

CHILD USA

LET'S END CHILD ABUSE AND NEGLECT

TO: Interested Parties

FROM: Marci Hamilton

DATE: May 12, 2020

RE: Validity of CVA SOL Extension under Executive Order No. 202.29

ISSUE

Does Governor Cuomo's directive under Executive Order No. 202.29 extending the Child Victims Act (CVA) statute of limitations (SOL) to January 14, 2021 run afoul of the authority vested to him under Executive Law § 29-a of Article 2-b?

BRIEF ANSWER

Yes. Governor Cuomo exceeded his authority under Executive Law § 29-a by creating a unilateral permanent modification, rather than a temporary suspension, of the CVA SOL pursuant to the state disaster emergency he declared for the entire State of New York on March 7, 2020 (Executive Order No. 202).

FACTS

The New York Child Victims Act (CVA), enacted last year, created a window for victims of historic child sexual abuse to initiate claims that were previously barred from court due to the statute of limitations. The legal window is set to close on August 21, 2020. A March 2020 order from the state's Chief Administrative Judge postponing all nonessential court services

and prohibiting the filing of new cases has effectively placed a hold on all new and most of the pending litigation under the Act. In light of the court closures and ongoing COVID-19 pandemic, Governor Cuomo issued Executive Order 202.29 on May 8, 2020, extending the window for victims to file new claims under the CVA to January 14, 2021.

APPLICABLE LAW

The Governor's power to issue an order suspending or modifying statutes of limitations derives from Executive Law § 29-a of Article 2-b which states that "subject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order *temporarily suspend* any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency." (emphasis added). Section 29-a was amended earlier this year, permitting the governor not just to suspend laws in response to an emergency but also to issue *any directive* necessary to respond to the same. *See* Senate Bill S7919, NY State Senate, <https://www.nysenate.gov/legislation/bills/2019/s7919>.

This power is subject to several limitations. Such suspensions and directives: (1) must be "in the interest of the health or welfare of the public" and must be "reasonably necessary to aid in the disaster effort"; (2) must "provide for the minimum deviation from the requirements" of the law "consistent with the goals of the disaster action deemed necessary"; (3) may not exceed 30 days, though "upon reconsideration" by the governor they may be extended in 30-day increments through further executive orders; and (4) is subject to legislative override. Executive Law § 29-a(2), (a)-(b), (e), § 29-a(4).

Case law does not clearly define the scope of the Governor's emergency powers. The state disaster emergency authority was previously used to toll statute of limitations and other

deadlines following the September 11th attacks and Hurricane Sandy. The disputes arising out of those orders focused largely on the scope and effect of the orders rather than on challenging their legitimacy. *See People v. Sheehan*, 39 Misc.3d 695, (Crim. Ct., 2013); *People v. Haneiph*, 745 N.Y.S.2d 405 (Sup. Ct. Kings Cnty. 2002). However, the court in *People v. Haneiph* did expressly reject an argument that a post-September 11th executive order suspending the “speedy trial” statute violated constitutional separation-of-powers principles.

New York courts are beginning to consider challenges to a wide variety of issues related to Governor Cuomo’s executive orders issued in response to the COVID-19 pandemic, however, given the limited precedent regarding the constitutional or statutory limitations on the Governor’s emergency powers, that authority remains largely undefined. *See, e.g., People v. Hood*, 2020 N.Y. Slip Op. 50384(U) (Poughkeepsie City Ct. Apr. 4, 2020) (holding that temporary suspensions of certain deadlines related to state criminal prosecutions do not violate the constitutional right to due process or prohibition against unlawful detention); *but see, People v. Stanley*, --- N.Y.S.3d ---, 2020 WL 1917666, at 4 (Albany City Ct. Apr. 20, 2020) (“[T]he court might be inclined to suspect that the Executive Order is unconstitutional”).

DISCUSSION

I. Governor Cuomo’s Extension of the Child Victims Act Statute of Limitations Is Not a Valid Exercise of His State Disaster Emergency Authority

The broad issue is whether Executive Order 202.29 is a legally valid exercise of Governor Cuomo’s authority under the state and federal constitutions. Given that the courts have left that authority largely undefined, it remains to be seen whether such a challenge would be successful. Even if we assume that Executive Order 202.29 passes this threshold inquiry, the

Governor’s directive extending the CVA SOL is still subject to the limitations established in Executive Law § 29-a (2). Applying those limitations to the directive, it is clear that the Governor exceeded his authority under Executive Law § 29-a (1) by extending the Child Victims Act statute of limitations window to January 14, 2021. For this reason, in order to make the extension binding and to avoid unnecessary uncertainty and any additional litigation expense and delay, Executive Order 202.29 needs to be codified in legislation.

Without legislative action, the original purpose of the Child Victims Act will be thwarted by the necessary and unavoidable shutdown of the courts in response to COVID-19, and survivors relying on the extension may be deprived of justice once again due to an expired civil SOL.

a. Executive Order 202.29 Is Not Reasonably Necessary to Aid in the Disaster Efforts Associated with the COVID-19 Pandemic

The first issue is whether Executive Order 202.29 extending the CVA SOL is in “the interest of the health or welfare of the public” and “reasonably necessary to aid in the disaster effort.” New York State Senate Bill S7919, which passed in March, gives Governor Cuomo the ability to change state law so long as doing so assists the state in its disaster response. *See* Senate Bill S7919, Summary of Provisions (maintaining that the action was necessary to “allow New York to manage, prepare, respond to, and contain” the threat of the virus and to “ensure the Governor has necessary legal authority to confront these emergencies”). NY LEGIS 23 (2020), 2020 Sess. Law News of N.Y. Ch. 23 (S. 7919). Since the bill was passed, Governor Cuomo has issued a number of executive orders setting forth emergency measures related to the COVID-19 pandemic. These orders included expanding funding for testing and medical supplies

(Executive Order 202.1), redistributing ventilators (Executive Order 202.14), shutting down schools (Executive Order No. 202.4), relaxing regulatory burdens on access to healthcare (Executive Order No. 202.10), requiring certain citizens to wear a mask (Executive Order 202.17) and encouraging residents to stay-at-home to name a few (Executive Order 202.8). These measures were developed in light of public health expert recommendations and have been critically important in slowing the spread of the virus in the state of New York.

Though the directive under Executive Order 202.29 extending the CVA SOL implicates public health and welfare insofar as the physical and psychological safety of New York's children is an important public interest, it is less clear that such action is "reasonably necessary" to aid in the disaster effort. Unlike the other Executive Orders that were issued in response to the imminent emergency posed by the spread of COVID-19, the directive under Executive Order 202.29 is not similarly aimed at mitigating the virus' effects.

Therefore, Executive Order 202.29 exceeds the statutory limitation requiring that executive orders be reasonably necessary to aid New York's statewide disaster emergency.

b. The Governor's Directive Creates More than a Minimum Deviation from the Requirements of the Law Consistent with the Goals of the Disaster Action

The second issue is whether the directive represents a "minimum deviation from the requirements of the law...consistent with the goals of the disaster action deemed necessary." Executive Law § 29-a (2). Prior valid Executive Orders that extended the statute of limitations did so only for those claims with limitations periods expiring during the state disaster emergency. As the court noted in *Scheja v. Sosa*, the state of emergency caused by the September 11, 2001 attacks no longer existed at the time the plaintiff in that case was required

to commence his action and thus could not have interfered with the plaintiff's ability to file his case within the statute of limitations. *Scheja v. Sosa*, 4 A.D.3d 410, 412 (2004).

Before the issuance of Executive Order 202.29, the one-year window for filing new claims under the Child Victims Act was set to expire on August 13, 2020. The presumptive new date for filing under the Governor's directive is January 14, 2021, thus increasing the window for victims to file by an additional five months (eight months post-issuance). Given that no one knows how long the current pandemic will last, it is difficult to say whether five months will be considered a "minimum deviation"; however, the sooner courts resume their daily functions the arguably less likely a court will be to see the length of the extension as such.

Even if one could successfully argue that the extension provides for a minimum deviation, the change must still be consistent with the goals of the disaster action; as stated above, those goals are the protection of public health and control over spreading the COVID-19 virus. If the state of emergency ceases to exist prior to the January 14, 2021 deadline, the directive becomes difficult to defend as a legitimate exercise of executive authority under the law.

c. Extension of the Child Victims Act Statute of Limitation Exceeds the 30-day Limitation Proscribed Under Executive Law § 29-a(2)(a)

The third issue is whether the SOL extension under Executive Order 202.29 exceeds the temporal limitation imposed under Executive Law § 29-a(2)(a) which limits the suspension period to 30 days (although the governor may renew any suspension in 30-day increments via consecutive orders so long as the emergency conditions persist).

While an executive order remains eligible for thirty-day extensions “upon reconsideration of the relevant facts and circumstances, it cannot be extended indefinitely.” *People v. Hood*, No. CR-1395-20, 2020 WL 1672425, *4 (N.Y. City Ct. 2020). The Governor’s ability to temporarily suspend or modify a “defendants statutory procedural rights” is directly tied to the existence of the COVID-19 emergency disaster and thus his power to suspend the same is not unlimited. *See Police Benevolent Ass’n of the N.Y. State Troopers, Inc. v. Bennett*, 477 F. Supp. 2d 534, 542 (N.D.N.Y. 2007).

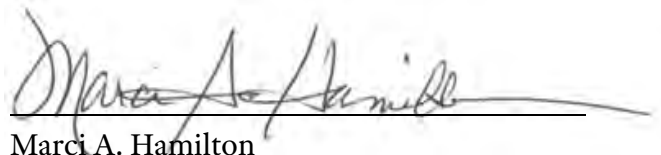
Executive Order 202.29 directs a one-time permanent modification to the CVA SOL that, in effect, turns what should otherwise be a temporary suspension into a directive spanning more than eight months from the issuance date. This extension is clearly more than the 30-day period contemplated by Section 29-a(2)(a). Not only is the governor limited to 30-day limits on any extensions, but the power to suspend or modify the CVA SOL does not outlast the emergency declaration itself. If the pandemic ceases to exist before January 14, 2021, then the underpinning of the CVA SOL executive order itself lapses voiding the order.

CONCLUSION

Given the extensive media reporting on this issue, survivors and their advocates may be assuming, based on Executive Order 202.29, that they can safely delay filing new lawsuits under the CVA until the fall. Yet, at best, it is unclear whether the extension of the CVA SOL will survive a statutory or constitutional challenge. Given the many questions surrounding the Governor’s action, it is likely that defendant perpetrators and institutions will challenge Executive Order 202.29 and argue that any case filed after the statutory deadline of August 13, 2020 is out of statute. That would be catastrophic for many victims who have waited over 15

years to obtain justice in New York, which previously had one of the worst SOLs in the United States for child sex abuse victims.

Not only does the directive under Executive Order 202.29 create uncertainty, it will potentially undermine the ability of victims and survivors to seek justice under the CVA. In order to mitigate the ambiguity posed by Executive Order 202.29, and to ensure that victims get their long-awaited day in court as the Governor and lawmakers intended after so many years of working tirelessly to finally pass the CVA, the legislature must codify the Governor's well-intended CVA extension to January 14, 2021. Anything less will result in yet a further tragic outcome of this unprecedented pandemic which will further traumatize and disappoint victims of childhood sexual abuse.



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