

# Calif. Extension Of Court Deadlines Rests On Shaky Ground

By **Mitchell Tilner and Andrea Russi**

On March 4, in response to the global pandemic caused by COVID-19, California Gov. Gavin Newsom declared a state of emergency, followed on March 19 by a statewide stay-at-home order. Empowered by the governor, the California Judicial Council has issued emergency rules applicable to courts statewide.

These rules are designed to maintain judicial operations while protecting the health and safety of court staff, judges, potential jurors and the public. Most of us would agree these actions are necessary and appropriate but may wonder whether the governor and Judicial Council have the authority to take measures such as pausing or extending statutes of limitations in civil cases, a power normally reserved for the Legislature.

California Government Code Section 68115 vests the Judicial Council with powers in the event of an emergency. The chair of the Judicial Council may, at the request of a local presiding judge, authorize the presiding judge to declare the dates of an emergency to be court holidays for purposes of computing the time to file papers under Code of Civil Procedure Sections 12 and 12a. During the first few weeks of the pandemic, the Judicial Council authorized individual counties to declare such court holidays, which effectively extended the time to file any papers in court.

The Judicial Council's emergency rules issued on April 7 go further. For instance, California Rules of Court, emergency rule 9 tolled the statute of limitations statewide for civil causes of action "from April 6, 2020, until 90 days after the Governor declares that the state of emergency related to the COVID-19 pandemic is lifted."

On May 29, faced with changes to the statewide shelter-in-place order and the reality that the state of emergency could go on for a significant period of time, the Judicial Council amended the rule to untie it from the state of emergency declaration. Under the amendment, the tolling period will end on Aug. 3 for causes of action with statutes of limitations of 180 days or less and on Oct. 1 for causes of action with statutes of limitations exceeding 180 days.

The rule on its face, both as originally issued and as amended, conflicts with statutes enacted by the Legislature setting the time for bringing civil actions.

Anticipating this conflict, the governor issued Executive Order N-38-20 on March 27, which states that to the extent Government Code Section 68115 or any other provision of law imposes or implies a limitation on the authority of — or subject matter that may be addressed by — the Judicial Council, that limitation is suspended.

The governor's order was intended to "remove any impediment" to the Judicial Council establishing rules in response to the COVID-19 pandemic.[1] The order states it "should be construed to extend the rulemaking authority of the Judicial Council to its constitutional maximum under Article VI, section 6 of the California Constitution." [2]



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In essence, the governor has altered the "constitutional maximum" for the Judicial Council's rulemaking authority by suspending any statute that conflicts with a Judicial Council emergency rule. Does the governor have the power to suspend statutes enacted by Legislature, and if so, can he delegate this authority to the Judicial Council?

### **The Governor's Emergency Powers**

The California Legislature has granted the governor broad executive authority in times of crisis. The Emergency Services Act, or ESA, allows the governor to declare a state of emergency in situations of "extreme peril to life, property, and the resources of the state" and to act "to protect the health and safety and preserve the lives and property of the people of the state."<sup>[3]</sup> The current pandemic is a basis for declaring a state of emergency.<sup>[4]</sup>

During a state of emergency, the governor "may make, amend, and rescind orders and regulations" as necessary.<sup>[5]</sup> Prior governors have utilized this authority to rescind agency regulations during emergencies. In 2013, during the Tuolumne and Mariposa County wildfires, then-Gov. Jerry Brown issued Executive Order B-23-13, suspending state statutes, rules, regulations and requirements that were within the jurisdiction of the California Environmental Protection Agency and the California Natural Resources Agency to expedite the removal and cleanup of debris from the fires.<sup>[6]</sup> In 2001, then-Gov. Gray Davis issued Executive Order D-26-01 proclaiming a state of emergency due to California's electricity shortage, allowing him to rescind or suspend environmental regulatory statutes and regulations concerning power plant approval.<sup>[7]</sup>

The ESA also covers the power to alter regulatory and administrative statutes. During "a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency."<sup>[8]</sup> One might question whether statutes of limitations enacted by the Legislature fall into any of these categories.

The specific power at issue in the Judicial Counsel's emergency rule 9 — the power to set the time within which certain rights must be exercised — resides exclusively in the Legislature.<sup>[9]</sup> In the California Code of Civil Procedure, the Legislature has prescribed the time for commencing civil actions. Since 1872, Code of Civil Procedure Section 312 has provided: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

The California Constitution expressly separates the powers of each branch of government: "The powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by the Constitution."<sup>[10]</sup> Thus, the governor may not exercise legislative powers.<sup>[11]</sup>

Yet in the ESA, the Legislature itself has granted the governor powers normally reserved to the legislative branch. This grant likely does not conflict with the separation of powers in the Constitution because the governor's emergency powers are only temporary; they end when the emergency ends.<sup>[12]</sup> Under Government Code Section 8629, the governor "shall proclaim the termination of a state of emergency at the earliest possible date," and all the powers granted to the governor in connection to the state of emergency are terminated at that time.

Further, the judicial branch can police the governor's use of emergency power via lawsuits contesting the scope and duration of the governor's powers.[13]

Yet, even if we conclude the governor can exercise legislative authority in an emergency to override statutes of limitations, can he also delegate that authority to the Judicial Council?

### **Role of the Judicial Council**

Section 6, subdivision (d) of Article VI of the California Constitution establishes the Judicial Council and provides:

To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.

This provision permitting the council to "perform other functions prescribed by statute" establishes that the council may perform additional functions when authorized by the Legislature.[14]

The Constitution reserves to the Legislature and the people of this state the higher right to provide rules of procedure. The Judicial Council's right is secondary — a right to adopt rules only when the higher authority of the Legislature and the people has not been exercised.[15]

While there is no question the Judicial Council has the authority to adopt rules relating to the administration of the courts, it is less clear how far this authority extends, namely whether the Judicial Council can toll the statutes of limitations in civil cases. Does the Legislature's authorization of broad emergency powers to the governor constitute a legislative grant of authority to the Judicial Council?

The council's emergency rule 9 tolling statutes of limitations might be characterized as a rule of court administration, necessary to control the flow of cases and allow the courts to manage their caseloads. The problem is that the rule conflicts with multiple statutes of limitations for different types of civil actions.[16] Under the Constitution, a rule adopted by the Judicial Council cannot be inconsistent with a statute. "If a rule is inconsistent with a statute, the statute controls."[17]

In ordinary times, the Judicial Council would not be empowered to toll a statute of limitations because such a rule or order would, by definition, be inconsistent with a statute. But, as explained, the Legislature has given the governor broad powers for dealing with emergencies, and Newsom has now relied on that legislative authorization to expand the authority of the Judicial Council.

However, unlike in some other states, the California Legislature's grant of authority does not expressly empower the governor to suspend statutes in the event of an emergency.[18] In New York, the governor specifically has the authority to toll the statute of limitations and has used that authority during this pandemic.[19]

Given the limited precedent concerning the constitutional and statutory limitations on the governor's and Judicial Council's emergency powers, when this emergency has passed, courts and parties may face litigation over whether the Judicial Council had the authority to alter statutes of limitations statewide. In the meantime, attorneys must consider whether

they should advise their clients to file civil actions within existing statutory deadlines or to file within the extended deadlines set by the Judicial Council and risk future litigation over the statute of limitations.

It is probably unlikely a court would conclude emergency rule 9, enacted to aid judicial administration and protect public health, was unconstitutional, especially where parties have relied on it in good faith. But attorneys and litigants are faced with uncertainty about whether they can safely rely on the extended deadlines.

Finally, when considering whether to take advantage of the tolling of the statute of limitations, it is important to remember that the last word on the legality of emergency rule 9 will rest with the California Supreme Court led by the chief justice, who is also the chair of the Judicial Council. Whether the chief justice will recuse herself from cases challenging the constitutionality of the Judicial Council's emergency rules remains to be seen.

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[1] Governor's Exec. Order N-38-20 (Mar. 27, 2020) p. 1.

[2] *Id.* at p. 2.

[3] Gov. Code, §§ 8550, 8625.

[4] *Id.*, § 8558.

[5] *Id.*, § 8567.

[6] Governor's Exec. Order B-23-13 (Oct. 23, 2013).

[7] Governor's Exec. Order D-26-01 (Feb. 8, 2001).

[8] Gov. Code, § 8571.

[9] *Olivas v. Weiner* (1954) 127 Cal.App.2d 597, 599 ("Fixing the time within which particular rights must be asserted is a matter of legislative policy").

[10] Cal. Const., art. III, § 3.

[11] *Harbor v. Deukmejian* (1987) 43 Cal. 3d 1078, 1084.

[12] See Duvernay & Stracener, *The Governor's Powers Under the Emergency Services Act* (March 19, 2020) SCOCA blog, <http://scocablog.com/the-governors-powers-under-the-emergency-services-act/> (as of May 11, 2020).

[13] See, e.g., *California Correctional Peace Officers Assn. v. Schwarzenegger*(2008) 163 Cal.App.4th 802, 808 (petition for writ of mandate alleging the Governor exceeded powers

granted under the ESA in declaring an emergency based on prison overcrowding); *Hendricks v. Hanigan* (Mar. 14, 2002, D037609) 2002 WL 397648 (nonpub opn.) (complaint for injunction alleging Governor exceeded his authority by issuing an order declaring a state of emergency due to power shortage).

[14] *People v. Wright* (1982) 30 Cal.3d 705, 711, citation omitted.

[15] *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 22 (California Court Reporters).

[16] See Code Civ. Proc., §§ 312-366.3.

[17] *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 532; see *California Court Reporters*, 39 Cal.App.4th at p. 22 (Judicial Council's "rulemaking power is limited by existing law as enacted by the Legislature, thus making the legislative branch an inherently higher authority than the Judicial Council itself").

[18] See, e.g., N.Y. Exec. Law § 29-a ("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").

[19] See N.Y. Governor's Exec. Order 202.8 (Mar. 20, 2020) (tolling "any specific time limit for the commencement, filing, or service of any legal action"); N.Y. Governor's Exec. Order 202.14 (Apr. 7, 2020).