EARLY COVID-19 COURT DECISIONS SUPPORTING EXECUTIVE ORDERS SUGGEST HOW THE COURTS MAY VIEW THEIR IMPACT ON BUSINESS RELATIONSHIPS

Hodgson Russ Business Litigation Alert
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In response to the COVID-19 public health crisis, the New York legislature expanded the emergency powers of the Governor, and the Governor has issued a steady stream of executive orders suspending state and local laws and regulations and directing the undertaking of emergency actions.

Not surprisingly, a significant amount of litigation has arisen testing the scope and meaning of the Governor's executive orders. These cases have primarily occurred in the criminal procedure, habeas, and election law contexts, but they provide valuable insights outside of those contexts as to the judiciary branch's likely approach to the executive orders' effects on business contracts.

So far, cases have reflected acceptance of the validity of the executive orders and a reluctance to find or accept challenges to the Governor's expanded authority. For example, in the criminal law context, executive orders suspending or modifying "non-essential" procedures have survived multiple constitutional challenges. In one instance, the Queens County Supreme Court explained that, even if the statutes suspended or modified by the executive orders are tangential to fundamental constitutional rights, the specific rights they protect are statutory in nature, and can be revoked.[1] In making these statements, New York courts have stressed the State's power to address a healthcare-related emergency and accepted its ability to modify and amend its own statutory frameworks.[2] This position reflects a significant level of deference to the State's emergency power in a time of crisis. By determining that the rights affected are statutory, and not fundamental constitutional rights, courts are able to avoid the "strict scrutiny" applicable to constitutional rights, which asks whether the infringement is "narrowly" tailored and serves a "compelling" state interest.

Similar positions are reflected in the election law cases. In *Quinn v. Cuomo*, a petitioner sought injunctive relief—a special election—from an executive order cancelling an election on free speech and equal protection grounds. The court initially denied the injunctive relief requested because it would be for a "non-legislative and non-executive position for a period of approximately six months," and

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because the petitioner was dilatory in bringing the challenge, making it difficult for the State to otherwise address its compelling interest in managing COVID-19.[3] Specifically, the court noted that, while reinstating a fair election while implementing alternative ways of managing COVID-19 may have been possible had petitioner brought an immediate challenge, the delay had undermined those alternatives. On appeal, the Appellate Division affirmed on the grounds that cancelling the special election met the "compelling interests" test because it was the minimum deviation necessary to address the pandemic.[4]

The courts also appear to have been reassured by the fact that the executive orders have been met with legislative approval. Not only do these executive orders follow a clear grant of authority from the legislature, but they also are sometimes followed by additional legislation that essentially ratifies the changes in question. *Murray v. Cuomo* dealt with Executive Order 202.2, which accelerated primary registration deadlines while reducing the signature requirement. In that case, the Southern District of New York held that the changes were "reasonable and non-discriminatory" after "carefully scrutiniz[ing]" them. Notably, the district court repeatedly mentioned the fact that the changes were implemented both through executive order and "the legislation that followed," stressing the actions taken by the "Government" rather than any particular branch, and noting the State's interest in both the public health and in conducting elections.[5]

At the same time, however, New York courts have been careful not to give excessive meaning or scope to the executive orders.[6] In *Council v. Zapta*, for example, a petitioner attempted to argue that an executive order that reduced the signature requirement to be on a ballot under Election Law § 6-136 should be extended to the ballot signature requirements in the New York City Charter. Although the Supreme Court initially accepted this argument as within the general policy and purpose of the executive order, the Appellate Division promptly reversed, noting that the executive order specifically mentioned the Election Law, and not the New York City Charter.

This caution was recently driven home by the Court of Appeals in *Seawright v. Board of Elections in the City of New York*. A majority of the Court of Appeals noted that the legislature had power over elections, and that, although the executive orders had "expressly suspended or modified" some of the procedures required by legislation, they did not address the consequences for a late filing—and petitioner was requesting relief from the consequences of a late filing. In light of the "mandatory" timelines and the absence of either executive or legislative modifications expressly

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providing relief for those requirements, the Court declined to endorse fashioning one.[7] Notably, both the majority and the dissent agreed with the outcome in *Hawatmeh v. New York State Board of Elections*, in which the Third Department rejected a constitutional challenge to the signature timeline acceleration effected through both executive order 202.2 and subsequent legislation.[8]

These cases can be contrasted with the Second Circuit's opinion in *Yang v. Kosinski*, which reversed the New York State Board of Elections' cancellation of the State's Democratic Primary as a First Amendment violation.[9] The Second Circuit held that the outright cancellation of a primary election for which the candidates had already qualified was a "severe restriction" that was not "narrowly drawn" to advance the State's interests in managing COVID-19.[10] *Yang* has since been distinguished from other election cancellation lawsuits on the basis that the plaintiffs in those other lawsuits were dilatory in seeking legal relief. The courts recognized that the State had a "compelling interest" in managing COVID-19, and, due to the delay in bringing a suit, the public interest weighed against granting the injunction."[11]

Takeaways

Extrapolating from the above, it is reasonable to conclude that direct challenges to the validity of executive orders changing contractual obligations are unlikely to succeed under the current climate. This is likely to be a key factor in, for example, judging defenses to non-performance based on legal impossibility. At the same time, businesses relying on those executive orders should verify that they plainly encompass the situations to which they are being applied.

Hodgson Russ attorneys can help ensure that your business is operating in compliance with all applicable executive orders and emergency legislation. If you need assistance evaluating your compliance with the ever-changing legal landscape caused by the pandemic, please contact Reena Dutta (716.848.1626), Patrick Hines (716.848.1679) or David Short (716.848.1609).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics

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[1] *People ex rel. Arogyaswamy v. Brann*, No. CR-008452-20QN, 2020 WL 3023202, at *3 (N.Y. Sup. Ct. June 4, 2020).

[2] *People v. Hood*, 67 Misc. 3d 1204(A) (N.Y. City Ct. 2020) ("We live in unprecedented times . . .").

[3] *Quinn v. Cuomo*, No. 705011 2020, 2020 WL 2563703, at *3 (N.Y. Sup. Ct. May 18, 2020).

[4] *Quinn v. Cuomo*, No. 2020-03854, 2020 WL 2739938 (N.Y. App. Div. May 27, 2020).

[5] *Murray v. Cuomo*, No. 1:20-CV-03571-MKV, 2020 WL 2521449, at *11 (S.D.N.Y. May 18, 2020).

[6] *See Matter of Council v. Zapata*, __ A.D.3d __, 2020 WL 2312125 (2d Dep't 2020) (holding that Executive Order No. 202.2, which reduced the required signatures under Election Law § 6-136, did not reduce the required signatures under New York City Charter, which was not specifically mentioned); *Abdin v. Zapata*, 121 N.Y.S.3d 656, 657 (2d Dep't 2020)

(reversing Supreme Court's order applying Executive Order 202.2 to New York City Charter's signature requirements), *leave to appeal denied*, No. 2020-361, 2020 WL 2529495 (N.Y. May 19, 2020).

[7] *Seawright v. Bd. of Elections in City of New York*, No. 56, 2020 WL 2568804 (N.Y. May 21, 2020).

[8] *Hawatmeh v. New York State Bd. of Elections*, No. 903484-20, 2020 WL 2235860, at *4 (N.Y. Sup. Ct. May 6, 2020), *aff'd*, No. 531344, 2020 WL 2508851 (N.Y. App. Div. May 15, 2020), *leave to appeal granted*, No. 2020-371, 2020 WL 2529571 (N.Y. May 19, 2020), *and aff'd sub nom. Seawright*, 2020 WL 2568804.

[9] *Yang v. Kosinski*, No. 20-1494-CV, 2020 WL 2820179 (2d Cir. June 1, 2020).

[10] *Id.* at *6.

[11] *Quinn*, 2020 WL 2563703, at *3; *see also Murray*, 2020 WL 2521449, at *11 ("Controlling the spread of the disease . . . is a powerful compelling government interest.")