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SHORT SURVIVAL PERIODS MAY NOT WORK IN FLORIDA

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By: Phyllis S. Bean

Florida law generally invalidates contract provisions seeking to shorten the legal statute of limitations. This squarely conflicts with provisions in many business combination and other commercial contracts that attempt to create shorter time limits for claims under the agreement. For example, an acquisition agreement may provide an 18-month "survival" period for representations and warranties, and state that claims asserted after that period expires are time-barred. Or a services agreement may provide that a claim for faulty services must be commenced within a specified time period after the services are concluded. Often these contractual time periods are shorter than those provided for in the applicable statute of limitations.

Florida Statute Section 95.03 provides that "any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void." Judicial precedents have upheld this law, including recently in *RMD Holdings, Ltd. v. HD Supply Construction Supply, Ltd.*, 2016 WL 4005405 (W.D. La. 2016). In that case, the U.S. District Court for the Western District of Louisiana considered a contract that was governed by Florida law and contained a provision stating that "all claims must be brought within one year of accrual of a cause of action." The Court held that such a provision was unenforceable in light of Florida Statute Section 95.03 and Florida's five year statute of limitations for contract claims. The *RMD Holdings* court recognized that, under Florida law, a choice of law provision applies only to substantive law (and not procedural law), and relied on Florida Supreme Court holdings that statute of limitations choice of law matters should be treated as substantive (citing *Merkle v. Robinson*, 737 So.2d 540 (Fla. 1999) and *Fulton County Administrator v. Sullivan*, 753 So.2d 549 (Fla. 1999)). Because the applicable statute of limitations involved the application of a substantive right under Florida law, the *RMD Holdings* court held that the parties could not shorten the applicable prescriptive period by contract.

Agreements governed by Florida law that seek to shorten time limitations must consider and accommodate Florida Statute Section 95.03. For example, an agreement governed by Florida law could seek to set liquidated damage limits for recovery on claims asserted after contractually set time limits that courts disregard. Alternatively, the parties may wish to avoid the Florida statute altogether by, if appropriate, choosing the law of another state to govern their contract. In all events, Florida business transactions seeking to shorten the five-year limitation period must address this issue.

For more information on this topic, please contact Daniel Lampert or Phyllis Bean on the firm's Business, Finance & Tax.

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