

Complex Commercial Litigation

Prepare for Disruption: An Update on Commercial Litigation in New York Courts



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Commercial parties across the world rely on the state and federal courts of New York to resolve sophisticated commercial disputes. Indeed, New York courts recognize that the state’s role as “the center of world commerce, the headquarters of international finance, [and] the home of America’s leading businesses” requires an effective forum “for the swift, fair and expert resolution of significant commercial disputes.”^[1]

With New York now the unfortunate epicenter of confirmed COVID-19 cases in the United States, public institutions in New York—including the courts—find themselves under significant strain while balancing their important role in resolving legal disputes with public health exigencies.

In an effort to protect the safety of all who interact with the courts—judges, court personnel, lawyers, juries, and parties—New York State has increasingly limited court work to that which is “essential.” These changes directly impact complex commercial disputes, which are typically not among the type of matters deemed “essential.” Accordingly, businesses that rely on courts in New York to resolve their disputes should carefully consider how to manage ongoing litigation, or how to confront ongoing disputes where court access may be delayed or unavailable.

This article describes the new status quo in the state and federal courts in New York and offers several considerations for those with pending or upcoming litigation in New York. Of course, this is a mere snapshot in time. As the breadth of the COVID-19 crisis changes each day, those with business in New York courts must stay apprised of court orders that limit and later restore access to the courts to fully understand how their interests may be impacted.

I. Reduced Access to Courts in New York

A. New York State Courts

As of the week of March 23, 2020, commercial litigation is most restricted in New York’s *state* courts following the issuance of multiple orders over a weeklong period that, in a nutshell, have stripped functioning down to the “essential.” Working backwards:

- [March 22](#). The chief administrative judge issued an order providing that New York state courts will no longer accept filings—including *electronic filings*—unless they are on a defined list of essential matters.^[2] According to a court representative, lawyers may not purchase index numbers—a necessary step when opening a new matter—until April 19 “at the earliest.”^[3] The majority of essential matters under the order of March 22 pertain to criminal and family court proceedings, with no exceptions for commercial litigation. Although the order makes an exception for “any other matter that the court deems essential,” the order does not define a process for seeking such an exception.^[4]

Notably, while trial courts in New York may still hear “emergency applications related to the coronavirus” and “emergency Election Law applications,” no specific exceptions apply to orders to show cause or other emergency applications that commercial parties may use to obtain time-

sensitive relief.^[6] With new index numbers unavailable for purchase, it appears as though parties seeking emergency relief in brand new commercial disputes will not have access to the state courts. Accordingly, commercial parties requiring emergency relief should consider whether other forums or dispute resolution mechanisms are available to vindicate their rights, particularly if the relief sought is time-sensitive and not on the New York court's defined list of essential matters.

- March 20. New York Governor Andrew Cuomo tolled all deadlines for “the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding” whether imposed by the procedural laws of the state, including under the New York Civil Practice Law and Rules (“CPLR”), or any statute, regulation, or order.^[6] Time limits are tolled from March 20, 2020 until April 19, 2020.^[7]
- March 19. The chief administrative judge of the New York courts “strongly discouraged” the prosecution of pending civil litigation matters if “in-person appearances or travel” was required.^[8] If the coronavirus emergency made the parties unable to meet case deadlines, including discovery and dispositive motion deadlines, the parties were to agree on the postponement of proceedings for up to 90 days.^[9] Absent agreement, proceedings “shall be deferred until such later date when the court can review the matter and issue appropriate directives.”^[10]
- March 15. New York state courts postponed “all non-essential functions of the courts,” announcing, for example, that no civil trials will commence “until further notice.”^[11]

B. Federal Courts in New York

As of the week of March 23, federal courts in New York are continuing to manage ongoing litigation during the current public health emergency. Unlike in state court, parties may still open new matters and file motions and other papers in pending civil matters in New York federal courts. Instead, federal courts in New York have largely deferred case management issues to individual judges. However, adjournments in civil matters that are not time-sensitive appear to be widespread. As of March 20, federal courts in New York remain open for applications for emergency relief, with no limitations on the types of emergency relief that may be heard. Accordingly, parties seeking emergency relief for a commercial dispute governed by New York law may be able to obtain relief more quickly in federal court, to the extent that subject matter jurisdiction and other requirements for appearing in federal court are met.

1. Southern District of New York

In the federal district court based in Manhattan, civil case operations will proceed “at the discretion of the individual Judge.”^[12] Accordingly, practitioners with pending matters before assigned judges are encouraged to review the judge's individual rules and practices.^[13] New civil cases filed electronically “will continue to be processed and assigned to judges.”^[14] However, in-court appearances are limited to “Emergency Matters,” but even those matters should be conducted by videoconference or teleconference if possible.^[15]

Emergency matters will continue to be handled “in the usual manner” by the judge assigned to hear the matter.^[16] However, emergency applications may be filed only during the hours of 8:30 AM and 4:00 PM Monday through Friday; applications cannot be brought during the evening or weekend hours.^[17] Arguments on applications in emergency matters are still available to be heard in a courthouse, but a party may apply to the presiding judge to participate by telephone.^[18]

2. Eastern District of New York

Similarly, the federal district court based in Brooklyn is allocating significant discretion for case management to individual judges. Effective March 16, all civil jury trials scheduled to begin before April 27 are continued “pending further order of the Court.”^[19] Individual judges determine whether the parties are required to comply with trial-specific deadlines.^[20] Moreover,

although individual judges may “continue to hold hearings, conferences, and bench trials in the exercise of their discretion,” judges are “strongly encouraged” to conduct proceedings by telephone or videoconference or “adjourn matters or deadlines, or stay litigation, where in-person meetings, interviews, depositions, or travel would be necessary to prepare for any such proceedings.”^[21] Accordingly, parties to civil commercial litigation should be prepared to continue the litigation through remote participation and be prepared for delays.

II. Considerations for Commercial Litigation

Companies with matters pending or soon-to-be filed in the courts of New York must consider numerous strategic issues in light of the declining availability of the courts. Several issues require immediate attention.

Forum Selection Clauses. Many commercial contracts include forum selection clauses designating the courts of New York County (*i.e.*, Manhattan’s state and federal courts) as the chosen forum. Oftentimes, however, only the state courts are truly available for ensuing disputes because of a lack of federal subject matter jurisdiction. The current unavailability of New York state court as a forum for commercial disputes could render that forum “unavailable” such that a forum selection clause may be unenforceable. A forum selection clause “may be set aside if it is shown by the resisting party to be unreasonable or unjust, or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.”^[22] Some jurisdictions recognize that a forum selection clause may be unenforceable if the chosen forum is “unavailable or unable to accomplish substantial justice.”^[23]

Thus, a litigant requiring immediate injunctive relief during the pendency of the state court shutdown could attempt to commence litigation in another forum with a nexus to the parties and/or the dispute, and argue that enforcing the forum selection clause would deprive the party of its “day in court.” Of course, commencing an action elsewhere requires meeting that court’s jurisdictional requirements.

Alternatively, the parties could negotiate to submit their dispute to arbitration or mediation. Arbitral institutions usually operate remotely until the final in-person hearing, so such a forum may be better suited to the commencement of new matters at this time.^[24] Parties preferring judicial review but wishing to make swift progress in the litigation could attempt to negotiate creative dispute resolution agreements, such as a hearing on liability through an arbitral forum while preserving the right to trial to determine the amount of damages. Alternatively, parties could submit a dispute to a neutral decision-maker for a preliminary determination of one or more issues without waiving the right to sue in court, which may increase the likelihood of an informal resolution or narrow the issues later required to be resolved in court.

Statute of Limitations. Carefully assess the statute of limitations applicable to any contemplated claims that may be governed by New York law. Because state procedural rules also govern statutes of limitations of claims under New York law brought in federal court, the tolling of deadlines for the commencement of actions under the CPLR and other statutory time limitations provides additional time for practitioners to prepare to file an action governed by New York law, regardless of the chosen forum.^[25] For example, if the six-year period for commencing an action for breach of contract is approaching, additional time may now be available to bring your claim.^[26]

Type of Relief. The type of relief sought may affect the availability and speed of obtaining relief. In New York state court, emergency relief may only be available if “related to the coronavirus” or New York’s Election Law. In federal court, emergency applications for relief in a range of matters may still be heard, with the sensible caveat that judges may opt to use telephonic or video proceedings rather than in-person appearances. Thus, parties seeking immediate injunctive relief in federal court need not worry about locating an available forum.

Pragmatism. All of these considerations should be weighed in light of New York’s new but hopefully short-lived reality: ordinary life is on pause because the health and safety of metropolitan area residents hangs in the balance. During these unprecedented times, parties and their counsel should strongly

consider whether they too can pause for a few weeks before engaging the courts or seeking something from their adversaries. Court administrators and the governor are imploring litigants to do just that, penalty-free, with the various orders that have been issued in recent days. Those who fail to heed this message do so at their own risk. More than ever, judges are likely to show frustration or more with parties who mistakenly ascribe urgency to issues that can wait.

If a true emergency arises and court action is unavailable or impracticable, work with counsel to identify creative solutions. Consider other types of dispute resolution mechanisms, including arbitration or mediation, as well as all available potential forums. For example, if concerned about an actual or threatened trade secret misappropriation, consider seeking injunctive relief in federal court under the Defend Trade Secrets Act of 2016.^[27]

III. Managing Delays In New York Commercial Litigation

The restrictions on access to courts in New York require careful thought about the implications for litigation strategy of a pending or forthcoming case. Parties relying on New York courts should anticipate delays in judicial action and be prepared to appear by telephone or videoconference. Where the action must be brought in New York state court, commercial parties should consider creative ways to obtain remedies or litigation objectives without immediate court intervention. If the crisis continues for many months, parties should consider the extent to which they are willing to engage in the litigation proceedings remotely, such as through virtual depositions. Parties may need to weigh the new realities of traditional litigation on an extended schedule, the extensive use of remote proceedings, or whether efforts to resolve the matter informally may be newly possible and desirable.

[1] Commercial Division Rules, Preamble (quoting N.Y. St. Bar Ass'n, A Commercial Court For New York [Jan. 1995]).

[2] AO/78/20 (Mar. 22, 2020), *available at* <https://www.nycourts.gov/whatsnew/pdf/AO-78-2020.pdf>.

[3] Emma Whitford, *NY Gov. Pauses Court Deadlines Over COVID-19*, LAW360 (Mar. 23, 2020, 9:13 AM), <https://www.law360.com/articles/1255810/ny-gov-pauses-court-deadlines-over-covid-19->

[4] AO/78/20.

[5] *Id.*

[6] Executive Order Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, No. 202.8 (Mar. 20, 2020), *available at* <https://www.nycourts.gov/whatsnew/pdf/EO-202.8-ocr.pdf>.

[7] *Id.*

[8] AO/71/20 (Mar. 19, 2020), *available at* <https://nysba.org/app/uploads/2020/03/AO-71.pdf>.

[9] *Id.*

[10] *Id.*

[11] Memorandum from Lawrence K. Marks, Chief Administrative Judge, State of New York Unified Court System, to All Judicial and Non-Judicial Personnel of the Unified Court System (Mar. 15, 2020) at 1, *available at* <https://www.nycourts.gov/whatsnew/pdf/Updated-Protocol-AttachmentA3.pdf>.

[12] Memorandum from Edward Friedland, District Court Executive, United States District Court, Southern District of New York, to SDNY Bar (Mar. 20, 2020), *available at* [https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID Memorandum - FINAL.pdf](https://www.nysd.uscourts.gov/sites/default/files/2020-03/COVID%20Memorandum%20-%20FINAL.pdf).

[13] Individual rules and practices are available on the Court's website at <http://www.nysd.uscourts.gov/judges>.

[14] Friedland Memorandum, *supra* note 12.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] AO 2020-06 (Mar. 16, 2020) at 1, *available at* https://img.nyed.uscourts.gov/files/general-ordes/2020-06_In_Re_CoronavirusCovid19Pandemic.pdf.

[20] *Id.* at 2.

[21] *Id.* at 2–3.

[22] *N. Leasing Sys., Inc. v. French*, 48 Misc. 3d 43, 44–45 (1st Dep't 2015).

[23] *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016, 1027 (9th Cir. 2016) (applying California law).

[24] For example, although AAA-ICDR has suspended in-person hearings at its facilities through April 17, 2020, case operations continue to function. See AMERICAN ARBITRATION ASSOCIATION, <https://go.adr.org/covid19.html> (last visited Mar. 24, 2020).

[25] See, e.g., *Baker v. Stryker Corp.*, 770 F. App'x 12, 15 (2d Cir. 2019) (applying CPLR to determine whether statute of limitations for state law claim was tolled).

[26] CPLR § 213(2) (six-year standard statute of limitations for “an action upon a contractual obligation or liability, express or implied, except as provided in section two hundred thirteen-a of this article or article 2 of the uniform commercial code or article 36-B of the general business law”).

[27] 18 U.S.C. § 1836(b)(3)(A).

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

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