

COVID-19's enduring impact on statutes of limitations: Take caution

Seth M. Kruglak, *New York Law Journal* — October 03, 2023

Although the COVID-19 pandemic is fading, Gov. Andrew Cuomo's tolling of statutes of limitations during the emergency period will create an enduring surprise for many years to come.

Statutes of limitation are critical considerations for all practitioners. It is not uncommon for parties to hotly litigate whether a suit has been filed by the required deadline. Among other issues, disputes can center on determining the time and place a cause of action accrues, which state's statute of limitations applies and whether any doctrines can toll or extend the limitations period.

Gov. Cuomo's executive orders overlaid further complexity on what will remain a complicated, case-by-case matter for the foreseeable future.

Governor's executive orders impacting statutes of limitation

At the outset of the pandemic, Cuomo issued an executive order stating that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding" would be "tolled" from March 28, 2020 to April 19, 2020. Exec. Order 202.8, N.Y. Comp. Codes R. & Regs. tit. 9, §8.202.8.

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He proceeded to issue a series of extensions, ultimately extending the tolling period to Nov. 3, 2020 for a grand total of 228 days. Exec. Order 202.67, N.Y. Comp. Codes R. & Regs. tit. 9, §8.202.67.

New York courts apply Governor's executive orders

After an initial period of uncertainty, New York courts have generally (although not always) arrived at the view that Cuomo's executive orders tolled—rather than suspended—statutes of limitations during this 228-day period. *See, e.g., Afanassieva v. Page Transportation*, No. 21-3090, 2022 WL 7205009, at *1 (2d Cir. Oct. 13, 2022); *Aparicio v. Uber Technologies*, No. 22-CV-4244-OEM-SJB, 2023 WL 5287065, at *10 n.10 (E.D.N.Y. Aug. 16, 2023); *McLaughlin v. Snowlift*, 214 A.D.3d 720, 721 (2d Dep't 2023); *New York City Transit Authority v. American Transit Insurance*, 211 A.D.3d 643, 643 (1st Dep't 2022). *But see Loeb v. County of Suffolk*, No. 22-CV-6410 (HG), 2023 WL 4163117, at *3 (E.D.N.Y. June 23, 2023)

("The court is of the opinion that Executive Order 202.8 suspended the time period to which it applied . . ." (emphasis in original) (internal quotation marks and citation omitted)).

A "'toll does not extend the statute of limitations indefinitely but merely *suspends* the running of the applicable statute of limitations for a finite . . . time period; . . . the period of the toll is excluded from the calculation of the time in which the [petitioner] can commence an action [or proceeding].'" *Roach v. Cornell University*, 207 A.D.3d 931, 933 (3d. Dep't 2022) (quoting *Chavez v. Occidental Chemical*, 35 N.Y.3d 492, 505 n. 8 (2020) (alteration and emphasis in original)) (holding claim with four-month statute of limitations that accrued on April 20, 2020 was required to be filed within four months of Nov. 4, 2020); *Ruiz v. Sanchez*, No. 2022-00468, 2023 WL 5944101, at *1 (N.Y. App. Div. 2d Dep't Sept. 13, 2023) ("[Plaintiff] did not have an additional 228 days, the length of the tolling period, after the toll's expiration to commence the action. Instead, the remaining 152 days left on her three-year statute of limitations started to run after the toll was lifted on Nov. 4, 2020." (citation omitted)).

In contrast, "a suspension does not exclude its effective duration from the calculation of the relevant time period. Rather, it simply delays expiration of the time period until the end date of the suspension." *Loeb*, 2023 WL 4163117, at *3 (internal quotation marks and citation omitted).

As a result, causes of action arising under New York law that accrued prior to, or during, this 228-day period will not count the days falling within this period toward the deadline for filing the claim. *See, e.g., Williams v. Ideal Food Basket*, 219 A.D.3d 917, 917 (2d Dep't 2023) ("[T]his toll of the statute of limitations did not only apply to statutes of limitations that expired between March 20, 2020, and Nov. 3, 2020").

New York federal courts have recognized that Cuomo did not have the authority to toll the statutes of limitation for filing federal causes of action. *See, e.g., Aguilar v. New DairyDel*, No. 22 Civ. 3700 (NSR), 2023 WL 5835829, at *2 n.3 (S.D.N.Y. Sept. 8, 2023); *Romero v. Manhattan & Bronx Surface Transit Operating Authority*, No. 21-CV-4951 (LJL), 2022 WL 624451, at *6 (S.D.N.Y. Mar. 2, 2022).

It remains a case-by-case determination as to whether Cuomo's toll extends to federal causes of action that borrow state statutes of limitation, such as 42 U.S.C. §1983. *Compare Jones v. Assencao*, No. 20-CV-693-DG-SJB, 2022 WL 4455229, at *5 (E.D.N.Y. June 28, 2022) ("Courts have uniformly held that this executive order's tolling [Executive Order 202.8] applies to federal section 1983 claims using the New York statute of limitations like this one."), with *Loeb*, 2023 WL 4163117, at *4 ("The court finds that applying any tolling purportedly required by the executive orders to Section 1983 claims filed in federal court would defeat the purposes of finality and certainty that statutes of limitations serve.").

Separately, New York federal courts have not readily been receptive to arguments that the pandemic was one of the "rare and exceptional circumstances" meriting the equitable tolling of statutes of limitations. *See, e.g., Mosca v. United States*, 602 F. Supp. 3d 344, 347-48 (E.D.N.Y. 2022); *Verne v. New York City Department of Education*, No. 21 CIV. 5427 (JPC), 2022 WL 4626533, at *6 (S.D.N.Y. Sept. 30, 2022). *But see White v. Gutwein*, No. 7:20-CV-04532 (NSR), 2023 WL 5803708, at *4 & n.2 (S.D.N.Y. Sept. 6, 2023) (applying Executive Order 202.8's tolling provisions to Section 1983 claim brought by pro se prisoner and expressly permitting prisoner to raise equitable tolling arguments in subsequent briefing).

New York's borrowing statute intersects with pandemic tolling and extensions

Pandemic-era orders relating to statutes of limitation outside New York will impact New York litigation through New York's Borrowing Statute, CPLR 202. As the New York Court of Appeals has stated, "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Deutsche Bank National Trust Co. v. Barclays Bank*, 34 N.Y.3d 327, 334 (2019) (alteration in original) (internal quotation marks and citations omitted). A cause of action accrues at the time and place of the injury, which for economic harm is usually where the plaintiff resides and sustains the economic loss.

In addition, "CPLR 202 calls for a comparison of New York's 'net' limitations period, integrating all relevant New York extensions and tolls, and the foreign state's 'net' limitations period, with all foreign tolls and extensions integrated, and if the foreign limitations period is shorter, the foreign net period determines the timeliness of the action."

To that end, in *Afanassieva v. Page Transportation*, a suit brought by New Jersey plaintiffs in the Northern District of New York, the U.S. Court of Appeals for the Second Circuit rejected arguments by the plaintiffs to apply New York's 228-day COVID-19 tolling period and held the district court properly applied New Jersey's 56-day period. No. 21-3090, 2022 WL 7205009, at *1-*2 (2d Cir. Oct. 13, 2022).

Underscoring the complexities in this area, the Second Circuit noted that "[a] New Jersey court recently interpreted the state's pandemic-related orders as suspending, not tolling the statutes of limitations. . . . Plaintiffs were untimely under either calculation." (citing *Barron v. Gersten*, 277 A.3d 502, 506 (N.J. Super. Ct. App. Div. 2022)); see also *Espinal v. Port Authority of New York & New Jersey*, 213 A.D.3d 101, 104–05 (2d Dep't 2023) ("[T]he Supreme Court of New Jersey issued omnibus orders declaring legal holidays from March 16, 2020, through May 10, 2020. . . . In *Barron*, the Superior Court of New Jersey, Appellate Division, held that these omnibus orders did not toll time limitations, but instead created 'legal holidays,' which allowed the filing of pleadings such as a complaint or notice of claim on the next business day after the expiration of the omnibus orders that was not a Saturday, Sunday or legal holiday." (citations omitted)).

Limitations

Parties should take a careful second look at statutes of limitations post-pandemic. For a potential plaintiff, it might be possible to file a suit that absent tolling would have been time-barred. Likewise parties could face suits or potential liability farther into the future than in the absence of tolling. These complex inquiries will remain a feature of post-pandemic litigation for many years and require case-specific analysis.



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