. 2, of the constitution which provides that 'the general assembly shall have no power to pass retroactive laws.' (Emphasis added.)

*Miller v. Hixson*, 64 Ohio St. 39, 59 N.E. 749 (1901), paragraph one of the syllabus. More recently, Chief Justice Moyer explained for a majority of the Court:

> We recently interpreted Section 28, Article II of the Ohio Constitution, stating that "[t]he retroactivity clause nullifies those new laws that 'reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].' " *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 352-353, 721 N.E.2d 28, 32, quoting *Miller* [64 Ohio St. at 51, 59 N.E. 749]. (Emphasis added.)

*Bd. of Edn. of the Cincinnati School Dist. v. Hamilton Cty. Bd. of Rev*ision, 91 Ohio St.3d 308, 315, 744 N.E.2d 751, 757 (2001). "A retroactive statute is substantive if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." (Emphasis added.) *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St.3d 358, 360, 2002-Ohio-2338, 767 N.E.2d 1159, ¶ 6; *see also Perk v. City of Euclid*, 17 Ohio St.2d 4, 6-7, 244 N.E.2d 475, 476-477 (1969).

Prior legislative efforts to shorten limitations periods *ex post facto* have been found to violate the Ohio Constitution. *See Schneider v. Jefferson Smurfit Corp.*, 42 Ohio App.3d 53, 54-55, 536

N.E.2d 691, 694 (1st Dist.1988) (invalidating retroactive application of new one-year statute of limitations for workplace intentional tort actions). It is conceivable that once the emergency period is over, defendants could challenge the constitutionality of Division (B) on the grounds that the tolling of the statute of limitations served to foist new claims upon them that would have been time barred without H.B. 197. Thus far such an argument appears to be unprecedented in Ohio Jurisprudence.

In closing please note that this analysis is based upon our current understanding of the applicable law, which is always subject to modification as well as differing interpretations.