

Del. May Extend Statute of Limitations for Contract Claims

This article appeared in Law360 on May 28, 2014.

In many jurisdictions throughout the United States, parties to a written agreement cannot contractually extend the statute of limitations for a breach of contract claim arising from such agreement. In particular, Delaware has a three-year statute of limitations for general breach of contract claims pursuant to Section 8106 of Title 10—Courts and Judicial Procedure Law (the CJPL) and a separate four-year statute of limitations for a breach of contract governed by Article 2 of the Delaware UCC pursuant to Section 2-275 of Title 6—Commerce and Trade. The statute of limitations in Delaware for a breach of contract claim may be reduced within the four corners of the contract.¹ Generally speaking,² though, these statute of limitations contract claims cannot be extended beyond the statutory limits.

If the agreement provides that the claim of indemnity does not accrue until liability to a third party has occurred, this may provide an exception to the above-stated provisions regarding the statute of limitations in Delaware for a breach of contract claim.³

Under common law in Delaware, breach of contract claims may survive beyond the statutory limitations—in some cases for a period of up to 20 years—if the parties to a contract enter into it under seal.⁴ In order to establish a contract under seal in Delaware, the parties to such contract should observe certain formalities, such as: (1) an affirmative statement in the recitals that the parties intend to create a contract under seal; (2) an express agreement between the parties in the body of the agreement to enter into a sealed instrument; (3) a forum selection clause selecting Delaware as the exclusive forum; (4) a choice of law provision selecting Delaware, and specifically stating that the choice of law applies to the determination of the statute of limitations with respect to any claim arising under such contract; (5) a testimonium clause referring to execution of the contract as under “seal;” and (6) signature blocks that include the word “Seal” next to or below the signature lines.

At this time, it appears that the most effective way to extend the statute of limitations for a contractual claim in Delaware is to enter into a contract under seal. Without executing a contract under seal, there is some question as to the enforceability of a claim arising under such contract after the applicable three- or four-year period (notwithstanding the fact that language within the contract may give a party the perceived right to bring a claim). Not surprisingly, sellers negotiating acquisitions or purchase agreements under Delaware law are justifiably resistant to allowing any contract claims, particularly for breaches of the representations and warranties, to survive for a potential 20-year period. A possible solution for limiting the survival of contract claims under seal is the inclusion of language clearly and expressly stating the parties’ desire to limit the survivability of such claims, in a form similar to the following:

Expiration of Claims. Notwithstanding anything to the contrary contained herein, and in order to limit the survival period for common law claims for breach of contract under seal, it is the intent of the parties hereto that no party [to this Agreement] may bring a claim for a breach of contract arising from or in connection with this Agreement after the date that is the six (6) year anniversary of this Agreement.

¹ *ENI Holdings, LLC v. KBR Group Holdings LLC* (Del. Ch. Nov. 27, 2013).

² See *GRT, Inc. v. Marathon GTF Tech., Ltd.*, (Del. Ch. July 11, 2011) (noting that generally parties to a contract may not extend the statute of limitations in Delaware).

³ See *Certaineed Corp. v. Celotex Corp.* (Del. Ch. Jan. 24, 2005).

⁴ *Whittington v. Dragon Group LLC*, 991 A.2d 1, 10 (Del. 2009).

In the mergers and acquisitions context, many purchase agreements reduce the survival period for breach of contract claims to less than the statutorily afforded period. The aforementioned approach represents the extension of such practice in order to limit the survival period for common law claims for breach of a contract executed under seal.

There is currently a proposal before the Commercial Law Section of the Delaware State Bar Association (the DSBA) that would amend Section 8106 of the CJPL. The amendment, if approved by the DSBA, would take effect on Aug. 1, 2014, and would extend the current statute of limitations beyond the three- or four-year period, as applicable, without requiring the parties to enter into a contract under seal. The proposed amendment to Section 8106 of the CJPL would add a new subsection (c) permitting parties to a written contract with a minimum value of \$100,000 to memorialize their mutual desire to extend the statute of limitations beyond the three- or four-year period, as applicable.

Providing additional clarification to parties negotiating purchase agreements via statutory amendment would eliminate the necessity for certain formalities undertaken in executing a contract under seal. Further, executing a contract under seal in Delaware adds an extra layer of uncertainty between parties negotiating a purchase or acquisition agreement. Given the unfamiliarity many practitioners have with respect to this trend involving contract negotiations, providing statutory support in Delaware for the common practice of open negotiation for contract claim survival periods between buyers and sellers will eliminate ambiguity in purchase agreement enforceability. If the DSBA passes the proposed amendment to Section 8106 of the CJPL, that should provide the necessary latitude for buyers and sellers to negotiate the survivability issue without having to enter into a contract under seal.

– By Noah J. Leichtling and Jonathan H. Bernstein, Katten Muchin Rosenman LLP

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