For Whom the Clock Tolls?

Louisiana’s New Law on Tolling Agreements

By Ronald J. Scalise, Jr.
Effective Aug. 1, 2013, Louisiana for the first time allows tolling agreements. Popular in other states, tolling agreements are contracts by which parties involved in a dispute agree to extend the relevant liberative prescriptive period. For a variety of reasons, however, tolling agreements have not, until now, been enforceable in Louisiana. By effect of Act 88 of 2013, the previous preclusions in Louisiana law no longer apply, and parties are now free, within limits, to extend a liberative prescriptive period.

Background and Purpose

The Prescription Committee of the Louisiana State Law Institute was formed in 2011 to address House Concurrent Resolution 28. Specifically, the resolution requested that the Law Institute “study agreements to voluntarily extend liberative prescriptive periods and to make specific recommendations for authorizing agreements to extend liberative prescriptive periods.” The resolution noted that tolling agreements are valid in some states and observed that parties in Louisiana must often needlessly file suit to preserve their rights against the running of a short prescriptive period. Although not limited to tort suits, the problem is particularly vexing in delictual actions where the general prescriptive period is only one year.

The primary stumbling block to tolling agreements in Louisiana has always been Article 3471 of the Civil Code, which states that “[a] juridical act purporting to exclude prescription, to specify a longer period than that established by law, or to make the requirements of prescription more onerous, is null.” Because a tolling agreement would give an obligee a longer time to sue than provided for by legislation, tolling agreements have always been treated as “specifying a longer period than that established by law” and thus viewed as ineffective.

After detailed study, the Law Institute recommended and the Legislature enacted a much needed change. The change now allows parties to extend a prescriptive period rather than wastefully filing suit to interrupt the prescriptive period, only to dismiss the suit later after settlement negotiations are fruitful. Now, prescriptive periods can be extended; negotiations can proceed; and, in many instances, resolutions can occur, without unnecessarily incurring filing fees and needlessly wasting judicial resources.

How to Extend Prescription

Although the new law allows for the extension of liberative prescription, parties must comply with certain prerequisites to do so. Most notably, for an extension of liberative prescription to be granted, it must be both express and in writing — requirements that are not uncommon in the Civil Code. Oral extensions are not allowable, and the comments to the new articles make clear that the form requirements for an extension are imposed for proof purposes. Casual statements during settlement negotiations should not be relied upon to effectuate an extension; rather all extensions must be committed to writing.

To constitute a “writing,” an act can be either in authentic form or under private signature.

Again, for proof purposes, extensions, even those in writing, must be “express” to be effective. The term “express” in this context is used in opposition to “tacit” and to indicate that ambiguous statements that might be construed as intending an extension are not sufficient. Magic words are not required, but clear intent is. Although Louisiana has no prior experience with tolling agreements, the law of other states may be helpful. Statements that the “applicable prescriptive period will be tolled” or that the “relevant period of limitation will be extended” should thus be effective and enforced under the new legislation. The goal is to allow extensions but to avoid evidentiary contests. Thus, within the ambit of the code articles, any statement in proper form that clearly indicates the intent to extend prescription should be given that effect.

Despite the subtitle to this article, an “agreement” is not necessary to extend a prescriptive period, although one would certainly be allowable. Rather, the legislation requires only a juridical act by the obligor. As explained in the Civil Code, a juridical act is “a lawful volitional act intended to have legal consequences.” A juridical act “may be a unilateral act, such as an affidavit, or a bilateral act, such as a contract.” The rationale for not requiring an agreement is simple: an obligee will always favor more time to sue and thus his consent to an extension of prescription should not be required.

The Limits of an Extension of Prescription

Although the new legislation allows for parties effectively to extend a prescriptive period, it is not without limitations. First, an extension of prescription may occur only after a cause of action accrues, not before. Parties may not extend a prescriptive period prospectively or before prescription has begun to run. Contracts that attempt at the time of formation to create a longer prescriptive period than that established by legislation for a cause of action that has not yet arisen are still unenforceable.
under the new legislation and still violative of Article 3471.10

Second, an extension of prescription may be granted for up to a one-year period, but not longer. The goal is to grant flexibility to parties but not to allow overreaching and to “prevent[] an obligor from rashly granting an excessively long or indefinite extension” that, after cool reflection, would obviously work to his prejudice.11 If, as in some cases, a year-long extension is still not enough time to resolve a dispute, the parties may always grant another year-long extension to continue their talks. Although there is no limit on the number of extensions that can be granted, each extension can only be granted for up to one year, and the year time period commences to run from “the date of the juridical act granting it.”12

Thus, parties cannot sign several extensions at the same time in an attempt to frustrate the year limitation and in the hopes of achieving a multi-year extension. Similarly, parties are not allowed to execute acts with separate “calendar dates” and “effective dates” in an attempt to extend a prescriptive period beyond a year or to create a series of extensions that take effect after the expiration of others. Each extension takes effect on its day of execution. Clever attempts to frustrate the limitations of the law should be viewed as unenforceable and in violation of both the language and intent of the new legislation.

Once a period of prescription has been effectively extended, however, the extension is itself treated as a prescriptive period and thus can be subject to interruption or suspension, just as any prescriptive period could be.13 Consequently, the acknowledgment of a debt during a period of extension will serve to reset the prescriptive clock as it would have had it occurred during the original prescriptive period.14

Finally, periods of time that are designated as preemptive are not subject to extension as those periods of time are “fixed by law for the existence of a right,” rather than merely the enforceability of a right.15 At the end of a preemptive period, a right ceases to exist and cannot be extended by juridical act or contract.16 Thus, parties may not, for instance, extend a period to bring a claim for lesion17 or to seek spousal support18 or for any other claim that is characterized as preemptive rather than prescriptive.

The Effects of an Extension

In addition to the requirements for granting an extension of prescription, the effects of an extension must also be closely considered. As a preliminary matter, the effects of an extension are obvious: An obligee has additional time (up to one year) to sue an obligor who has granted the extension. In situations involving multiple obligors, however, more complexity exists if only one obligor grants an extension but is bound jointly or solidarily together with others for a debt. Consider, for instance, multiple borrowers who have defaulted on a loan repayment. If, rather than sue the borrowers, the lender obtains an extension to sue and eventually negotiates with the borrowers on a new repayment schedule, the lender must be sure to obtain the extension from all the borrowers. Otherwise, prescription will run with respect to the borrower who did not grant the extension, and the lender will be left with recourse against only the borrower who granted the extension. In short, although an interruption in prescription, such as might occur by virtue of an acknowledgment of a debt, is effective against solidary obligors and joint obligors of indivisible obligations, an extension granted by one obligor is not. The approach of the new legislation is deliberatively conservative to ensure that the extension, although possible, operates only against those obligors who know of it and approve.

Further complexities, however, exist in the context of sureties who may be bound for the debt of the principal obligor. Because a suretyship is an accessorial obligation, a surety obviously cannot grant an extension that is effective against his principal, at least not without the consent of the principal.19 In fact, to the extent the principal obligation prescribes because the obligor has not granted an extension, not only could the principal obligor not be sued but also the surety — even the one who putatively granted an extension — would likewise be immune from suit. Thus, for an extension of prescription to be effective with respect to a surety, the principal obligor must be involved in the granting of the extension.

This does not mean, however, that only the principal obligor should grant the extension. Although it is true that the grant of an extension of prescription by the principal obligor would be effective as to his sureties,20 the surety may have a defense under suretyship law and, in certain circumstances, be able to terminate the suretyship entirely. In the context of an ordinary suretyship, Article 3062 extinguishes a suretyship if there has been a “modification or amendment of the principal obligation . . . in a material manner and without the consent of the surety.”21 To the extent the suretyship is a commercial one, the obligation is similarly extinguished but only “to the extent the surety is prejudiced by the action of the creditor, unless the principal obligation is one other than for the payment of money, and the surety should have contemplated that the creditor might take such action in the ordinary course of performance of the obligation.”22 Comment (c) to Article 3505.3 reminds the reader that the new prescription articles, like all articles in the
Civil Code, should not be read in a vacuum but interpreted in pari materia with other articles in the Civil Code on relevant topics.

With respect to multiple obligees, the situation is very different. Unlike an obligor, an obligee will always benefit from an extension of prescription. Consequently, the concern in ensuring that every affected obligor consent to an extension does not exist with respect to multiple obligees. In fact, for the same reasons that the consent of the obligee is not required for an extension, the benefits that arise from an extension of prescription should redound to the benefit of all solidary obligees and all those joint obligees of an indivisible obligation, even those who did not consent to or have knowledge of the extension. In this instance, the effects of an extension mirror those of an interruption in prescription.23

Unfinished Business

Despite the success of Act 88, work related to prescription remains to be done. In addition to the enactment of Articles 3505 through 3505.4 concerning extensions of prescription, the proposed legislation also included a revision to Article 3471, which would have amended the article to read as follows:

A provision in a juridical act purporting to specify a different prescriptive period than that established by legislation, to exclude prescription, or to make the requirements for the accrual of prescription more onerous is absolutely null. Nevertheless, parties may agree in writing to shorten a prescriptive period to a stated amount of time that is reasonable and is in no event less than one year.

The purpose of the proposed revision to Article 3471 was manifold. First, the proposed revision corrected some minor semantic inaccuracies in the original article, such as by stating that only a “provision in a juridical act” in violation of the article would be “absolutely null” rather than the entire “juridical act” itself. Second and more importantly, the proposed comments made clear that the new legislation in Articles 3505-3505.4 was excepted from the prohibitory scope of the article. Third, the proposal also clarified that, despite some erroneous jurisprudence, shortening of prescription is allowed. In fact, agreements shortening prescription have long been allowable in Louisiana and in a variety of other civil law jurisdictions and common law states.24 A few Louisiana courts, however, have mistakenly found agreements shortening prescription to be “more onerous” and thus invalid under Article 3471.25 The term “more onerous” in Article 3471, however, refers to actions or agreements that make the invocation of prescription more difficult for the obligor. For example, agreements not to plead prescription, to interrupt prescription, to delay the commencement of prescription, or to provide for additional causes of interruption are “more onerous” because they make the accrual of prescription more difficult for the obligor, the party primarily protected by the accrual of prescription.26

Unfortunately, the proposed changes to Article 3471 were excised by the Legislature, and the confusing cases persist in Louisiana. Nonetheless, for the reasons stated above, agreements shortening prescription are and should continue to be allowable. Moreover, despite the deletion of the express cross reference in a proposed comment, Article 3471 as it currently stands should not be viewed to continue to preclude voluntary extensions of prescription. Rather, Article 3505-3505.4 should be appropriately read as more specific and later expressions of the legislative will than that embodied in Article 3471. The continuing prohibition in Article 3471 against “specify[ing] a longer [prescriptive] period” can properly be understood as continuing to prohibit prospective extensions of prescription, as Article 3505 allows for extensions only after a cause of action arises, not before. Such a reading gives meaning and respect to the literal language and intent of both Articles 3471 and 3505, as well as comporting with well-accepted techniques of statutory interpretation and common sense.27

FOOTNOTES

1. HCR 28 (2011).
3. Id. art. 3471.
4. Id.
5. Id. arts. 3038 & 963, 3450. See also, La. Civ.C. art. 3505.1 cmts. (a) & (b).
7. Id. art. 3471, cmt (c).
8. Id.
9. Id. art. 3505, cmt (a).
10. Id. art. 3471.
11. Id. art. 3505, cmt (c).
12. Id. art. 3505.2.
13. Id. art. 3505.4.
14. Id. arts. 3464, 3466 & 3505.4.
15. Id. art. 3458.
16. Id.
17. Id. art. 2595.
18. Id. art. 117.
19. Id. arts. 3035 & 1913.
20. Id. art. 3505.3.
21. Id. art. 3062.
22. Id.
25. See, e.g., Contours Unlimited v. Board of Comm’rs, 630 So.2d 916 (La. App. 4 Cir. 1993); Cameron v. Bruce, 42-873, 42-983 (La. App 2 Cir. 4/23/08), 981 So.2d 204; Prestridge v. Bank of Jena, 05-545 (La. App. 3 Cir. 3/8/06), 924 So.2d 1266 (finding an agreement regarding a substantive element of a cause of action to be “more onerous” and thus violative of Article 3471). But see, Groue v. Capital One, 10-0476 (La. App. 1 Cir. 9/10/10), 47 So.3d 1038 (finding that a contractually shortened period to notify a bank of an altered check not to be violative of Article 3471).