

Waiver Of The Statute Of Limitations In Indemnity Agreements? Not So Fast.

Sureties often find themselves seeking to enforce a contractually shortened limitations period contained in a bond. However, when pursuing indemnitors, it is the surety that can potentially be barred from bringing an indemnification suit by a statute of limitations. To aid the surety, many indemnity agreements contain clauses which provide that the indemnitors agree to waive the statute of limitations with respect to any lawsuit brought by the surety. Sureties may rely on those waivers as part of their underwriting of a particular principal. Frequently, however, questions arise concerning the enforceability of such waivers following a default by the principal.

As is typical in the surety industry, the enforceability of waivers of the statute of limitations depends on the jurisdiction controlling the dispute, and how it treats contractual waivers. Parties assessing the law in a particular state must also take into account any choice of law considerations, especially if an indemnity agreement is signed in one jurisdiction but is enforced in another. In some jurisdictions, such as Virginia, Maryland, and the District of Columbia, contractual waivers of the statute of limitations are generally unenforceable, except for an extremely limited situation in Virginia.¹ One exception to the general unenforceability of such waivers, however, is situations in which the parties have executed a separate tolling agreement, which is discussed further below.²

The Mid-Atlantic region's refusal to enforce these waivers is not unique, and, in fact, the majority of states across the country refuse to enforce agreed-upon terms that permanently waive the statute of limitations.³ The rationale behind these jurisdictions' refusal to enforce contractual waivers derives from public policy considerations. Such courts routinely explain that statutes of limitations were created to prevent the revival and enforcement of stale demands, which are difficult to defend because of the lapse of time, faded memory, or the loss of documents supporting the claim.⁴ Permitting a party to contractually agree to revive what would otherwise be a time-barred claim violates the premise and public policy supporting statutes of limitations.

Some states will enforce waivers of the statute of limitations if those waivers are for a limited duration, or if the parties agree to the waiver only after the accrual of a cause of action. For example, Texas courts enforce waivers of the statute of limitations provided the agreement is "specific and for a reasonable time," decreeing that "[a] general agreement in advance to waive or not to plead the statute of

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limitations on a particular obligation is void as against public policy.”⁵ Somewhat similar are Massachusetts and New York, which will enforce waivers of their statutes of limitations if the waivers are in writing and made after the accrual of the cause of action.⁶ The explanation for New York’s allowing only post-accrual waivers is that a party cannot in advance make a valid promise that “a statute founded in public policy shall be inoperative.”⁷

As with Massachusetts and New York, Virginia’s policy regarding enforceability of waivers of the statute of limitations permits their use in only one circumscribed situation. To have an enforceable waiver of the statute of limitations, Virginia’s Code requires that: (1) the waiver is made to avoid or defer litigation pending settlement of any case; (2) the waiver is not made contemporaneously with any other contract; and (3) the waiver is made for an additional period of time which is not longer than the applicable limitations period.⁸ In addition to meeting those strict requirements of the Virginia Code, the waiver must also be in writing.⁹ Enforceable waiver agreements in Virginia, therefore, typically arise only in the context of tolling agreements or as a result of ongoing settlement negotiations. A waiver contained in form contracts, such as an indemnity agreement, would not qualify. Thus, it is the rare situation where a surety can claim the benefit of a waiver of the statute of limitations in Virginia, and any waiver for an indefinite or permanent period of time is entirely unenforceable.

While most states will not enforce blanket waivers of the statute of limitations, some states – including California – will allow parties to agree to such a provision. California courts appear to have little reservations about parties’ agreements to waive the statute of limitations. California “overwhelmingly” grants contracting parties substantial freedom to modify the statute of limitations by agreement, including both shortening and extending the period.¹⁰ The California Code of Civil Procedure recognizes the enforceability of parties’ agreements to waive the statute of limitations, as long as those waivers are in writing, signed by the person obligated, and are limited to only four additional years before the expiration of the limitations period and four additional years after the expiration of the limitations period. Despite these temporal limitations, however, statute of limitation waivers in California can be renewed, effectively permitting “evergreen” or limitless waivers. Similarly, New Jersey and Montana each have a long history of enforcing contractual waivers of the statute of limitations.

As a result of the varying nature of how waivers of the statute of limitations are dealt with and enforced across the country, sureties that include such a waiver in their indemnity agreements or seek to enforce a waiver should be careful to review controlling state law. Even if the surety finds itself with an older claim in a state that does not enforce waivers, an alternative means to overcome an impending statute of

limitations may be to propose a tolling agreement to suspend all claims for a defined period of time, while the parties evaluate their options or attempt a resolution. When faced with an imminent lawsuit or a tolling agreement, many indemnitors would likely choose the latter, which will preserve the surety's rights until such time as the surety decides whether to pursue settlement or filing an indemnity action on an older claim. This suggestion will not help a surety if the claim is already barred by an applicable statute of limitations (as tolling agreements typically do not revive barred claims), but it may provide the surety flexibility in pursuing some claims. ➤

Endnotes

- 1 See [Ahmad v. Eastpines Terrace Apartments, Inc.](#), 28 A.3d 1, 8-9 (Md. Ct. Spec. App. 2011) (concluding that "any permanent waiver of the statute of limitations offends Maryland public policy and is unenforceable."); [Munter v. Lankford](#), 127 F.Supp. 630, 633 (D.D.C. 1995) (holding the same in the District of Columbia); *but see* VA. CODE ANN. § 8.01-232 (providing for the enforcement of waivers in three limited situations).
- 2 See, e.g., [Developers Sur. and Indem. Co. v. Belcher](#), 2017 WL 896861, *5 (D. Md. 2016) (slip copy) (enforcing a tolling agreement provided by the indemnitors).
- 3 See, e.g., [Haggerty v. Williams](#), 855 A.2d 264, 268 (Conn. App. Ct. 2004) (analyzing the law from thirteen states and concluding that there are two schools of thought on waivers of the statute of limitations, and that the majority position is that "a stipulation contained in a written instrument, waiving the defense of the statute of limitations permanently, as to any breach of contract that might occur in the future, is void and unenforceable as contrary to public policy.") (internal citations omitted).
- 4 See, e.g., [Hirtler v. Hirtler](#), 566 P.2d 1231, 1231 (Utah 1977) (stating that statutes of limitations are designed for the public good).
- 5 [Am. Alloy Steel, Inc. v. Armco, Inc.](#), 777 S.W.2d 173, 177 (Tex. App. 1989).
- 6 See N.Y. GEN. OBLIG. § 17-103; see also [Nat'l Bond & Inv. Co. v. Flaiger](#), 77 N.E.2d 772, 773-74 (Mass. 1948) ("[A]n agreement contained in the original obligation never to set up the statute of limitations violates the public policy of the statute, and is invalid.").
- 7 See generally, [Xerox State & Local Solutions, Inc. v. Xchanging Solutions \(USA\), Inc.](#), 216 F.Supp.3d 355, 361 (S.D.N.Y. 2016) (relying on [John J. Kassner & Co. v. City of New York](#), 389 N.E.2d 99 (N.Y. 1979)).
- 8 See VA. CODE ANN. § 8.01-232 (effect of promises not to plead statute).
- 9 *Id.*
- 10 See [Brisbane Lodging, L.P. v. Webcor Builders, Inc.](#), 157 Cal. Rptr. 3d 467, 475-76 (Cal. Ct. App. 2013).
- 11 CAL. CIV. PROC. CODE § 360.5.
- 12 [Simpson v. Hudson Cty. Nat. Bank](#), 57 A.2d 473, 474 (N.J. 1948) (stating that the statute of limitations is for the benefit of individuals and may be waived by express agreement).
- 13 [Parchen v. Chessman](#), 142 P. 631, 633 (Mont. 1914) (allowing parties to waive their rights to a statute of limitations in any way and time they choose).