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March 27, 2013

Representative Chuck Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

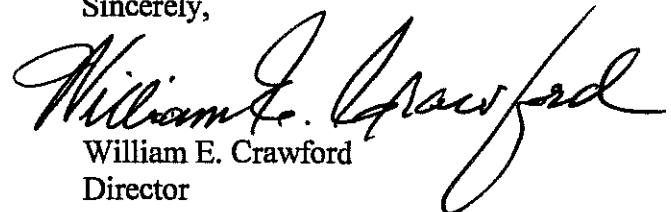
Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

RE: HCR 28 of 2011

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2011 House Concurrent Resolution No. 28, relative to agreements to extend liberative prescriptive periods.

Sincerely,


William E. Crawford
Director

WEC/lr

Enclosure

cc: Representative Neil C. Abramson

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.state.la.us

LOUISIANA STATE LAW INSTITUTE

**REPORT IN RESPONSE TO HCR 28
OF THE 2011 REGULAR LEGISLATIVE SESSION
Agreements to Extend Liberative Prescriptive Periods**

Ronald J. Scalise Jr., Reporter

Lynette Roberson, Staff Attorney

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* * *

Ronald J. Scalise Jr., Reporter

Lynette Roberson, Staff Attorney

REPORT ON HCR 28 OF 2011

1

2

3 House Concurrent Resolution of the 2011 Regular Legislative Session directed
4 the Louisiana State Law Institute to "study agreements to voluntarily extend liberative
5 prescriptive periods and to make specific recommendations for authorizing agreements
6 to extend liberative prescriptive periods." Pursuant to this resolution, the Law Institute
7 formed a committee to study this issue.

8 The Prescription Committee has met and Civil Code Articles were drafted and
9 approved by the Law Institute Council at its September 2012 meeting. The following

10 legislation has been submitted on recommendation of the Louisiana State Law Institute.

1 Regular Session, 2013

2 HOUSE BILL NO.

3 BY REPRESENTATIVE ABRAMSON

4 (On Recommendation of the Louisiana State Law Institute)

5

6 PRESCRIPTION: Provides relative to prescriptive periods pursuant to HCR 28 of 2011.

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8

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11

AN ACT

12 To amend and reenact Civil Code Article 3471 and to enact Civil Code Articles 3505, 3505.1,

13 3505.2, 3505.3, and 3505.4, relative to prescriptive periods; to provide for the limits of

14 contractual freedom; to provide for the extension of liberative prescription; to provide

15 formal requirements for the extension of liberative prescription; to provide for the

16 commencement of the period of extension; to provide for the effect of the extension on

17 other obligors and obligees; to provide for the interruption or suspension of prescription

18 during a period of extension; and to provide for related matters.

19 Be it enacted by the Legislature of Louisiana:

20 Section 1. Civil Code Article 3471 is hereby amended and reenacted and Civil Code

21 Articles 3505, 3505.1, 3505.2, 3505.3, and 3505.4 are hereby enacted to read as follows:

22 Art. 3471. Limits of contractual freedom

23 A provision in a A juridical act purporting to ~~exclude prescription~~, to specify a longer

24 different prescriptive period than that established by legislation law, to exclude prescription, or

25 to make the requirements of for the accrual of prescription more onerous, is absolutely null.

26 Nevertheless, parties may agree in writing to shorten a prescriptive period to a stated amount of

27 time that is reasonable and is in no event less than one year.

28

Revision Comments – 2013

29

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

18
19 (b) By requiring any reduction in prescription to be reasonable, this Article allows for
20 some degree of judicial oversight of juridical acts that shorten the prescriptive period. Even
21 before the enactment of C.C. Art. 3471 (Rev. 1982), the jurisprudence imposed a reasonableness
22 requirement on reductions of the prescriptive period. See, e.g., *Bonura & Co. v. Southern Pac.*
23 *Co.*, 2 La. App. 4 (Ct. App. Orl. 1925). After the enactment of C.C. Art. 3471 (Rev. 1982),
24 courts continued to police the reasonableness of agreements but did so by mistakenly finding
25 some excessive reductions to be “more onerous” and therefore invalid. See, e.g., *Contours*
26 *Unlimited v. Board of Comm'rs*, 630 So. 2d 916 (La. App. 4 Cir. 1993); *Comeron v. Bruce*, 981
27 So. 2d 204 (La. App 2 Cir. 2008). In fact, the phrase “more onerous” has proved vexing for
28 courts. Some courts have mistakenly found agreements regarding substantive elements of a
29 cause of action to be “more onerous” and thus invalid under Article 3471. See, e.g., *Prestridge*
30 *v. Bank of Jenou*, 924 So. 2d 1266 (La. App. 3 Cir. 2006). But see *Grono v. Copital One*, 47 So.
31 3d 1038 (La. App. 1 Cir. 2010) (finding that a contractually shortened period to notify a bank of
32 an altered check not to be violative of Article 3471). This revision explicitly adds the term
33 “reasonable” to the language of this article and distinguishes it from the term “more onerous.”
34 The term “more onerous” refers to actions or agreements that make the invocation of prescription
35 more difficult for the obligor. For example, agreements not to plead prescription, to interrupt
36 prescription, to delay the commencement of prescription, or to provide for additional causes of
37 interruption are “more onerous” because they make the accrual of prescription more difficult for
38 the obligor, the party primarily protected by the accrual of prescription. See, e.g., Constantine
39 Semanteras, *General Principles of Civil Law* §1036 (4th ed.) (in Greek).

40
41 (c) In no event shall a contractual reduction of prescription be for a period of less than one
42 year. As a matter of public policy, parties must have sufficient time to investigate and pursue a
43 claim. Prescriptive periods that are themselves less than one year are not subject to reduction.
44 Under this Article, even some prescriptive periods that are greater than one year may not be
45 subject to reduction on the grounds that doing so would be per se unreasonable and in derogation
46 of laws enacted for the public interest. See, e.g., C.C. Art. 7. For example, courts should not
47 allow reduction of prescription in areas such as filiation, child support, sexual abuse, or similar
48 areas where public as well as private interests are at stake. See, e.g., R.S. 9:2800.9 (ten-year
49 liberative prescription for sexual abuse of a minor); C.C. Art. 3493.10 (two-year liberative
50 prescription for delictual actions involving a crime of violence); C.C. Art. 3501.1 (ten-year
51 prescription for child support arrearages). Although prescriptive periods are often matters of
52 private interest, prescription in areas such as those noted above have overriding public interest
53 concerns from which no derogation should be allowed. For similar reasons of public policy,
54 courts should not allow parties to reduce a prescriptive period in cases of liability for acts
55 involving intentional or gross fault. See generally C.C. Art. 2004; BGB § 202.

56

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

11
12 (e) This Article does not prevent an obligor from extending a prescriptive period after a cause
13 of action has arisen. *See* C.C. Art. 3505 (2013).

14 * * *

15
16 Art. 3505. Acts extending liberative prescription

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

20
21 Revision Comments – 2013

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

32
33 (b) An extension of prescription may be granted by the obligor only in a juridical act that
34 complies with the form requirements of C.C. Art. 3505.1. *See, e.g.*, Convention on the
35 Limitations Period in the International Sale of Goods Art. 22 (2) (allowing modification of the
36 limitations period by means of a “declaration”). For the definition of a juridical act, *see* C.C.
37 Art. 3471, Comment (c) (Rev. 1982).

38
39 (c) An obligor may grant multiple extensions of prescription, each for no more than one year.
40 Although this Article gives priority to individual freedom, that freedom is not absolute.
41 Limitations on the ability to extend prescription are common. *See, e.g.*, Convention on the
42 Limitations Period in the International Sale of Goods Art. 22(2); Civil Code (Fr.) Art. 2254;
43 BGB § 202; Principles of European Contract Law art. 14:601; Unidroit Principles Art. 10.3. The
44 one-year limitation on each extension is designed to allow parties sufficient time to negotiate and
45 settle a dispute rather than having to file suit to interrupt prescription. At the same time,
46 however, the one-year limitation prevents an obligor from rashly granting an excessively long or
47 indefinite period of extension. A renewable one-year limitation provides an appropriate balance.
48 For commencement of the duration of each extension, *see* C.C. Art. 3505.2 (Rev. 2013).

49
50 (d) An extension of prescription is explicitly recognized by legislation, *see* C.C. Art. 3505,
51 and thus is not violative of the prohibition in Article 3457, which is designed to prohibit the

1 recognition of the common law doctrine of laches. *See* C.C. Art. 3457 (Rev. 2013), Comment
2 (b).

3
4
5 Art. 3505.1. Formal requirements

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

7
8 Revision Comments – 2013

9
10 (a) The policy behind this Article is not one of public interest but one of evidence. Oral or
11 implied extensions would allow evidentiary debates and unnecessary doubts as to the existence
12 of an agreement. The requirement that an extension be express and in writing exists for proof
13 purposes and is common throughout the Louisiana Civil Code. *See, e.g.*, C.C. Arts. 963
14 (renunciation of succession rights); 3038 (creation of suretyship); 3450 (renunciation of
15 acquisitive prescription with respect to immovables).

16
17 (b) The phrase “in writing” requires the existence of either an authentic act or an act under
18 private signature. *See* C.C. Arts. 1833 and 1837. Under certain circumstances, an electronic
19 transmission may satisfy the requirement of a writing. *See, e.g.*, R.S. 9:2601 *et seq.*

20 Art. 3505.2. Commencement of period of extension

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

22 Revision Comment – 2013

23
24 This Article specifies the time at which the period of extension commences to run.
25 Successive extensions each restart the period of extension but only from the date of the act
26 granting it.

27
28
29 Art. 3505.3. Effect of extension on other obligors and obligees

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

32 An extension of liberative prescription by a principal obligor is effective against his
33 surety. An extension of liberative prescription by a surety is effective only if the principal
34 obligor has also granted it.

35 Revision Comments – 2013

36
37 (a) This Article provides that an extension granted by an obligor does not grant an
38 obligee an extension against other solidary or joint obligors. The same is true with respect to
39 joint tortfeasors. Thus, an obligee who obtains an extension from one solidary obligor may, after
40 the original prescriptive period has run, pursue a claim against only the obligor granting the
41 extension. To that extent, the effects of an extension are not analogous to an interruption. *Cf.*
42 C.C. Arts. 1799, 2324(C), and 3503. Similarly, an obligor who renders performance outside the
43 original prescriptive period but during a period of extension he granted may not recover from his
44 co-obligors who did not concur in the extension, as subrogation will be inoperative. *See*
45 *generally Perkins v. Scaffolding Rental and Erection Service, Inc.*, 568 So. 2d 549 (La. 1990);
46 *Cf. C.C. Art. 1804.*

1 (b) Unlike co-obligors, joint obligees of an indivisible obligation and solidary obligees all
2 benefit from an extension granted by an obligor. To that extent, the effect of an extension of
3 liberative prescription is similar to an interruption. *See, e.g.*, C.C. Art. 1793.
4

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

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

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

18 Revision Comments – 2013

19
20 (a) Because an extension of prescription is an extension of the original prescriptive period, an
21 interruption may occur or a suspension may exist during a contractually granted extension. *See,*
22 *e.g., Toronto v. Louisiana Citizens Prop. Ins. Corp.*, 62 So. 3d 721 (La. 2011) (holding that a
23 contractually shortened prescriptive period is a liberative rather than contractual period and thus
24 may be suspended under C.C.P. Art. 596). *But see id.* at 737 (Victory, J., dissenting); *Dixey v.*
25 *Allstote Ins. Co.*, 681 F. Supp.2d 740 (E.D. La. 2010).
26

27 (b) If an interruption occurs during a period of extension, after the last day of the interruption
28 only the original prescriptive period commences to run anew, not the extension. If prescription
29 is suspended during a period of extension, after the termination of the period of suspension the
30 remainder of the period of extension runs again. *See, e.g.*, C.C. Art. 3472.
31

32 (c) For the effect of an interruption of prescription, see C.C. Art. 3466. For the effect of a
33 suspension of prescription, see C.C. Art. 3472.
34

35 DIGEST

36
37 The digest printed below was prepared by the Louisiana State Law Institute. It
38 constitutes no part of the legislative instrument.
39

40 Author: HB

41
42 Abstract: Revises the Civil Code to provide for shortening of a prescriptive period by written
43 agreement of the parties and for the extension of liberative prescription.
44

45
46 Present law (C.C. Art. 3471) provides for the nullity a juridical act purporting exclude
47 prescription, to specify a longer prescriptive period than established by law, or make the
48 requirements of prescription more onerous.

49 Proposed law retains present law with regard to provisions that purport to exclude prescription.
50 Proposed law also provides for the nullity of any provision in a juridical act that purports to
51 specify a different prescriptive period than that established by law or makes the requirements for
52 the accrual of prescription more onerous. Proposed law adds that provisions that violate this

1 Code Article are absolutely null and limits the nullity to the relevant provision of a juridical act,
2 not the entire juridical act.
3
4 Proposed law (C.C. Art. 3505) is new and provides that an obligor may extend a period of
5 liberative prescription by juridical act after it has commenced to run. Proposed law provides that
6 an obligor may grant successive extensions. Proposed law provides that the duration of each
7 extension may not exceed one year.
8
9 Proposed law (C.C. Art. 3505.1) is new and provides that an extension of liberative prescription
10 must be express and in writing.
11
12 Proposed law (C.C. Art. 3505.2) is new and provides that the period of extension commences to
13 run on the date of the juridical act granting it.
14
15 Proposed law (C.C. Art. 3505.3) is new and provides that the extension of liberative prescription
16 is effective against only the obligor granting it. Proposed law provides that the extension benefits
17 all joint obligees of an indivisible obligation and all solidary obligees. Proposed law provides
18 that an extension of liberative prescription by a principal obligor is effective against his surety.
19 Proposed law provides that an extension of liberative prescription by a surety is effective only if
20 the principal obligor has also granted it.
21
22 Proposed law (C.C. Art. 3505.4) is new and provides that prescription may be interrupted or
23 suspended during the period of extension.

Regular Session, 2011

HOUSE CONCURRENT RESOLUTION NO. 28

BY REPRESENTATIVE ABRAMSON

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study agreements to voluntarily extend liberative prescriptive periods and to make specific recommendations for authorizing agreements to extend liberative prescriptive periods.

WHEREAS, resolution of certain claims frequently cannot be effected within one year, particularly in complex matters; and

WHEREAS, agreements to suspend or toll prescriptive periods have been successful in other states; and

WHEREAS, parties involved in certain actions have, at times, unanimously agreed to withhold the filing of suit in order to resolve the disputed issues, but due to Louisiana law, particularly, Civil Code Article 3471, suit is required to be filed in order to avoid the liberative prescriptive period, even though all parties to the action agree that filing suit at that time is not otherwise necessary; and

WHEREAS, the ability to suspend the liberative prescriptive period when all parties agree could be beneficial to the parties and the courts by saving both time and money.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana State Law Institute to study agreements to voluntarily extend liberative prescriptive periods and to make specific recommendations for authorizing agreements to extend liberative prescriptive periods.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and that the Louisiana State Law Institute report

HCR NO. 28

ENROLLED

its findings and recommendations in the form of specific proposed legislation to the Legislature of Louisiana on or before January 1, 2013.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE