

Tolling of New York State statute of limitations

23 OCTOBER 2020

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CATEGORY:

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Originally published in [New York Law Journal](#) on October 22, 2020.

A discussion of the significance of Governor Andrew Cuomo's executive order suspending New York's statute of limitations and other procedural deadlines as part of a series he has issued throughout the COVID-19 pandemic. The article offers considerations to keep in mind based on the language used by the Governor when issuing these orders and provides key approaches to weigh in order to avoid the lingering effects of the toll.

On March 20, 2020, Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020:

... [A]ny 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.

Id. (emphasis added). Thereafter, the governor repeatedly extended the civil tolling in Executive Order (EO) 202.8 by issuing various EOs, including most recently, EO 202.67 dated October 4, 2020. EO 202.67 extended the civil tolling provisions to Nov. 3, 2020, and stated that thereafter, this tolling would expire:

The suspension in Executive Order 202.8, as modified and extended in subsequent Executive Orders, ...is hereby continued,...provided however, for any civil case, such suspension is only effective until November 3, 2020, and after ***such date any such time limit will no longer be tolled[.]***

(emphasis added). Under EO 202.67, the statute of limitations will have been tolled in New York for 228 days.

The interpretation of EO 202.8 has been subject to substantial debate, primarily focusing on whether EO 202.8 imposed a true toll (i.e., time does not run during the tolling period, and all effected deadlines are delayed by up to 228 days), or whether it merely suspended deadlines until it expired (i.e., all deadlines falling between March 20, 2020 and Nov. 3, 2020 are extended to Nov. 4, 2020, and all deadlines falling on or after Nov. 4, 2020 are not extended).

The words "toll" and "suspend" have different legal meanings. Moreover, the fact that Cuomo used the word toll here, but he and Governor George Pataki previously used the word suspend when they suspended limitations periods after Hurricane Sandy and 9/11, supports an argument that Governor Cuomo's change of language was deliberate, because he intended EO 202.8 to operate as a true toll. Compare EO 202.8 with EO 52 (dated Oct. 26, 2012).

If EO 202.8 (as extended) operates as a true toll, its effects will linger long after the pandemic abates. For example, a breach of contract claim which accrued on March 20, 2020, and would otherwise expire on March 20, 2026, would arguably be tolled for 228 days, and thus expire on Nov. 3, 2026.

For a detailed analysis of how a toll would work, and how long its effects could last, see Cumulative Supplement to Siegel & Connor, N.Y. Prac. (6th Edition) §33, Part C; see also Update: Tolling of New York State statutes of limitations extended, [Tolling of New York State statutes of limitations extended](#); Moore & Gaier, Toll on Statutes of Limitations During the COVID-19 Emergency, [Toll on Statutes of Limitations During the COVID-19 Emergency](#).

Even if Governor Cuomo intended EO 202.8 to act as a true toll, it is unclear whether he had the emergency power to do so via executive order under Executive Law §29-a (as amended). Effective March 3, 2020, the NY State Legislature amended Section 29-a to temporarily increase the

governor's powers during the pandemic, by adding and deleting, in relevant part:

Subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, 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. The governor, by executive order, may issue any directive during a state disaster emergency declared in the following instances: ...epidemic, disease outbreak... Any such directive must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.

Under Executive Law §29-a (as amended), the governor not only has the power to suspend the statute of limitations, he also has the power to issue any "directive" necessary to cope with the disaster, which might be read to include the power to toll the statute of limitations.

There are, however, limits to Cuomo's expanded powers. First, under Executive Law §29-a(2)(a), no suspension or directive can last more than 30 days, although the governor can repeatedly renew each suspension or directive. Second, under Executive Law §§29-a(2)(b) and 29-a(2)(e), each suspension or directive must be in the interest of the public's health and welfare, reasonably necessary to aid the disaster effort, and represent the minimum deviation from existing law, consistent with the goals of disaster relief. *Id.* It is—at best—unclear how an executive order which extends limitations periods for years into the future is necessary to aid the disaster relief, let alone a "minimum deviation" from existing law.

Before Cuomo issued EO 202.67, a good argument existed that EO 202.8 needed to be treated as a toll, because treating it as a mere suspension could ironically lead to the very risky behavior it was meant to prevent. Specifically, until EO 202.67 issued, lawyers and litigants did not know how many times EO 202.8 would be extended, and generally only learned of a further extension late on the day the EO was set to expire.

Under these circumstances, if EO 202.8 was treated as a suspension, any failure to extend it would be an abrupt dislocation, which would likely cause attorneys, staff, and litigants—some still struggling with the pandemic and its effects—to use public transportation, crowd offices or other indoor venues, meet with each other in person, and otherwise give up social-distancing best practices, in order to avoid risking procedural default. The necessary rush of filings would also inundate courts still striving to return to normal operational efficiency, while maintaining low building density.

As EO 202.8 was repeatedly extended, a contrary consideration also grew stronger, as the notion that this extended tolling would be with us for years to come became less tenable. Limitations periods in New York can last up to 20 years for certain claims, and many common claims (including breach of contract and fraud) have six-year limitation periods. A 30-day toll may be a minimally disruptive deviation from existing law, even if it lingers for years. By contrast, a 228-day toll (over 7 months) is substantially disruptive, and would represent an increasingly significant (and hopefully increasingly unnecessary) deviation from existing law as years go by.

The New York courts have been open for all new non-essential civil filings since May 25, 2020, which somewhat alleviates the concern about a rush to the courthouse doors. Furthermore, EO 202.67 provides significant advance notice that "such suspension is only effective until Nov. 3, 2020, and after such date any such time limit will no longer be tolled[.]" *Id.*

Arguably, this language in EO 202.67 means that the "toll" was always a mere suspension, and therefore all deadlines which would have expired between March 20, 2020 and Nov. 3, 2020 will now expire on Nov. 4, 2020, and no deadlines after Nov. 3, 2020 will be extended. However, it could also mean that beginning Nov. 4, 2020 time limits start running again, but any claim which accrued before Nov. 4, 2020 and was still alive on March 20, 2020 is tolled for up-to 228 days. Even if the second reading is more consistent with the definition of the word "toll," the first reading is more consistent with the limit of the governor's powers under Executive Law §29-a. Thus, until this issue is resolved by the courts, attorneys who continue to read EO 202.8 as a true toll, do so at their peril.

One possible solution would be for the NY State Legislature to enact fully or partially ratifying legislation, which could either accept this seven-month toll extending for years to come, or set up a system where (for example) all deadlines that fall on or before Nov. 3, 2020 get the full benefit of the tolling of EO 202.8 (as extended), but for each day thereafter, one less day of tolling would apply.

This would mean that any deadline which would otherwise fall between Nov. 3, 2020 and June 19, 2021 would be extended to June 21, 2021 (because June 19, 2021 is a Saturday), and thereafter the effect of the toll would come to an end. Doing this would resolve uncertainty as to deadlines, give additional time to those attorneys and litigants who are still struggling with the effects of the pandemic, while setting a reasonable period to end the lingering effects of the toll.

Absent legislation, however, EO 202.67 has already given attorneys and litigants a reasonable amount of lead time. We should use this time wisely.

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