

Regular Session, 2013

HOUSE BILL NO. 588

BY REPRESENTATIVE ABRAMSON

(On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

PRESCRIPTION: Provides relative to extending liberative prescriptive periods

1 AN ACT

2 To amend and reenact Civil Code Article 3471 and to enact Civil Code Articles 3505,
3 3505.1, 3505.2, 3505.3, and 3505.4, relative to modes of acquiring ownership; to
4 provide relative to obligations and contracts; to provide for enforcement and
5 termination; to provide for the limits of contractual freedom; to provide for the
6 extension of liberative prescription; to provide formal requirements for the extension
7 of liberative prescription; to provide for the commencement of the period of
8 extension; to provide for the effect of the extension on other obligors and obligees;
9 to provide for the interruption or suspension of prescription during a period of
10 extension; and to provide for related matters.

11 Be it enacted by the Legislature of Louisiana:

12 Section 1. Civil Code Article 3471 is hereby amended and reenacted and Civil Code
13 Articles 3505, 3505.1, 3505.2, 3505.3, and 3505.4 are hereby enacted to read as follows:

14 Art. 3471. Limits of contractual freedom

15 A provision in a juridical act purporting to ~~exclude prescription~~, to specify
16 a ~~longer~~ different prescriptive period than that established by ~~law~~, legislative
17 enactment, to exclude prescription, or to make the requirements ~~of~~ for the accrual of
18 prescription more onerous; is absolutely null. Nevertheless, parties may agree in
19 writing to shorten a prescriptive period to a stated amount of time that is reasonable
20 and is in no event less than one year.

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Revision Comments – 2013

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3 (a) This Article reproduces much of the substance of C.C. Art. 3471 (Rev.
4 1982). It changes the law in part by imposing a bright-line minimum below which
5 prescriptive periods may not be reduced. Under this revision, parties are still not
6 allowed to extend prescription, to exclude prescription, or to make the accrual of
7 prescription more difficult for the obligor. Voluntary shortening of prescriptive
8 periods, however, has long been allowed in Louisiana and by a variety of other civil
9 law sources and by other American states. *See, e.g., Green v. Peoples Benev. Indus.*
10 *Life Ins. Co.*, 5 So. 2d 916 (La. App. 1941); *Carraway v. Merchants' Mut. Ins. Co.*,
11 26 La. Ann. 298 (La. 1874); Code Civil (Fr.) Art. 2220 (1804); BGB § 202; Austrian
12 Civil Code § 1502; Dutch Civil Code Art. 3:322, Para. 3; Principles of European
13 Contract Law Art. 14:601; Unidroit Principles Art. 10.3; *Beeson v. Schloss*, 192 P.
14 292, 294 (1920); *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010 (2011); *City of*
15 *Hot Springs v. Nat. Sur. Co.*, 531 S.W.2d 8 (1975); *Hepp v. United Airlines, Inc.*, 540
16 P.2d 1141 (Colo. App. 1975); *Smith v. Auto-Owners, Inc. Co.*, 877 N.E.2d 1220 (Ind.
17 App. 2007). This Article makes the authority to shorten prescription explicit but
18 specifically requires any reduction in prescription to allow for a reasonable amount
19 of time to pursue a claim. What is reasonable will depend upon the circumstances
20 of each case, the cause of action involved, the length of the original prescriptive
period, and other similar factors.

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22 (b) By requiring any reduction in prescription to be reasonable, this Article
23 allows for some degree of judicial oversight of juridical acts that shorten the
24 prescriptive period. Even before the enactment of C.C. Art. 3471 (Rev. 1982), the
25 jurisprudence imposed a reasonableness requirement on reductions of the
26 prescriptive period. *See, e.g., Bonura & Co. v. Southern Pac. Co.*, 2 La. App. 4 (Ct.
27 App. Orl. 1925). After the enactment of C.C. Art. 3471 (Rev. 1982), courts
28 continued to police the reasonableness of agreements but did so by mistakenly
29 finding some excessive reductions to be "more onerous" and therefore invalid. *See,*
30 *e.g., Contours Unlimited v. Board of Comm'rs*, 630 So. 2d 916 (La. App. 4 Cir.
31 1993); *Cameron v. Bruce*, 981 So. 2d 204 (La. App 2 Cir. 2008). In fact, the phrase
32 "more onerous" has proved vexing for courts. Some courts have mistakenly found
33 agreements regarding substantive elements of a cause of action to be "more onerous"
34 and thus invalid under Article 3471. *See, e.g., Prestridge v. Bank of Jena*, 924 So.
35 2d 1266 (La. App. 3 Cir. 2006). *But see Groue v. Capital One*, 47 So. 3d 1038 (La.
36 App. 1 Cir. 2010) (finding that a contractually shortened period to notify a bank of
37 an altered check not to be violative of Article 3471). This revision explicitly adds
38 the term "reasonable" to the language of this Article and distinguishes it from the
39 term "more onerous". The term "more onerous" refers to actions or agreements that
40 make the invocation of prescription more difficult for the obligor. For example,
41 agreements not to plead prescription, to interrupt prescription, to delay the
42 commencement of prescription, or to provide for additional causes of interruption
43 are "more onerous" because they make the accrual of prescription more difficult for
44 the obligor, the party primarily protected by the accrual of prescription. *See, e.g.,*
Constantine Semanteras, General Principles of Civil Law §1036 (4th ed.) (in Greek).

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46 (c) In no event shall a contractual reduction of prescription be for a period
47 of less than one year. As a matter of public policy, parties must have sufficient time
48 to investigate and pursue a claim. Prescriptive periods that are themselves less than
49 one year are not subject to reduction. Under this Article, even some prescriptive
50 periods that are greater than one year may not be subject to reduction on the grounds
51 that doing so would be per se unreasonable and in derogation of laws enacted for the
52 public interest. *See, e.g., C.C. Art. 7.* For example, courts should not allow
53 reduction of prescription in areas such as filiation, child support, sexual abuse, or
54 similar areas where public as well as private interests are at stake. *See, e.g., R.S.*
55 *9:2800.9* (ten-year liberative prescription for sexual abuse of a minor); *C.C. Art.*
3493.10 (two-year liberative prescription for delictual actions involving a crime of

1 violence); C.C. Art. 3501.1 (ten-year prescription for child support arrearages).
 2 Although prescriptive periods are often matters of private interest, prescription in
 3 areas such as those noted above have overriding public interest concerns from which
 4 no derogation should be allowed. For similar reasons of public policy, courts should
 5 not allow parties to reduce a prescriptive period in cases of liability for acts
 6 involving intentional or gross fault. *See generally* C.C. Art. 2004; BGB § 202.

7 (d) Although this Article, like its predecessor, is of general applicability to
 8 the concept of prescription, the ability of parties to shorten prescription is applicable
 9 primarily in the context of liberative prescription and, in some regards, with respect
 10 to the prescription of nonuse, rather than in the context of acquisitive prescription.
 11 Moreover, this Article does not allow for the modification of preemptive periods and
 12 does not abrogate special legislation governing the modification of prescription. *See,*
 13 *e.g.*, R.S. 31:56 (modification of the prescription of non-use in the mineral context);
 14 R.S. 22:868 (prohibiting limitation of actions to less than two years in insurance
 15 contracts involving certain first-party claims and to one year in other contexts).
 16 More specific legislation regarding modification of prescription in areas such as
 17 mineral rights and insurance continues to govern over this more general Article.

18 (e) This Article does not prevent an obligor from extending a prescriptive
 19 period after a cause of action has arisen. *See* C.C. Art. 3505 (2013).

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21 Art. 3505. Acts extending liberative prescription

22 After liberative prescription has commenced to run but before it accrues, an
 23 obligor may by juridical act extend the prescriptive period. An obligor may grant
 24 successive extensions. The duration of each extension may not exceed one year.

25 Revision Comments – 2013

26 (a) Under this Article, an obligor may extend the liberative prescriptive
 27 period only after a cause of action exists and prescription has begun to run. This
 28 approach is consistent with those of a variety of other civil law jurisdictions and
 29 international conventions. *See, e.g.*, Cour de Cassation (Comm.), No. 03-21156 (30
 30 Mars 2005); Sophie Stijns et Ilse Samoy, *La Prescription Extinctive: Le Rôle de la*
 31 *Volonté et du Comportement des Parties 355*, in Patrice Jourdain et Patrick Wéry,
 32 *La Prescription Extinctive: Études de Droit Comparé* (2010); Convention on the
 33 Limitations Period in the International Sale of Goods Art. 22 (2). Prescription may
 34 not be extended before it has begun to run, see C.C. Art. 3471, or after it has accrued.
 35 Nonetheless, after prescription has accrued, an obligor may renounce prescription.
 36 *See, e.g.*, C.C. Art. 3449.

37 (b) An extension of prescription may be granted by the obligor only in a
 38 juridical act that complies with the form requirements of C.C. Art. 3505.1. *See, e.g.*,
 39 Convention on the Limitations Period in the International Sale of Goods Art. 22 (2)
 40 (allowing modification of the limitations period by means of a "declaration"). For
 41 the definition of a juridical act, see C.C. Art. 3471, Comment (c) (Rev. 1982).

42 (c) An obligor may grant multiple extensions of prescription, each for no
 43 more than one year. Although this Article gives priority to individual freedom, that
 44 freedom is not absolute. Limitations on the ability to extend prescription are
 45 common. *See, e.g.*, Convention on the Limitations Period in the International Sale
 46 of Goods Art. 22(2); Civil Code (Fr.) Art. 2254; BGB § 202; Principles of European
 47 Contract Law art. 14:601; Unidroit Principles Art. 10.3. The one-year limitation on

1 each extension is designed to allow parties sufficient time to negotiate and settle a
2 dispute rather than having to file suit to interrupt prescription. At the same time,
3 however, the one-year limitation prevents an obligor from rashly granting an
4 excessively long or indefinite period of extension. A renewable one-year limitation
5 provides an appropriate balance. For commencement of the duration of each
6 extension, see C.C. Art. 3505.2 (Rev. 2013).

7 (d) An extension of prescription is explicitly recognized by legislation, see
8 C.C. Art. 3505, and thus is not violative of the prohibition in Article 3457, which is
9 designed to prohibit the recognition of the common law doctrine of laches. *See* C.C.
10 Art. 3457 (Rev. 2013), Comment (b).

11 Art. 3505.1. Formal requirements

12 An extension of liberative prescription must be express and in writing.

13 Revision Comments – 2013

14 (a) The policy behind this Article is not one of public interest but one of
15 evidence. Oral or implied extensions would allow evidentiary debates and
16 unnecessary doubts as to the existence of an agreement. The requirement that an
17 extension be express and in writing exists for proof purposes and is common
18 throughout the Louisiana Civil Code. *See, e.g.,* C.C. Arts. 963 (renunciation of
19 succession rights); 3038 (creation of suretyship); 3450 (renunciation of acquisitive
20 prescription with respect to immovables).

21 (b) The phrase "in writing" requires the existence of either an authentic act
22 or an act under private signature. *See* C.C. Arts. 1833 and 1837. Under certain
23 circumstances, an electronic transmission may satisfy the requirement of a writing.
24 *See, e.g.,* R.S. 9:2601 *et seq.*

25 Art. 3505.2. Commencement of period of extension

26 The period of extension commences to run on the date of the juridical act
27 granting it.

28 Revision Comment – 2013

29 This Article specifies the time at which the period of extension commences
30 to run. Successive extensions each restart the period of extension but only from the
31 date of the act granting it.

32 Art. 3505.3. Effect of extension on other obligors and obligees

33 A. An extension of liberative prescription is effective against only the
34 obligor granting it but benefits all joint obligees of an indivisible obligation and all
35 solidary obligees.

36 B. An extension of liberative prescription by a principal obligor is effective
37 against his surety. An extension of liberative prescription by a surety is effective
38 only if the principal obligor has also granted it.

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(a) This Article provides that an extension granted by an obligor does not grant an obligee an extension against other solidary or joint obligors. The same is true with respect to joint tortfeasors. Thus, an obligee who obtains an extension from one solidary obligor may, after the original prescriptive period has run, pursue a claim against only the obligor granting the extension. To that extent, the effects of an extension are not analogous to an interruption. *Cf.* C.C. Arts. 1799, 2324(C), and 3503. Similarly, an obligor who renders performance outside the original prescriptive period but during a period of extension he granted may not recover from his co-obligors who did not concur in the extension, as subrogation will be inoperative. *See generally Perkins v. Scaffolding Rental and Erection Service, Inc.*, 568 So. 2d 549 (La. 1990); *Cf.* C.C. Art. 1804.

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(b) Unlike co-obligors, joint obligees of an indivisible obligation and solidary obligees all benefit from an extension granted by an obligor. To that extent, the effect of an extension of liberative prescription is similar to an interruption. *See, e.g.*, C.C. Art. 1793.

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(c) The second paragraph of this Article makes an exception to the general rule that extensions of liberative prescription will be effective only against the obligor granting the extension. Because of the nature of the surety arrangement, a special rule is necessary. A principal obligor's extension of prescription is effective against his surety because of the accessory nature of the contract. *See, e.g.*, C.C. Arts. 3035 and 3504. This Article does not, however, preclude the application of Article 3062, which must be read *in pari materia* with this and other Articles that may serve to modify a principal obligation. This Article also makes clear that for an extension of prescription granted by a surety to be effective, the principal obligor must also grant the extension. Because suretyship is an accessorial obligation, a prescriptive period cannot effectively be extended, even as to the surety who granted the extension, without a similar grant by the principal obligor.

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Art. 3505.4. Interruption or suspension during a period of extension

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Prescription may be interrupted or suspended during the period of extension.

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(a) Because an extension of prescription is an extension of the original prescriptive period, an interruption may occur or a suspension may exist during a contractually granted extension. *See, e.g., Taranto v. Louisiana Citizens Prop. Ins. Corp.*, 62 So. 3d 721 (La. 2011) (holding that a contractually shortened prescriptive period is a liberative rather than contractual period and thus may be suspended under C.C.P. Art. 596). *But see id.* at 737 (Victory, J., dissenting); *Dixey v. Allstate Ins. Co.*, 681 F. Supp.2d 740 (E.D. La. 2010).

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(b) If an interruption occurs during a period of extension, after the last day of the interruption, only the original prescriptive period commences to run anew, not the extension. If prescription is suspended during a period of extension, after the termination of the period of suspension, the remainder of the period of extension runs again. *See, e.g.*, C.C. Art. 3472.

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(c) For the effect of an interruption of prescription, see C.C. Art. 3466. For the effect of a suspension of prescription, see C.C. Art. 3472.

DIGEST

The digest printed below was prepared by House Legislative Services. It constitutes no part of the legislative instrument. The keyword, one-liner, abstract, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

Abramson

HB No. 588

Abstract: Revises the Civil Code to provide for shortening of a prescriptive period by written agreement of the parties and for the extension of liberative prescription.

Present law (C.C. Art. 3471) provides for the nullity of a juridical act purporting to exclude prescription, to specify a longer prescriptive period than established by law, or make the requirements of prescription more onerous.

Proposed law retains present law with regard to provisions that purport to exclude prescription. Proposed law also provides for the nullity of any provision in a juridical act that purports to specify a different prescriptive period than that established by law or makes the requirements for the accrual of prescription more onerous. Proposed law adds that provisions that violate present law are absolutely null and limits the nullity to the relevant provision of the juridical act, not the entire juridical act.

Proposed law (C.C. Art. 3505) provides that an obligor may extend a period of liberative prescription by juridical act after it has commenced to run, and that an obligor may grant successive extensions, each of which may not exceed one year.

Proposed law (C.C. Art. 3505.1) provides that an extension of liberative prescription must be express and in writing.

Proposed law (C.C. Art. 3505.2) provides that the period of extension commences to run on the date of the juridical act granting it.

Proposed law (C.C. Art. 3505.3) provides that the extension of liberative prescription is effective against only the obligor granting it. Further provides that the extension benefits all joint obligees of an indivisible obligation and all solidary obligees.

Proposed law provides that an extension of liberative prescription by a principal obligor is effective against his surety.

Proposed law provides that an extension of liberative prescription by a surety is effective only if the principal obligor has also granted it.

Proposed law (C.C. Art. 3505.4) provides that prescription may be interrupted or suspended during the period of extension.

(Amends C.C. Art. 3471; Adds C.C. Arts. 3505-3505.4)