AUTHORS

- Ryan C. Hardy

Manufacturer's Corner: A Brief Return to Our Discussion of Statutes of Limitations

A thing I like to do is approach people at parties and other gatherings and ask them if they know they can use contracts to shorten some statutes of limitations.[1] Usually I get quizzical looks, but I guess the context just worked better when I mentioned it while speaking at a recent event put on by the Kansas Bar Association. An especially attentive participant asked a good follow-up question that warrants some discussion: can you shorten the limitations period for fraud?

That's a great question. As I've discussed here before, the Uniform Commercial Code allows you to shorten the limitations period, "by original agreement," to a period of not less than one year, but it refers only to actions "for breach of any contract for sale [of goods]." Might it extend beyond that context?

I don't think the UCC permits reducing the limitations period for fraud actions, but that doesn't mean it can't be done. In Kansas, for example, the law is fairly clear that, absent a strong public policy to the contrary, parties to a contract can agree to reduce limitations periods.[2] As a general matter, I think reducing the limitations period for fraud actions is probably a thing you can do – and why not try? After all, it would be a shame to take the trouble to reduce your limitations period for a breach of contract action alone when that shortened limitations period could so easily be circumvented by styling the cause of action as something other than breach of contract.

Keep in mind, of course, that the provision won't be enforced if assent to the provision was itself the product of fraud or duress.[3] Consider also whether you are dealing with a consumer sale, where a reduced limitations period might be forbidden by the Magnusson-Moss Act or a state consumer protection statute.[4]

In short, I say go for it. But make sure you have a good severability provision in case the limitation gets tossed by a court, so that your other limitations remain intact.

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[1] I don't get invited to many parties.

[2] *See Pfeifer v. Federal Express Corp.*, 304 P.3d 1226 (Kan. 2013). In that case, the Court held the reduced limitations period unenforceable, but that was in the context of a retaliatory discharge action, and the Court's reasoning was limited to that context. Generally, the Court was amenable to shortened limitations period.

[3] *See, e.g.*, *Diana Jewelers of Liverpool, Inc. v. A.D.T. Co., Inc.*, 167 A.D.2d 1990 (N.Y. App. 1990); *CingleVue Intern. Pty., Ltd. v. eXo Platform NA, LLC*, 2014 WL 3400856 (N.D.N.Y. July 10, 2014); *Liparoto Const., Inc. v. General Shale Brick, Inc.*, 772 N.W.2d 801 (Mich. App. 2009).

[4] Interestingly, one court applying New Jersey law held that New Jersey's consumer protection statute didn't prevent shortened limitations periods because it did not expressly prohibit them. *Smith v. TA Operating LLC*, 2011 WL 3667507 (D. N.J. Aug. 19, 2011). That seems like it might be a tough sell in other jurisdictions. Returning to Kansas for a moment, I note that its consumer protection statute prohibits limiting remedies and some warranty disclaimers, but it is conspicuously silent about shortened limitations periods.

As to Mag-Moss, it's also silent about shortening limitations periods. It has that weird language about the duration of implied warranties, but on its face that doesn't seem like it would have anything to do with limitations on fraud actions.

A final tidy-up point. I mentioned during my presentation that I wouldn't want to make this argument to a court. I mean, you can imagine the follow-up question to "there's no public policy against fraud." But while that sounds strange, I think it's true unless you're working in the consumer space. Lots of things are actionable, but not "contrary to public policy" as that term is used in the case law.