

Second Department Rules that Governor Cuomo's COVID-19 Executive Orders "Toll" Filing Deadlines

By Morgan R. McCord

On June 2, 2021, the Appellate Division, Second Department helped ease the minds of mortgage servicers and their attorneys by ruling that Governor Cuomo's Covid-19 Executive Orders ("EOs"), particularly EO No. 202.8 and subsequent EOs extending No. 202.8, toll rather than suspend the running of the applicable statutory limitations periods. The importance of this decision and order cannot be overstated. Had the court found otherwise, hundreds, if not thousands, of filings in the Second Department would have been time-barred as of November 4, 2020, a day after the tolling period ended pursuant to EO No. 202.72 on November 3, 2020.

The relevant facts in [Brash v. Richards](#), 2021 NY Slip Op 3436, are straightforward. The plaintiff/appellant filed a notice of appeal on November 10, 2020 of an order entered on October 2, 2020 that was served with notice of its entry on October 2, 2020. Defendants/respondents moved to dismiss the appeal on several grounds, including that the appeal was untimely because it was taken after the November 3, 2020 expiration of Governor Cuomo's EOs suspending filing deadlines. In opposition, Plaintiff argued that the appeal was timely because the EOs tolled rather than suspended filing deadlines.

The court began its analysis by highlighting the important distinction between a suspension and a toll. A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the relevant time period. A suspension, on the other hand, does not exclude its effective duration from the calculation of the relevant time period. Instead, it delays the expiration of the time period until the end date of the suspension.

In this case, if the EOs suspended the running of the limitation period, as the defendants argued, the appeal would be untimely since it was taken on November 10, 2020; 7-days after the November 3, 2020 suspension period ended. However, if the EOs tolled the limitation period, as the plaintiff argued, the appeal would be timely since it was taken, pursuant to CPLR 5513(a), within 30-days of the expiration of the tolling period on November 3, 2020.

Defendants argued that Governor Cuomo's EOs suspended the limitation period for two primary reasons. First, they argued that the word "toll" was missing from the vast majority of the nine EOs extending EO No. 202.8. The Appellate Division was not persuaded, however, because EO No. 202.8 expressly and plainly provided that the subject time limits were tolled, two of the nine subsequent EOs referred to the alteration of the subject time limits as a toll, and EO No. 202.72 reiterated that the "toll" would no longer be in effect as of November 4, 2020.

Second, Defendants contended that Governor Cuomo lacked the statutory authority to toll the subject limitation period. However, the Appellate Division reasoned, after analyzing the relevant statutes, that since the Governor had the authority to "alter" or "modify" the requirements of a statute under Executive Law 29-a(2)(d), he had the authority to toll statutory limitations periods. Consequently, the Appellate Division denied the defendants' motions to dismiss, finding that the

appeal was timely taken since the notice of appeal was filed within 30-days of the November 3, 2020 tolling expiration date.

The practical importance of this decision cannot be overstated. Because Governor Cuomo's EOs tolled, rather than suspended, the running of statutory limitations periods, litigation filings, including claims, in the Appellate Division, Second Department that accrued before the start of the tolling period on March 20, 2020, will have their respective limitations periods extended 228 days (the full length of the tolling period from March 20, 2020 to November 3, 2020). Claims that accrued during the tolling period will have their limitations periods extended by the number of days that exist between the date the claim accrued and November 3, 2020, when the tolling period expired. For example, if a breach of contract claim accrued on March 21, 2014 and needed to be filed within 6-years pursuant to CPLR 213, by March 21, 2020, the limitations period would be extended 228 days to November 4, 2021. Similarly, if a breach of contract claim accrued on April 1, 2020, the limitations period would be extended 217 days (the number of days between April 1, 2020 and November 3, 2020), and the claim would now have to be filed on or before November 4, 2026. Viewed from a slightly different perspective, if there were 30-days left in a limitations period when the tolling period began on March 20, 2020, the limitations period would be extended until 30-days after the tolling period expired on November 3.

Although the Second Department's decision is a welcome relief to mortgage servicers and their attorneys, we recommend that lenders proceed with expedience and vigilance for several reasons. First, the decision is only binding on courts within the Appellate Division, Second Department. Other Appellate Divisions may not follow suit. Second, the decision addressed the deadline for filing a notice of appeal. It is possible that other filing deadlines, including court-ordered deadlines, will be treated differently. Third, it is yet to be seen how the trial courts will interpret the decision. Finally, given the gravity of this issue, we anticipate that it will eventually reach the Court of Appeals.