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Reporting on
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The COVID crisis has impacted so many aspects of our lives. We have attempted here to deal with the implications of the Governor's Executive Orders with respect to various deadlines. Joining with me in this effort are members of the CPLR Committee of the New York State Bar Association. The group includes the current Chair of the Committee, two prior Chairs, and a former Chair and past president of the NYSBA. Our hope is that this analysis will provide some context to the Executive Orders and the effect of the toll.

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THE SCOPE OF THE COVID-19 TOLL OF CPLR TIME LIMITS

Introduction

On March 20, 2020, Governor Cuomo issued Executive Order 202.8, which tolls statutes of limitations and various other time limits under the "procedural laws of the state." He has since extended the toll by a series of Executive Orders, with the toll currently set to run through August 5, 2020 absent further extension.¹ The Executive Order's use of the word "toll" is significant because it makes clear that the affected time periods do not run at all while the Executive Order is in effect.² This is different from the statute of limitations relief granted by executive order in the aftermath of the 9/11 and Superstorm Sandy emergencies, which merely "suspended" the expiration of limitations periods during the pendency of the relevant executive order and thus created the potential for a rush to the courthouse upon the expiration of the suspension.³ While the import of a "toll" appears clear, what is somewhat less clear is the scope of the COVID-19 toll, i.e., precisely what time limits are tolled in addition to statutes of limitations.

Although the language of Executive Order 202.8 creates a certain amount of ambiguity – which is hardly surprising given that this was an emergency measure issued under intense pressure at the height of New York's COVID-19 crisis – the Order's language supports the conclusion that it tolls the expiration of *all* time limits under the CPLR. Interpreting the Executive Order in this manner is necessary, moreover, to give effect to the clear intent of the Order – to create time and space for the state's courts and practitioners to deal with the effects of the COVID-19 emergency. That said, careful practitioners will take note of the ambiguities discussed below and enter into stipulations or take other measures to protect their clients against sharp practice by adversaries and the possibility that a court may take a more restrictive view of the toll's scope.

Executive Order 202.8

Governor Cuomo declared a state disaster emergency on March 7, 2020 in response to New York's COVID-19 outbreak. He did so by way of Executive Order 202, which recited that the World Health Organization had designated COVID-19 as a Public Health Emergency of International Concern and that the United States Health and Human Services Secretary had declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to COVID-19.

A week later, on March 13, Chief Administrative Judge Lawrence K. Marks issued a memorandum outlining steps – including the suspension of jury trials – being taken by the Unified Court System "to assure the operation of the courts in the safest possible manner for the public and our employees in this time of medical emergency." Those steps were then implemented by an Administrative Order issued a few days later.⁴ Pursuant to that Order, "all non-essential functions of the courts [were] postponed until further notice."⁵ Moreover, filing papers, whether in person or electronically, was difficult if not impossible at the height of the COVID-19 crisis.

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Executive Order 202.8 was issued on March 20, one in a series of disaster measures implemented by the Governor in response to the emergency. Consistent with Executive Order 202, Order 202.8 recites that “in order to facilitate the most timely and effective response to the COVID-19 emergency disaster, it is critical for New York State to be able to act quickly to gather, coordinate, and deploy goods, services, professionals, and volunteers of all kinds.” The Governor therefore invoked Section 29-a of Article 2-B of the Executive Law as authority to “temporarily suspend or modify any statute, local law, ordinance, order, rule, or regulation . . . if compliance with such statute, local law, ordinance, order, rule, or regulation would prevent, hinder, or delay action necessary to cope with the disaster emergency or if necessary to assist or aid in coping with such disaster. . . .” Executive Order 202.8 goes on to enumerate six categories of laws that the Governor was suspending or modifying in accordance with such authority.

Relevant here is the first of the enumerated categories. “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,” Executive Order 202.8 provides:

[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.

By its express terms, the Executive Order tolls various time limits; it does not merely suspend them. The toll applies not only to statutes of limitations, moreover, but to any “specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding.”

Effect of the Toll and Examples of Its Application

The CPLR provides for a number of different elongations of time in which to commence an action. Some of these provisions operate as an extension and allow a set period of time after the occurrence of a particular event in which to commence the action. Examples of extensions include CPLR 210(a) (one year from the death of the claimant) and CPLR 205(a) (six months from the dismissal of the action). Others operate as a toll, *e.g.*, CPLR 208 (infancy or insanity); CPLR 210(b) (death of a defendant); and CPLR 207 (defendant out of the state).

A toll “stops the clock” for statute of limitations purposes during a period that begins with the event that gives rise to the toll and ends with the expiration of the time allotted or the lifting of whatever disability was the reason for the toll. It might help to think of the statute of limitations period as a ruler – its length is equal to the limitations period. When

a toll occurs along the timeline of the ruler, we cut the ruler at that point and save the remaining piece to be reinstated at the moment the toll ends. A toll will work the same way for any time limit for any other activity during the life of the action. If a motion must be made within 60 days of a particular event, and the toll is instituted on the 25th day, there is a 35-day piece of ruler left to be applied to the end of the toll during which time the motion must be made, to be timely.

By its terms, the COVID-19 toll applies to time limits set by Court order, as well as those established by rule.⁶ Counsel would be wise, however, to confirm that the Court agrees that such deadlines are tolled, whether established by a standing order, scheduling order, or other order. Needless to say, if the Court directs counsel to comply with a deadline set by the Court regardless of the COVID-19 toll, counsel would be well advised to do so.

Here are a few examples to show how the toll contained in Executive Order 202.8 (and those Executive Orders that extended it) would work:

- Suppose an automobile accident, in which the plaintiff is injured, occurred on January 4, 2019. The statute of limitations for personal injury actions based in negligence is three years (CPLR 214(5)). On March 20, 2020, there is one year, 290 days left on the statute of limitations. When the toll is lifted on August 6, 2020 (assuming no further extensions), the action must be commenced within the one year, 290 days remaining, measured from that date (or by May 23, 2022).
- Suppose the same automobile accident, in which the plaintiff is injured, occurred during the COVID-19 tolling period, on July 13, 2020. Assuming that the toll is lifted on August 6, 2020, the action must be commenced within three years of August 6, 2020.
- Suppose an accident on municipal property occurs on January 2, 2020, subject to a statute of limitations of one year plus 90 days, and subject to the service of a notice of claim on the defendant within 90 days. On March 20, 2020, there are 12 days left for the service of the notice of claim, and one year and 12 days left on the statute of limitations. If the toll is lifted on August 6, 2020, the notice of claim must be served by August 18, 2020 and the action must be commenced by August 18, 2021. Any application for a late notice of claim (beyond August 18, 2020), must be made by August 18, 2021.
- Suppose an action is commenced on February 3, 2020, and the defendant serves an answer on February 24, 2020, which raises as an affirmative defense that there is no personal jurisdiction as a result of improper service. In order to achieve a dismissal based on that affirmative defense, the defendant must make a motion within 60 days of the assertion of the affirmative defense (CPLR 3211(e)). On March 20, 2020, there are 35 days left for service of that motion. If the toll is lifted on August 6, 2020, the motion must be made by September 10, 2020.
- Suppose the plaintiff in an existing action files a note of issue on February 14, 2020. Under CPLR 3212(a), any motion for summary judgment is to be

made within 120 days (assuming no shorter period is adopted by the court). On March 20, 2020, there are 85 days left in the 120-day period. If the toll is lifted on August 6, 2020, the motion must be made by October 30, 2020.

- Suppose the plaintiff in an existing action files a note of issue during the COVID-19 tolling period, on July 13, 2020. If the toll is lifted on August 6, 2020, any motion for summary judgment would be required within 120 days of August 6, 2020 (i.e., December 4, 2020). The time between July 13, 2020 and August 6, 2020 would be excluded from the computation.

Service of Papers Not Filed in Court

Executive Order 202.8's toll applies by its terms to the time limits applicable to filing and service of various types of papers, including "any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including . . . the civil practice law and rules . . ." This language is ambiguous as to whether the toll applies to service of various papers that are required to be served but not filed in court including, for instance, service of discovery demands and responses. Indeed, the author of a leading New York practice commentary has concluded that "[w]hile the COVID-19 Toll applies to the service of a notice of appearance under CPLR 320(a), a CPLR 3211(a) pre-answer motion to dismiss, and a CPLR 3024 corrective motion, it does not apply to toll the defendant's time to serve an answer!"⁷

The language of Executive Order 202.8 supports – and the context in which the Order was issued requires – a broader reading. The Order provides that the toll applies to "any specific time limit for the . . . service of any legal action, notice, motion, *or other process or proceeding*, as prescribed by the procedural laws of the state . . ." (emphasis added). While the words "service of any . . . other process or proceeding" are not a model of clarity, this broad language supports the conclusion that the toll covers all time limits applicable to service of papers under the CPLR. Furthermore, the paragraph of Executive Order 202.8 that establishes the COVID-19 toll expressly invokes "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." At the time those words were written, the electronic system was shut down for the filing of papers, including answers, responses, and so forth. Indeed, at least one court has already concluded in the context of criminal cases that "[t]he language of [Executive Order 202.8] sweeps up every procedural time limited imposed in the Criminal Procedure Law. . . ."⁸

A broad reading of the toll to apply to all time limits under the CPLR is further supported by Executive Order 202.8's invocation of the importance of facilitating "the most timely and effective response to the COVID-19 emergency disaster," and its stated intent to provide relief from statutes and rules that would otherwise "prevent, hinder, or delay action necessary to cope with the disaster emergency or if

necessary to assist or aid in coping with such disaster. . . ." These clear signals of the Governor's intent in issuing the Executive Order take on all the more significance in light of the Order's ambiguous language.⁹ Interpreting the toll narrowly, in a way that might prejudice attorneys and clients who may have been directly affected by the COVID-19 virus, or who were unable to meet otherwise applicable deadlines because they were unable to get to their offices or for other reasons related to the public health crisis, would at the very least interfere with efforts to "cope with the disaster."

A Word of Caution

While the authors believe that the language and context of Executive Order 202.8 support a broad reading of the toll, others may take – and indeed, already have taken – a more limited view. Caution dictates that lawyers protect their clients by entering into stipulations or taking other measures to obtain explicit extensions of otherwise applicable deadlines, especially where the application of Executive Order 202.8 may be less than absolutely clear. This is all the more true where the stakes are high – for instance in responding to a notice to admit under CPLR 3123(a), which provides that "the matters of which an admission is requested shall be deemed admitted" absent a timely response. By taking protective measures that leave their adversaries without any basis to argue that a deadline was missed, counsel will wisely heed Professor Siegel's advice: "Let this issue ultimately be decided in someone else's case."¹⁰

Moreover, a dispute as to the effect of the COVID-19 toll on the statute of limitations period for any particular case may not arise for several years. For example, assume that the statute of limitations for a claim does not expire until May 23, 2022 as a result of the toll (as discussed in an example above). If the plaintiff waits until then to commence an action, any dispute as to the applicability of the toll would likely not be raised until the defendant files a CPLR 3211 motion based on the statute of limitations, or even later if the defendant instead raises the statute of limitations as an affirmative defense. Thus, wise practitioners should try to memorialize this toll in a manner that will be easy to recall in years to come.

Finally, practitioners should keep abreast of all developments in this area, including any further Executive Orders or Court directives. A good place to start would be the updates provided by the NYSBA website, specifically accessible via this link: <https://nysba.org/covid-19-information-updates>.

Most important, please stay safe and healthy.

Endnotes

1 See Executive Order 202.14 issued on April 7, 2020 (extending toll through May 7, 2020); Executive Order 202.28 issued on May 7, 2020 (extending toll through June 6, 2020); Executive Order 202.38 issued on June 6, 2020 (extending toll through July 6, 2020); Executive Order 202.48 issued on July 6, 2020 (extending toll through August 5, 2020).



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2 See, e.g., Patrick M. Connors, *The COVID-19 Toll: Time Periods and the Courts During Pandemic*, NYLJ 7/17/20 at 2-3, <https://www.law.com/newyorklawjournal/2020/07/17/the-covid-19-toll-time-periods-and-the-courts-during-pandemic> (“Connors”).

3 See Executive Order 113.7 issued on September 12, 2001 (9/11); Executive Order 52 issued on October 31, 2012 (Superstorm Sandy). For a more detailed comparison of Executive Order 202.8 to these prior executive orders, see Thomas A. Moore and Matthew Gaier, *Toll on Statutes of Limitations During the COVID-19 Emergency*, NYLJ 6/1/20 at 3, <https://www.law.com/newyorklawjournal/2020/06/01/toll-on-statutes-of-limitations-during-the-covid-19-emergency>.

4 Administrative Order of the Chief Administrative Judge of the Courts, AO/68/20, dated March 16, 2020. The Chief Administrative Judge has since issued a series of further Administrative Orders implementing additional procedures in response to the evolving COVID-19 situation.

5 *Id.*

6 Executive Order 202.8 (“any specific time limit . . . as prescribed by . . . any . . . order . . . is hereby tolled”).

7 Connors at 4-5. Under Connors’s view, the time to file a notice of appearance is tolled because Executive Order 202.8 expressly covers “notices,” whereas it is less clear that the time to file an an-

swer is tolled because an answer need not be filed, and in Connors’s view does not constitute a “legal action, notice, motion, or other process or proceeding.” These words, however, are susceptible to a broader reading that would cover all CPLR time limits, as discussed below, and the notion that the time to file a notice of appearance is extended but the time to answer is not extended is difficult to square with the fact that an appearance is frequently accomplished by way of an answer.

8 *People ex rel. Hamilton v. Brann*, 2020 N.Y. Slip Op. 50392(U), at *2 (Sup. Ct., Bronx Co. April 2, 2020) (Westlaw pagination). See also *People ex rel. Mulry v. Franchi*, 120 N.Y.S.3d 790 (April 23, 2020) (citing *Hamilton* with approval).

9 See, e.g., *People v. Ballman*, 15 N.Y.3d 68, 72 (2010) (“Although the text itself is generally the best evidence of legislative intent, where ‘the language is ambiguous, we may examine the statute’s legislative history.’”) (original source of quotation omitted). See also *Cole v. Young*, 351 U.S. 536, 551–56 (1956) (interpreting Presidential executive order in light of Presidential intent as evidenced by language in the preamble and the history leading to the issuance of the order).

10 David D. Siegel, Patrick M. Connors, *New York Practice* § 168(D) (6th ed.).