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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Using Contract Provisions To Shorten The Time To Sue

Law360, New York (September 21, 2015, 10:50 AM ET) --

Aaron K. Kirkland Jennifer M. Cascio

Plaintiffs typically rely on the applicable state's statute of limitations in determining the deadlines for filing their claims. In doing so, plaintiffs sometimes overlook their contractual promises to file their lawsuits within time periods that are shorter than the applicable statutes of limitations. This oversight can prove fatal to plaintiffs' lawsuits because certain contracts, such as service-based and insurance contracts, often include provisions shortening the time within which a party may file a lawsuit.[1] As the cases discussed below demonstrate, these provisions provide case-dispositive arguments that can stop an untimely filed lawsuit before the burdens of discovery begin. Because they also provide litigation predictability and business efficiencies, such as helping define document retention time periods, companies should consider including well-crafted provisions shortening the time to sue in their contracts.

Contract Provisions Shortening the Time to Sue

Service-based and insurance contracts often include provisions specifying a particular time within which parties may file their lawsuits. These time periods are shorter than the standard statute of limitations and typically apply to all types of claims that may arise out of a contractual relationship. These provisions include the following language or something similar: "No action against us may be brought unless ... the action is started within one year after the occurrence causing the loss or damage."[2]

Recent Cases Enforcing Provisions Shortening the Time to Sue

Recent federal court decisions in cases involving security-alarm services demonstrate the effect these provisions have on lawsuits filed after the contractually agreed-upon deadline to do so.[3] In Parra v. ADT Security Services Inc., Parra alleged that she incurred injuries from falling off a ladder while

attempting to disable her security system and, as a result, asserted claims against ADT for strict liability and negligence.[4] Parra filed her lawsuit nearly two years after she fell from the ladder.[5] Although the time Parra filed suit fell within California's applicable statute of limitations for personal injury, it fell outside the one-year limitation in ADT and Parra's contract.[6] In granting ADT's motion to dismiss Parra's claims, the Eastern District of California found that Parra failed to abide by her contractual promise to bring her claim within one year, noting that California courts routinely enforce contractual agreements to shorten the general statute of limitations so long as the time period is reasonable and the provision does not violate public policy.[7]

Similarly, in Home Owners Insurance Co. v. ADT LLC, Home Owners Insurance's insured, the Cullips, contracted with ADT to provide temperature sensors and alarm monitoring at their home.[8] After a pipe burst in the Cullips' home, HOI alleged that ADT never actually installed a temperature sensor despite telling the Cullips that it had and, as a result, asserted claims against ADT for breach of contract, negligence and fraud.[9] ADT moved to dismiss based on, among other things, HOI's failure to file suit within a year.[10] Noting that courts applying Michigan law enforce provisions shortening the time to sue "unless the provision would violate law or public policy," the Eastern District of Michigan enforced the provision and dismissed HOI's claims.[11]

Limitations on the Use of Provisions Shortening the Time to Sue

On occasion, courts can be reluctant to enforce provisions shortening the time to sue. In Nickens v. Tyco Integrated Security LLC, for example, Nickens contracted for Tyco Integrated Security LLC to install and monitor a security alarm system at his home.[12] Nickens alleged that his alarm triggered one night and he sustained hearing damage while attempting to disarm his system.[13] Although Nickens agreed to file suit against TycoIS within a year of any injury, he waited until almost two years to file suit.[14] TycoIS moved to dismiss, arguing that Nickens failed to abide by the following contractual promise to file suit within a year of the accrual of his claim: **"You agree to file any lawsuit ... you may have against us ... within one year from the date of the event that resulted in the loss, injury, damage or liability or the shortest duration permitted under applicable law if such a period is greater than one year."**[15] Denying TycoIS's motion to dismiss, the Southern District of Indiana found that the phrase "or shortest duration permitted under applicable law" referred to Indiana's two-year statute of limitations and Nickens had therefore timely filed his lawsuit.[16]

TycoIS requested reconsideration because the court's interpretation conflicted with Indiana precedent and rendered the one-year contract limitation on time to sue superfluous.[17] Specifically, TycoIS argued that, if the provision simply adopted Indiana's applicable statute of limitations, then the provision served no purpose and the Indiana Supreme Court urges courts not to read contract provisions in a manner that would render them meaningless.[18] The court reversed its prior decision, citing case law from the Indiana Court of Appeals addressing the enforceability of an identical provision and finding that "the phrase 'unless a longer period of time is provided by applicable statute' 'cannot be read to incorporate a general statute of limitations for breach of contract actions because it would render the one-year provision a nullity.'"[19] The court noted that the phrase "or the shortest duration permitted under applicable law" would override the one-year limitation only if Indiana had a specific statute setting a minimum time period for contract provisions shortening the time to sue.[20] Because Indiana had no such statute, the court enforced the provision and dismissed Nickens's claims because he failed to file suit within a year of his injury.[21]

The court in Nickens addressed one of the limitations on provisions shortening the time to sue — state statutes forbidding parties from contractually requiring a party to file suit in less than a certain amount

of time. For example, courts in many jurisdictions have statutes setting a minimum time period for the shortening of the time to sue, which explains why provisions often include the phrase "or the shortest time permitted under applicable law."

W. J. Kroeger Co. v. Travelers Indemnity Co. demonstrates why provisions shortening the time to sue include the phrase "or the shortest time permitted."[22] There, an insurance policy provided that an action must be commenced within a year of the discovery of the occurrence giving rise to the action or "within the shortest limit of time permitted by the laws" of Arizona.[23] After Travelers filed suit against Kroeger for an unpaid premium, Kroeger asserted a counterclaim premised on an incident that occurred more than four years before Kroeger asserted it.[24] Travelers moved for summary judgment on Kroeger's counterclaim, arguing that Kroeger failed to file it within a year of its occurrence as required by the policy's provision shortening the time to sue.[25] The trial court granted Travelers' motion.[26] Kroeger appealed, relying on an Arizona statute that specifically prohibited insurance policies from containing a condition limiting the time within which an action may be brought to a period of less than two years.[27] Because the one-year provision was void under the statute, Kroeger argued that Arizona's six-year statute of limitations for breach of contract actions applied.[28]

The Arizona Supreme Court disagreed, finding that because the policy contained the "shortest time permitted" language, it was not void altogether. The court noted that the policy's language essentially adopted a two-year time-to-sue provision because Arizona permits insurance policies to shorten the time to sue to no less than two years and the policy at issue in Kroeger included the "shortest time permitted" language. As a result, the court held that a two-year statute of limitations applied — and not Arizona's six-year limitations period for breaches of contract — and accordingly dismissed Kroeger's claims for failing to file suit within that two year time.[29]

Texas, Washington, Vermont and other states, have statutes similar to Arizona's that set a minimum time period for how short parties may contractually shorten the time to sue.[30] Texas, for example, expressly prohibits any agreements to "limit the time in which to bring suit on the stipulation, contract, or agreement to a period shorter than two years."[31]

Parties including these provisions in their contracts should be especially mindful of certain jurisdictions, including Florida, Alabama, Idaho, Mississippi and South Dakota that refuse to enforce any agreements shortening the applicable statute of limitation.[32]

Business and Legal Efficiencies of Provisions Shortening the Time to Sue

Provisions shortening the time to sue can stop a lawsuit before the discovery burdens begin. As the examples above demonstrate, plaintiffs often overlook their promise to file suit by a certain agreed-upon time, focusing instead only on the state's applicable statute of limitations. Therefore, including these provisions in your contracts and seeking to enforce them at an early stage is a cost-effective approach to managing litigation.

In addition, provisions shortening the time in which a party may file a lawsuit provide:

- ***Predictability*** — After an incident that may involve an entity's liability, any level of predictability is a valued asset. By including contractual provisions shortening the time to sue, an entity can add a layer of predictability by establishing a timeline in which a lawsuit may be filed.

- ***Business Efficiencies*** — Document retention policies, for example, are critical for managing business operations, including defending against a lawsuit. Thus, provisions shortening the time to sue in the company's contracts help guide the company when developing or revising a document retention policy.

Drafting Provisions Shortening the Time to Sue to Increase the Likelihood of Enforceability

To effectively use a provision shortening the time to sue, you must first ensure the provision is properly crafted. When drafting similar provisions, you should keep in mind the following points:

- Include language above the signature line that specifically directs the signatory's attention to the limitation of action provision, such as **"Attention is directed to the terms and conditions, specifically paragraphs X and Y."**

- Ensure that the limitation provision is conspicuous. Many jurisdictions use the Uniform Commercial Code as a guide for determining conspicuousness. For example, courts in Indiana use the UCC to define "conspicuous" and consider language to be conspicuous if it is larger or set apart from other language by contrasting font.[33]

- Include language such as "within the shortest limit of time permitted by the laws" or "the shortest duration permitted under applicable law if such period is greater than "X" year(s)." This ensures that the shortest time period to sue will apply in states that set minimum time periods on these provisions.

The discussion above emphasizes the importance of properly drafting and including contractual provisions shortening the time within which a party may file a lawsuit. These contractual provisions will add predictability and efficiency in document retention and defending lawsuits.

—By Aaron K. Kirkland and Jennifer M. Cascio, Shook Hardy and Bacon LLP

DISCLAIMER: Shook represents ADT LLC and Tyco Integrated Security LLC in lawsuits filed throughout the country, including those mentioned in this article.

Aaron Kirkland and Jennifer Cascio are associates in Shook's Kansas City office.

[1] For articles on drafting and enforcing other case-dispositive provisions commonly included in service-based contracts, see Charlie Eblen and Aaron Kirkland, Maximize Your Contract's Exculpatory Provision, Law360, July 15, 2013, and Aaron Kirkland and Jason Scott, Enforcing Exculpatory Provisions Against Meritless Claims, Law360, March 17, 2014.

[2] CBS Broadcasting Inc. v. Fireman's Fund Insurance Co., 70 Cal. App. 4th 1075, 1079 (1999).

[3] Although ADT and TycoIS disputed plaintiffs' allegations in the three examples above, ADT and TycoIS accepted the allegations as true for purposes of their Rule 12(b)(6) motions.

[4] No. 2:14-CV-01742-MCE, (E.D. Cal. Sept. 30, 2014).

[5] Id.

[6] Id., at *4.

[7] Id. (citing Moreno v. Sanchez, 106 Cal. App. 4th 1415, 1430 (2003); Beeson v. Schloss, 192 P. 292, 294 (Cal. 1920)).

[8] No. 15-CV-11262, 2015 WL 3763489, at *1 (E.D. Mich. May 21, 2015).

[9] Id.

[10] Id., at *2.

[11] Id. at *3 (citing Rory v. Continental Insurance Co., 703 N.W.2d 23, 31 (Mich. 2005)).

[12] No. 3:14-CV-00011-RLY, (S.D. Ind. Nov. 25, 2014).

[13] Id.

[14] Id.

[15] Id. (all capital letters in original, other emphasis added).

[16] Id.; see also Nickens v. Tyco Integrated Security LLC, No. 3:14-CV-00011-RLY, (S.D. Ind. July 9, 2014) on reconsideration in part, No. 3:14-CV-00011-RLY, (S.D. Ind. Nov. 25, 2014).

[17] 2014 WL 6910463, at *2.

[18] Id.

[19] Id. (citing United Technology Automotive Systems Inc. v. Affiliated FM Insurance Co., 725 N.E.2d 871, 875 n.5 (Ind. Ct. App. 2000)).

[20] Id. at *2-3 (citing Wabash Power Equipment Co. v. International Insurance Co., 540 N.E.2d 960, 962 (Ill. App. Ct. 1989) (noting Illinois law sets floor for shortening limitations in insurance contracts to no shorter than two years).

[21] Id., at *3.

[22] 541 P.2d 385, 387 (Ariz. 1975).

[23] Id.

[24] Id. at 386.

[25] Id.

[26] Id.

[27] Id. at 387.

[28] 541 P.2d at 387.

[29] Id.

[30] Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a) ("a person may not enter a stipulation, contract or agreement that purports to limit the time in which to bring suit on the stipulation, contract or agreement to a period shorter than two years. A stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state."); see also Stellar J. Corp. v. Argonaut Insurance Co., No. 3:12-CV-05982, (W.D. Wash. Apr. 16, 2014) ("Under Washington Law, a limitation period cannot be less than one year from the date the cause of action accrued")(citing R.C.W. 48.18.200 which governs insurance contracts)); Gilman v. Maine Mutual Fire Insurance Co., 830 A.2d 71, 75 (Vt. 2003) ("Policy provisions establishing limitation periods by contract are valid and enforceable against an insured if the limitation period is not less than 'twelve months from the occurrence of the loss, death, accident or default.'") (quoting 8 V.S.A. § 3663 which governs insurance contracts)).

[31] Tex. Civ. Prac. & Rem. Code Ann. § 16.070(a).

[32] See Fla. Stat. Ann. § 95.03 ("Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void."); Ala. Code § 6-2-15 ("Except as may be otherwise provided by the Uniform Commercial Code, any agreement or stipulation, verbal or written, whereby the time for the commencement of any action is limited to a time less than that prescribed by law for the commencement of such action is void."); Idaho Code Ann. § 29-110(1) ("Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho."); Miss. Code. Ann. § 15-1-5 ("The limitations prescribed in this chapter shall not be changed in any way whatsoever by contract"); Lillibridge v. Nautilus Insurance Co., No. CIV. 10-4105, (D.S.D. Mar. 7, 2013) ("The South Dakota Legislature has stated that parties may not shorten the length of time a party has to bring a cause of action by contractual agreement and any provision in a contract that does so is void.").

[33] Ind. Code Ann. § 26-1-1-201(10) (defining "conspicuous" stating "Language in the body of a form is conspicuous if it is in larger or other contrasting type or color."); see also Tex. Bus. & Com. Code Ann. § 1.201(10) (defining "conspicuous").