

# NY Court Deadline Extensions Bring Confusion For Litigants

By **Adam Swanson and Stephanie Pisko**

With New York Gov. Andrew Cuomo's executive orders tolling or suspending the state statutes of limitations during the COVID-19 pandemic set to expire Nov. 3, litigants may need to file claims on Nov. 4 depending on whether statutes of limitations have been tolled or simply suspended under the orders.

Debate has emerged over which type of relief the orders provide. A toll tacks on additional time to pursue a claim whereas a suspension merely suspends the statute of limitations during the time the orders are in effect, without adding additional time once the suspension ends.

In this article, we examine the governor's power to toll the statutes of limitations and argue that the statutes of limitations should be tolled, not simply suspended.

## **Executive Order: Suspended or Tolled Statutes of Limitations?**

On March 7, Cuomo issued Executive Order No. 202.8,[1] which temporarily tolled, suspended or modified any time limitations set forth in any statute or legislative or administrative act as part of the governor's campaign to combat the COVID-19 outbreak. The governor issued E.O. 202.8 in conjunction with Administrative Order No. AO/78/20[2] from Chief Administrative Judge Lawrence K. Marks, which drastically limited all court filings except those deemed essential.

E.O. 202.8 has been extended seven times for periods of 30 days, most recently on Oct. 4, under Executive Order No. 202.67. This last order, however, declared that the statute of limitations tolling orders would not be renewed again, effectively lifting any statute of limitations tolling or suspension after Nov. 3.

The language used in the governor's executive orders concerning statutes of limitations has varied. Three of them — the first; E.O. 202.60, which amended prior orders to exclude certain actions; and the latest one — reference tolling, whereas the others do not.

With Nov. 3 approaching, it is important to understand the effects of E.O. 202.8. There are competing interpretations and understandings within the New York legal community about whether E.O. 202.8 effected a toll or only a suspension of the statutes of limitations.[3]

Because the courts have not previously weighed in on which term applies or extensively ruled on the governor's power to toll statutes of limitations, practitioners and corporate in-house counsel must consider whether the statutes of limitations on their clients' or businesses' claims may expire on Nov. 3 and take action.

## **Origin of the Governor's Emergency Power**

Central to the question of what authority the governor has to either toll or suspend the statutes of limitations is New York Executive Law Section 29-a, titled "Suspension of other laws." This statute permits the governor to "temporarily suspend any statute, local law,



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ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency." [4] Section 29-a further provides that the order "may provide for the alteration or modification of the requirements of such statute ... and may include other terms and conditions." [5]

The governor's order concerning statutes of limitations is subject to certain requirements. A suspension cannot be for a period greater than 30 days, although the governor may extend each time period by another 30 days. Another is that the governor must "specify the statute, local law, ordinance, order, rule or regulation or part thereof to be suspended and the terms and conditions of the suspension."

The power given to the governor can be traced back to Article III, Section 25, of the New York Constitution. Subsection (2) provides that in "periods of emergency caused by enemy attack or by disasters (natural or otherwise)" the Legislature shall have the "power and duty" to adopt such measures "as may be necessary and proper for insuring the continuity of governmental operations."

Unfortunately, there is little to no case law discussing what the governor's power to provide for the alteration or modification of a statute suspended or to include other terms and conditions actually means. [6]

### **Prior Precedents**

The suspension of the statutes of limitations has occurred two other times in recent history. First, in 2001, following the 9/11 terrorist attacks, then-Gov. George Pataki invoked Executive Law Section 29-a to suspend the statutes of limitations for those affected by the attacks in Executive Order No. 113.7. [7]

Addressing E.O. 113.7, the New York Supreme Court's Appellate Division, Second Department, determined in a 2004 decision in *Scheja v. Sosa* that there was no tolling of claims for the period in which the suspension is in effect. Rather, the suspension only applied if the claim would have expired within the period that the suspension is in effect and the order effected a suspension, not toll. Thus, *Scheja v. Sosa* enforced E.O. 113.7 according to its terms.

The second time was in 2012, when Cuomo issued Executive Order No. 52 [8] in response to Superstorm Sandy. E.O. 52 was nearly identical to Pataki's E.O. 113.7.

The COVID-19-related E.O. 202.8 is much different from these executive orders. E.O. 113.7 and E.O. 52 by their terms operated only to suspend Section 201 of the New York Civil Practice Law and Rules, the general statute prescribing a statute of limitations, and affected only actions whose limitations period concluded during the period of emergency.

In contrast, the COVID-19-related E.O. 202.8 operates not just against Section 201, but against "any specific time limit" in the Civil Practice Law and Rules or found in other statutes, and is not limited to situations where the "limitations period concludes during" the emergency. Moreover, E.O. 202.8 also expressly states that the affected time limit is "hereby tolled from the date of this executive order."

### **COVID-19 Emergency Requires Tolling, Not Suspending, the Statutes of Limitations**

The COVID-19 pandemic is much different from the emergencies following the horrific 9/11

attacks and Superstorm Sandy. The COVID-19 E.O. 202.8 seeks to remedy a situation requiring the courts to actually close their doors to almost all civil litigation for a very prolonged period of time. Litigants who wanted to file a lawsuit amid the COVID-19 pandemic literally could not as a result of Administrative Order No. AO/70/20.

In contrast, after the 9/11 attacks and Superstorm Sandy, a few affected courts closed for a discrete period of time in a specific part of the state. For example, after the 9/11 attacks, all New York courts were fully operational within a week.[9]

At least one court has acknowledged that the present situation is different and observed that the Superstorm Sandy emergency "did not result in the sort of unprecedented statewide shutdown of an as-yet-unknown duration caused by COVID-19." [10]

Moreover, the length of time of the ongoing COVID-19 crisis has been unprecedented. For eight months, litigants have been unable to file nonessential claims, and the courts have been slowly moving and trying, in earnest, to transition to virtual courts while balancing the rights of litigants. There is no way to know when judicial operations will return to normal.

If the *Scheja v. Sosa* holding were applied to E.O. 202.8 — and with Nov. 3, Election Day, being a public holiday under Sections 24 and 25-a of the New York General Construction Law — on Nov. 4, either thousands of lawsuits will be filed or thousands of litigants may unwittingly lose their rights. That alone is administratively unfeasible.

The practical impacts of the COVID-19 pandemic continue to affect civil litigation. Certain people with high-risk or preexisting health conditions may not be able to leave their house to visit a law office for help filing their claim. Courthouses are still navigating the challenges of operating virtually.

In-house legal departments at major businesses are managing additional challenges involving their workforces affected by the COVID-19 pandemic in New York and across the country. These challenges are complicated by the shifting geographic surges of the pandemic.

A better approach would be to interpret the COVID-19-related E.O. 202.8 under the governor's Executive Law Section 29-a(2)(d) power to "provide for the alteration or modification of the requirements of the [suspended statute] ... and include other terms and conditions." This would provide a more practical and tempered approach that protects New Yorkers, including reducing community spread, and avoids the administrative overload that may come to the judiciary.

### **How to Preserve Your Rights**

Without a tolling of the statutes of limitations for the eight-month period set under E.O. 202.8 and its extensions, some additional grace period after Nov. 3, or a legislative enactment to codify a tolling period, litigants whose claims expired during the pandemic may lose those rights forever.

If the orders are interpreted as merely suspending statutes of limitations and past precedents interpreting prior suspensions are applied, then commencing a lawsuit on or before Nov. 4, is the safest way to preserve rights if the statutes of limitations of parties' claims expired in the past eight months. If not, litigants will be at risk of never being able to pursue those claims.

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[1] E.O. 202.8 reads:

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, 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, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

[2] AO/78/20 provides:

[C]onsistent with the Governor of New York's recent executive order suspending statutes of limitation in legal matters ... effective immediately and until further order, no papers shall be accepted for filing by a county clerk or a court in any matter of a type not included on the list of essential matters attached as Exh. A.

[3] See Thomas A. Moore and Matthew Gaier, Medical Malpractice, Toll on Statute of Limitations During the COVID-19 Emergency, NYLJ, June 1, 2020; Patrick M. Connors, New York Practice, The COVID-19 Toll: Time Periods And the Courts During Pandemic, NYLJ, July 17, 2020; compare Hon. Thomas F. Whelen, Executive Orders: A Suspension, Not a Toll of the statute of limitations, NYLJ, Oct. 6, 2020.

[4] See Executive Law § 29-a[1.].

[5] See Executive Law § 29-a(2)(d).

[6] See Executive Law § 29-a(2)(d).)

[7] E.O. 113.7 provides, in relevant part:

I hereby temporarily suspend Section 201 of the Civil Practice Law and Rules [CPLR statute of limitation], so far as it bars actions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 113, issued on September 11, 2001, until further notice, and so far as it limits a courts['] authority to extend such time, whether or not the time to commence such an action is specified in Article 2 of the Civil Practice Law and Rules.

[8] E.O. 52 provides:

I hereby temporarily suspend Section 201 of the Civil Practice Law and Rules, so far as it bars actions whose limitation period concludes during the period commencing from the date that the disaster emergency was declared pursuant to Executive Order Number 47, issued on October 26, 2012, until further notice, and so far as it limits a courts['] authority to extend such time, whether or not the time to commence such an action is specified in Article 2 of the Civil Practice Law and Rules.

[9] See Thomas A. Birkland and Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina*, *The Justice System Journal*, available [here](#).

[10] See *People of State of N.Y. ex rel. Nevins v. Brann*, 67 Misc. 3d 638, 122 N.Y.S.3d 874, 2020 N.Y. Misc. LEXIS 1431, 2020 NY Slip Op 20083 (N.Y. Sup. Ct. April 13, 2020) (referring to E.O. 202.8 as a "toll").