

THE BOTTOM LINE

Parties in New York may have limitations periods tolled at least until May 15. However, parties would be wise to exercise caution rather than relying on Executive Orders because:

1. Courts previously construed such orders narrowly, though the current language differs markedly from orders issued after 9/11 and Hurricane Sandy; and,
2. Courts may limit or invalidate the orders' application due to their language or statutory authority.

Parties should explore resolutions out of court, including express tolling agreements, because courts may be overburdened upon reopening, meaning that relief could be significantly delayed. Alternative resolutions may resort in more efficient and better outcomes.

>> COVID-19 ALERT

How New York's COVID-19 Executive Orders Affect Limitations Periods in New York

The COVID-19 pandemic is causing great uncertainty in the United States and around the world.

One potential uncertainty specific to parties in New York is the applicable deadline to file a lawsuit. New York state courts are currently restricting filings of non-essential new actions, but parties may not have long to file after restrictions have been lifted. The determination of the deadline to file depends on how recent Executive Orders are interpreted.

EXECUTIVE ORDER 202.8 AND ITS MEANING

New York Governor Andrew Cuomo issued Executive Order 202.8, which provides that the "time limit for the commencement, filing, or service of any legal action . . . is hereby tolled from [March 20, 2020] until April 19, 2020." This language has roundly been interpreted by practitioners as tolling — or pausing — the limitations period for all claims.

However, courts held that orders issued after 9/11 and Hurricane Sandy did not broadly toll limitations periods, but merely provided an extension to file claims that would have otherwise expired during the period covered by the order. Prior orders used narrower language than Executive Order 202.8 and did not expressly "toll" limitations periods, thus it is unclear if courts will follow earlier precedent or interpret the current language as tolling all claims.

For example, suppose a party has a breach of contract claim with a six-year limitations period, which arose on April 15, 2014. Under normal circumstances, the limitations period would expire on April 15, 2020. If Executive Order 202.8 is interpreted as a blanket toll, the limitations period for the claim would "pause" on March 20, 2020. The clock would again start ticking on April 19, 2020, giving the party until May 14, 2020 to file.

But if Executive Order 202.8 is interpreted similar to the way orders issued during prior crises were, a party that fails to bring its claim immediately upon the expiration of the order period would be barred from doing so and have their claim dismissed.

Because of this uncertainty, parties that attempt to rely on Executive Order 202.8 without considering alternative interpretations could have their claims dismissed as untimely.

SUBSEQUENT EXECUTIVE ORDERS

This analysis is complicated by subsequent orders which may further extend the tolling period. Gov. Cuomo issued Executive Orders 202.14 and 202.18, each of which purported to extend earlier orders, including 202.8, or at least certain aspects of them.

Executive Orders 202.14 and 202.18 each provided that earlier orders shall be continued and effective until April 29, 2020 and May 15, 2020, respectively.

However, the language extending the earlier orders states the extension applies to “Executive Orders . . . which closed or otherwise restricted public or private businesses or places of public accommodation, and which required postponement or cancellation of all non-essential gatherings.”

It is unclear if the added language is intended to limit the applicability of the extensions and, if so, if tolling limitations periods is included, given that filing a lawsuit does not require a “gathering.” While it may be assumed that the extensions are intended to be broadly applicable to all provisions of Executive Order 202.8 — including the purported tolling of limitations periods — the language creates uncertainty and makes it difficult to predict how courts will interpret the orders.

Regardless of the language, because New York state courts have restricted filing new actions, parties should feel comfortable delaying filing in state court at least until those restrictions are lifted.

AUTHORITY FOR TOLLING STATUTES OF LIMITATIONS

Courts might also consider whether the Executive Orders can be interpreted as broadly as they may have been intended. Executive Law §29-a, the purported authority for the orders, permits suspension or modification of procedural laws affecting limitations periods, but “only under particular circumstances” and by the “minimum deviation . . . consistent with the goals of the disaster action.” Tolling the limitations period for all actions for an extended period of time could be deemed to exceed such boundaries.

ACTIONABLE STEPS

Questions remain as to whether recent Executive Orders will toll the limitations period for all claims in New York, or merely provide an extension for claims that would have expired during the applicable period. To best protect their rights and preserve their claims during this time of crisis, parties should:

- >> Be prepared to file on the day the orders expire and courts re-open, any claims whose limitations period expired between March 20, 2020 and the end of the extension period, if no tolling agreement is possible.
- >> Disregard the purported tolling period for claims whose limitations period will expire after New York courts re-open.
- >> Enter an agreement with adverse parties to toll limitations periods rather than relying on Executive Order 202.8 and subsequent extensions.

FOR MORE INFORMATION

Ina B. Scher
Partner
212.468.4937
ischer@dglaw.com

Daniel A. Dingson
Associate
212.237.1488
ddingson@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

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