

March 23, 2020

New York and Delaware Take Steps to Toll Limitations Periods and Extend Other Deadlines in Light of COVID-19 Emergency

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State governments have begun to take broad actions to make wholesale adjustments to litigation deadlines in light of the challenges presented by the COVID-19 public health emergency. On March 20, 2020, New York Governor Andrew Cuomo issued Executive Order 202.8, entitled the “Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency,” temporarily tolling time periods for civil litigants to act under New York State law due to the ongoing COVID-19 public health emergency.¹ The Executive Order’s provisions take immediate effect, and have significant implications for all civil actions pending in New York State courts, including New York State Supreme Court (and the Commercial Division thereof). The Executive Order provides, in pertinent part, that:

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[.]

The Executive Order references a pre-existing directive of the Chief Judge of the New York State Court of Appeals, embodied in a Memorandum by the Chief Administrative Judge dated March 15, 2020, implementing operational protocols for New York Courts and specifying that until further notice civil courts would remain open only to handle “essential matters.”² On March 22, 2020, following the entry of the Executive Order, an Order by New York’s Chief Administrative Judge extended these operational protocols even further, specifying that until further notice, “no papers shall be accepted for filing” in any non-essential

¹ N.Y. Exec. Order No. 202.8 (Mar. 20, 2020), <http://www.courts.state.ny.us/whatsnew/pdf/EO-202.8-ocr.pdf>.

² Chief Administrative Judge Lawrence K. Marks, *Memorandum re: Updated Protocols* (Mar. 15, 2020), <https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA.pdf>.

matter in any New York court.³ The list of “essential matters” in civil actions is narrow and limited to matters pertaining to health and safety, but also allows courts discretion to deem additional matters not included on the list as “essential.”

These Executive and Administrative Orders have both procedural and substantive implications for litigants in New York State. As a procedural matter, all time periods to file or respond to complaints, motions, discovery or other applications are tolled at least until April 19, 2020. Only “essential” applications can be filed during the tolling period. Substantively, by tolling time periods applicable to the “commencement” of “any legal action” prescribed by the procedural laws of the state, the Executive Order also tolls any statutes of limitations applicable to claims under New York State law from March 20, 2020 through April 19, 2020. The Order does not operate retroactively, however, and therefore does not excuse untimely actions that were required before the Executive Order was entered.

Delaware has taken comparable measures. On March 22, 2020, the Supreme Court of the State of Delaware issued an order closing all courthouses and administrative offices to the public until April 15, 2020.⁴ The order permits the Delaware courts to hold telephonic hearings or arguments in their discretion throughout this span. As one facet of this order, the Delaware Supreme Court extended any statutes of limitations or statutes of repose that would otherwise expire on or before April 15 such that they will instead continue through April 21. The order likewise extends any default deadlines under Delaware court rules or Delaware statutes through April 21, while any deadlines imposed by Delaware court orders—such as scheduling orders governing Delaware actions—will remain in place, subject to potential extensions for good cause shown. On March 23, 2020, the Delaware Chancery Court issued a further statement acknowledging that “many hearings and case schedules will have to be adjusted” and stating that the Chancery Court would be “solicitous of granting any reasonable requests for extensions.”⁵ The court urged practitioners to be flexible and cooperative to avoid the need for intervention by the court.

New York’s Executive Order 202.8 has not yet been tested or interpreted by any court. Issues in interpretation may arise, however, particularly in the context of “essential” applications in civil cases which, pursuant to the Chief Administrative Judge’s operational protocols, may be heard at this time, but as to which the Executive Order may operate to toll deadlines for responding to such applications. In addition, parties seeking emergency judicial relief or concerned about the long term implications of the current operational protocols and the Executive Order on New York State courts may seek to avoid jurisdiction in

³ Admin. Order of the Chief Administrative Judge of the Courts, AO/78/20 (Mar. 22, 2020), <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

⁴ Supreme Court of the State of Delaware, Administrative Order No. 3 (Mar. 22, 2020), <https://courts.delaware.gov/forms/download.aspx?id=120578>.

⁵ Chancellor, Andre G. Bouchard, *Statement from the Court of Chancery Concerning Supreme Court Administrative Order No. 3* (Mar. 22, 2020), <https://courts.delaware.gov/rules/pdf/Chancery-Stmt-re-Admin-Order.pdf>.

New York courts altogether, and may instead attempt to establish jurisdiction in New York federal courts or in other states that have not yet instituted similar measures in civil cases. The Delaware Supreme Court order is somewhat more specific, although it too remains untested in any case.

Litigants seeking to avail themselves of the tolling period applicable to statutes of limitation under New York or Delaware law should consider carefully the choice of law analysis applicable to their claims. Under New York law, New York State courts apply New York State's statute of limitations to claims that arise under New York law. Under New York's borrowing statute, a nonresident's cause of action that accrued outside New York must be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued. Other states with similar statutory schemes also routinely apply New York's statute of limitations to claims brought under New York law, but filed in other jurisdictions. Courts both in New York and other jurisdictions may be called upon to interpret the application of the Executive Order to the timeliness of claims that may otherwise be barred under applicable statutes of limitation. All of these considerations remain true under Delaware law and the recent Delaware Supreme Court order as well.

We will continue to monitor developments and keep clients apprised of pertinent information.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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