

April 20, 2020

NEW YORK GOVERNOR CUOMO'S EXECUTIVE ORDERS CONCERNING STATUTES OF LIMITATIONS

To Our Clients and Friends:

I. New York Executive Orders Tolling Limitations Periods

On March 20, 2020, New York Governor Cuomo issued his eighth executive order following his March 7th declaration of a State disaster emergency in response to the COVID-19 pandemic. Executive Order No. 202.8, among other things, directs that

any 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, . . . or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from [March 20, 2020] until April 19, 2020.

The governor's Executive Order No. 202.14 extends the suspension, or tolling period, until May 7, 2020. The Order's tolling provision, in effect, has stopped the clock from running on a vast pool of claims' statutes of limitations.

The gubernatorial power to issue an order suspending the statute of limitations derives from Executive Law § 29-a. Initially promulgated in 1978, Section 29-a was amended by the state legislature just a few days before the COVID-19 disaster emergency to, among other revisions, provide the governor with authority not just to *suspend* laws in response to an emergency event, but also to "issue any directive" in response to the emergency.[1]

(It is this "directive" authority that the governor has relied upon for his various stay-at-home orders.) The amendment to Section 29-a will expire on April 30, 2021.

As amended, Section 29-a provides that the governor may suspend any law "if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster." [2] The statute also makes such suspensions subject to certain "standards and limits," including that (1) suspensions may be for no longer than 30 days, although the governor may extend the suspension for additional 30-day periods; (2) suspensions must be "in the interest of the health or welfare of the public" and must be "reasonably necessary to aid the disaster effort"; and (3) suspensions shall "provide for the minimum deviation from the requirements" of the law "consistent with the goals of the disaster action deemed necessary." [3]

II. Previous Orders Affecting Statutes of Limitations

In a certain respect, Governor Cuomo’s orders are not novel. Prior emergencies affecting New York have prompted both executive orders impacting statutes of limitations, as well as subsequent litigation upholding those orders. The two most recent instances are the September 11, 2001 terrorist attacks and Hurricane Sandy. Governor Pataki’s Executive Order No. 113.7, issued after the September 11 attacks, “temporarily suspend[ed], from the date the disaster emergency was declared . . . until further notice” select civil and criminal rules to the extent that they barred actions “whose limitation period conclude[ed] during the period commencing from the date that the disaster emergency was declared . . . until further notice” Governor Pataki later issued Executive Order No. 113.28, setting the end-date for the suspension as October 12, 2001, and as November 8, 2001 for litigants or attorneys directly impacted by the terrorist attacks. The Second Department later interpreted the orders as creating a “grace period until [one of two end-dates] to satisfy the statute [of limitations]” for certain litigants whose limitations periods were to expire within the grace periods.[4] Following Hurricane Sandy, Governor Cuomo issued an Executive Order almost identical to the one issued by Governor Pataki that was interpreted similarly by courts.[5]

While there is a history of orders affecting statutes of limitations, Governor Cuomo’s Order No. 202.8 is wider in scope and will result in different calculations for limitations periods. The prior orders extended the statutes of limitations for only certain claims—those with limitations periods expiring during the state disaster emergency. The earlier orders thereby impacted a narrower set of claims than Order No. 202.8, which creates a blanket toll for all claims subject to New York state laws and procedural rules. The earlier orders created for those subset of cases a grace period ending on a set date, whereas Executive Order No. 202.8, and its extension under Executive Order No. 202.14, implements a uniform toll that suspends the running of the limitations clock for the number of days between March 20 and May 7 (and any further extension that the governor may order).

III. Long-Term Impact of Orders

Executive Order Nos. 202.8 and 202.14 will impact litigants’ calculation of their statute of limitations periods for years to come. Unlike prior executive orders, these recent orders will affect many more claims that will each require individual calculations rather than looking to a single end-date. Parties should be mindful, however, of some plain exceptions to the orders’ scope, which reaches only *state* laws and procedures. The calculation of the limitations periods for federal claims will remain subject to federal rules and statutes. Contracts that contain parties’ own negotiated limitations periods and procedures likely will fall outside the orders’ ambit as well. States are treating statutes of limitations differently, with some states choosing not to extend the periods at all, some following the New York tolling approach, and others using the grace period approach. While there is often litigation concerning which state’s law may govern the claims asserted in any particular lawsuit, such disputes may take on added significance based on the different approaches being taken to the statute of limitations. Additionally, as states take varying approaches to their statutes of limitations, litigants that can file in multiple jurisdictions may also find value in comparing the different rules concerning tolling and calculation of the statute of limitations before commencing suit.

While courts held previous emergency orders concerning statutes of limitations to be constitutional and within executive powers, these most recent orders could conceivably be subject to future challenge. Litigants might argue, for instance, that (particularly with the benefit of hindsight) the tolling of the statute of limitations was not “necessary to cope with the disaster” or went beyond the “minimum deviation” necessary. In 2002, Paul G. Feinman, then a Manhattan Civil Court judge but now an Associate Judge of the New York Court of Appeals, wrote about potential bases for challenging Governor Pataki’s executive order suspending speedy criminal trials after the 9/11 attacks.^[6] He explained that the powers authorized under Section 29-a are subject to “standards and limits”^[7] requiring orders to be “reasonably necessary”^[8] to the disaster effort and to maintain “the minimum deviation” from statutory or other legal requirements.^[9] Applying such limitations to Governor Pataki’s executive order, Judge Feinman questioned whether the order’s suspension of speedy prosecutions not “only in New York City, close to the WTC site . . . [but also] in upstate and western counties” would be justified. He also raised the possibility of challenging the order’s scope or applicability to certain limitations periods. Such grounds for challenge may be deployed against Governor Cuomo’s Executive Order Nos. 202.8 and 202.14, but it remains to be seen whether such challenges will be successful.

[1] Act of Mar. 3, 2020, ch. 23, 2020 N.Y. Sess. Laws 1 (McKinney).

[2] N.Y. Exec. L. § 29-a(1) (amended 2020).

[3] *Id.* § 29-a(2)(a)-(b), (e).

[4] *See Scheja v. Sosa*, 4 A.D.3d 410, 411-12 (2d Dep’t 2004).

[5] *No. 52: Temporary Suspension and Modification of Statutory Provisions Establishing Time Limitations on Actions and Time in Which to Take an Appeal*, Office of New York State Governor (Oct. 31, 2012), <https://www.governor.ny.gov/news/no-52-temporary-suspension-and-modification-statutory-provisions-establishing-time-limitations>; *see Williams v MTA Bus Co.*, 44 Misc. 3d 673, 685 (Sup. Ct., N.Y. Cty. 2014) (interpreting Governor Cuomo’s order as creating a grace period for litigants), *vacated in part on other grounds*, 2017 WL 1362690 (Sup. Ct., N.Y. Cty. 2017).

[6] Paul G. Feinman & Brooks Holland, *Grounds May Exist to Challenge Orders Suspending Speedy Trials in Aftermath of September Attack*, N.Y. St. B.J., Feb. 2002, at 34.

[7] N.Y. Exec. L. § 29-a(2).

[8] *Id.* § 29-a(2)(b).

[9] *Id.* § 29-a(2)(e).



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