16-3852

In the
United States Court of Appeals
For the Third Circuit

ANDREW PANICO,

Plaintiff-Appellant,

– v. –

PORTFOLIO RECOVERY ASSOCIATES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

REPLY BRIEF FOR PLAINTIFF-APPELLANT

STERN THOMASSON LLP
Attorneys for Plaintiff-Appellant
150 Morris Avenue, 2nd Floor
Springfield, New Jersey 07081
(973) 379-7500

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SUMMARY OF THE ARGUMENT ON REPLY

PRA's Brief argued for a construction of Delaware's tolling statute which the Delaware Supreme Court expressly rejected. PRA unabashedly contended that tolling should last forever. Appellee's Brief at 34. Yet, PRA also acknowledged § 8117 should be applied as a Delaware court would apply it.[1] *Id.* at 12. Contrary to PRA's position, the Delaware Supreme Court in *Hurwitch* refused to literally apply § 8117 because doing so would effectively repeal Delaware's statute of limitations by tolling claims against non-Delaware defendants in perpetuity.

Instead of the literal construction applied below by the District Court, Delaware courts look to the policy underlying § 8117; namely, to protect a plaintiff's claim when the plaintiff is unable to summon the defendant to court. Hence, Delaware courts toll the limitations period only when either a Delaware *or* a non-Delaware defendant cannot be served with process

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[1] More accurately, Delaware law should be applied under New Jersey's conflicts of law regime because the issue here only arises when a *New Jersey* court applies Delaware law. Indeed, no Delaware court could ever be called on to decide the precise question here: whether to toll a claim against a non-Delaware defendant on a claim that could not, as a matter of law, be brought in a Delaware state court and could only be brought in a New Jersey state court. Nonetheless, a New Jersey court applying Delaware law would seek to determine, as best as possible, what the Delaware Supreme Court would hold.

regardless of where that defendant might be found.

PRA invites this Court to enter a dangerous precedent—one which Delaware and other courts have expressly rejected—namely, that Delaware corporations would be permitted to toll claims *in perpetuity* against non-Delaware residents until those defendants venture into Delaware. PRA has advanced, and lost, this argument in other courts.

The Delaware Supreme Court, in cases such as *Brossman* and *Saudi Basic*, tolled the limitations period only during the time the defendant was not amenable to service of process. Those decisions unequivocally instruct that, as soon as service could be effected, tolling ceased and the limitations period ran. Here, Panico was not only amenable to service of process, he was served. Therefore, § 8117 does not apply to the facts and the District Court's entry of summary judgment should be reversed.

LEGAL ARGUMENTS

POINT I: ALL OF DELAWARE'S LAW APPLIES TO THIS CASE BUT THE FACTUAL PREDICATE FOR TOLLING UNDER § 8117 DOES NOT EXIST.

PRA falsely accused Panico of arbitrarily selecting one Delaware statute while ignoring another. To the contrary, when applying Delaware law, New Jersey courts enforce *all* applicable Delaware statutes. PRA failed to understand that 10 Del.C. § 8117 no more applies here than does any other Delaware law which might toll a statute of limitations.

For § 8117 to apply, PRA would need to have met its burden of proof establishing that Panico could not be served with process, a fact which does not exist because Panico was served. Moreover, when viewed through the lens of the summary judgment standard, the evidential record establishes that Mr. Panico was capable of being served in the collection action PRA commenced as well as in a hypothetical case brought in a Delaware state court. Under any plausible construction, § 8117 did not toll the Delaware statute of limitations on PRA's claim.

A. Delaware's Decisions Don't Dictate Distinct Doctrines.

In its effort to apply § 8117, PRA supported the District Court's stubborn insistence on reading § 8117's "literal terms." Appx. 10. "A literal reading of the provisions of section [8117] tends to support [PRA's] view."

Hurwitch v. Adams, 52 Del. 13, 16, 151 A.2d 286, 288 (Sup'r. Ct.) *aff'd*, 52 Del. 247, 155 A.2d 591 (1959). But, at least as far back as *Hurwitch*, Delaware courts have repeatedly rejected that literal view. *See,* Opening Brief, Point I.B.

Delaware's courts look to "the obvious purpose and the only purpose of section [8117 which] is to allow reasonably diligent plaintiffs the statutory period within which to obtain service upon an absent or once absent and later elusive defendant." *Hurwitch,* 52 Del. at 16-17, 151 A.2d at 288. The statute protects a plaintiff's legitimate interests against being left with an unenforceable stale claim when it is impossible to summon the defendant to court through reasonable diligence. Thus, "the statute of limitations is tolled ***until*** the defendant becomes amenable to service of process." *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 18 (Del. 2005) (emphasis added). Thus, there is no tolling when the defendant can be served.

Brossman v. Federal Deposit Ins. Corp., 510 A.2d 471 (Del. 1986) illustrates the effect of § 8117 when a defendant can *and* when a defendant cannot be served because, under the unique facts of the case, tolling only applied for a portion of the pre-litigation period.

On December 31, 1981, a Pennsylvania guarantor was sued for a

deficiency on a defaulted mortgage loan. The loan was made by a Delaware bank but to a Pennsylvania limited partnership and secured by Pennsylvania real estate. The cause of action arose on October 23, 1975 but the applicable limitations period was six years. Thus, the case was commenced outside the limitations period and the defendant raised the statute of limitations as a defense.

The defendant's only connection with Delaware was his guaranty of the loan which was sufficient for jurisdiction under Delaware's long arm statute, 10 Del.C. § 3104. The long arm statute, however, did not become effective until July 11, 1978. Hence, prior to July 11, 1978, the defendant could not be served with process because no Delaware court could exercise personal jurisdiction over him. As a result, § 8117 tolled the limitations period prior to July 11, 1978. But, once the long arm statute became effective, the limitations period ran. Having run for less than six years, the claim was not time-barred.

The *Brossman* court held:

> If a defendant is not subject to service when a cause of action accrues against him, the relevant statute of limitations will be tolled ***until*** the plaintiff, by reasonable diligence, may serve him with process.

Brossman, at 472 (emphasis added). *Brossman* cited only to *Hurwitch* and § 8117.

PRA sought to distinguish *Hurwitch* (and its progeny) and argued that the decision in *Saudi Basic* supported its position. To the contrary, Delaware decisions are consistent; indeed, the specific sentence in *Saudi Basic* repeatedly quoted by PRA cited to a single precedent: *Hurwitch.*

PRA argued that the reasoning underlying *Hurwitch* and *Saudi Basic* differ. Like the other Delaware decisions, *Hurwitch* and *Saudi Basic* are aligned in their reasoning. The only difference was in the application of the law to the facts of each case: when the defendant could be served, the limitations period ran; when the defendant could not be served, the period was tolled. Thus, *Hurwitch* and *Saudi Basic* merely reflect the application of the same legal principle to different facts.

As further indication that *Saudi Basic* follows *Hurwitch*, *Hurwitch* is the *only* decision cited in support of the following statement in *Saudi Basic*:

> It is settled law that the purpose and effect of Section 8117 is to toll the statute of limitations as to defendants who, at the time the cause of action accrues, are outside the state and are not otherwise subject to service of process in the state.

Saudi Basic, at 18. PRA quoted that statement twice. Appellee's Brief at 14 and 17.

PRA has mistakenly placed too much emphasis on the phrase "in the state" at the end of that quote. First, the sentence which immediately

followed the quote above stated: "the statute of limitations is tolled ***until*** the defendant becomes amenable to service of process." *Saudi Basic*, at 18 (emphasis added). That statement is entirely consistent with *Hurwitch*, *Brossman*, and the other Delaware decisions. Second, *Saudi Basic* did not decide whether Saudi Basic was subject to service of process *in the state* or *outside the state*. It was never disputed that Saudi Basic could not be served. Rather, the only way for Saudi Basic to be served was upon its voluntary submission to the personal jurisdiction of the Delaware courts which occurred when it commenced its lawsuit.

Contrary to PRA's argument, Delaware courts do not resort to a literal application of § 8117's phrase "out of the state" and, instead, look to the statute's underlying purpose of tolling only when a defendant cannot be served with process. Consequently, no matter where defendants might be found, if they can be served with process then, according to Delaware courts, they are not "out of the state" within the meaning of § 8117. Here, Panico was amenable to service of process and was served. Therefore, § 8117 never applied to the facts of this case and the statute of limitations ran out before PRA sued Panico.

B. Hurwitch is Not Distinguishable.

Contending that *Hurwtich* and *Saudi Basic* are cut from different

cloth, PRA attempted to draw two unsupportable distinctions on which to rest its meritless rejection of *Hurwitch* and its progeny.

First, PRA would narrowly limit *Hurwitch* to merely hold that § 8117 does not apply to Delaware's one-year statute of limitations for personal injury claims because that statute made no exception for the pre-existing Tolling Statute.

The flaw in PRA's argument was its limited attention to *Hurwitch*'s discussion of *Lewis v. Pawnee Bill's Wild W. Co.*, 22 Del. 316, 66 A. 471 (1907). Consequently, PRA missed that *Hurwitch* went on to discuss two additional decisions and then synthesized all three decisions. The Delaware Supreme Court explained:

> The foregoing cases, we think, *taken together*, demonstrate that 10 Del. C. § 8116 [now § 8117] has no tolling effect on the applicable statute of limitations when the defendant in the suit is subject to personal or other service to compel his appearance.

Hurwitch, 52 Del. at 252, 155 A.2d at 593 (emphasis added). *Hurwitch* refused to treat out-of-state defendants as being "out of the state" within the meaning of § 8117 because doing so "would result in the abolition of the defense of statutes of limitation in actions involving non-residents." *Hurwitch*, 52 Del. at 252, 155 A.2d at 594. Thus, by the Delaware Supreme Court's expressed language, *Hurwitch* applied § 8117 to effectuate its

purpose and refused to toll—notwithstanding the statute's literal terms—when doing so exceeded its statutory purpose.

PRA then sought to distinguish *Hurwitch* and its progeny for not "actually" applying § 8117. Appellee's Brief at 18. PRA claimed *Hurwitch,* and the decisions following *Hurwitch,* "ignored" § 8117. Appellee's Brief at 25. None of those cases ignored the statute; instead, they considered § 8117 and reasoned the statute did not toll the limitations period because the defendant was capable of being served.

Delaware's refusal to literally apply § 8117 is appropriate when considering the statute's historical context. The statute was adopted prior to the Civil War. *D'Angelo v. Petroleos Mexicanos*, 398 F. Supp. 72, 80 (D. Del. 1975). The concept of minimum contacts opening the door for extra-territorial jurisdiction would not arise until the middle of next century. *See, International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

Furthermore, Delaware's antebellum legislature had no inkling of the modern age of conflicts law under which a foreign court would borrow Delaware's statute of limitations. Delaware's own borrowing statute, 10 Del.C. § 8121, was not adopted until 1953. 46 Del. Laws, c. 254. Thus, by the middle of the twentieth century, the application of § 8117 to claims against any person who was literally "out of the state" no longer made sense.

Consequently, Delaware courts properly looked to the underlying purpose.

C. The Non-Delaware Decisions Are Persuasive.

Seeking to discredit the cases discussed in Panico's Opening Brief, at Point I.C., PRA argued they all mistakenly misread *Hurwitch*. According to PRA, the following courts simply got it wrong: the Federal Circuit Court of Appeals, the New York Court of Appeals (where PRA lost this issue), the California Appellate Division, the New Jersey Superior Court, and the United States District Courts sitting in Colorado, Florida, Nevada, and New York. While these courts have applied different analyses, they all have the same effect: § 8117 does not apply when a non-Delaware defendant sued in a non-Delaware court can be served with process and brought within the personal jurisdiction of that court. Under those circumstances, the purpose of § 8117 is satisfied.

Panico offered to address the minority view if raised by PRA. Opening Brief at 22 n.2. PRA did not raise it. PRA did, however, cite one of the minority decisions, *CACV of Colo., LLC v. Stevens*, 248 Or. App. 624, 274 P.3d 859 (2012). There, an intermediate Oregon appellate court expressly applied a "literal interpretation" of § 8117. *Id.*, 248 Or. App. at 637, 274 P.3d at 867. As discussed in Section A, above, Delaware does not apply a literal interpretation. Moreover, *CACV* was expressly rejected by a

United States District Court which concluded *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D. Fla. 2008) and *Resurgence Fin., LLC v. Chambers*, 173 Cal. App. 4th Supp. 1, 92 Cal. Rptr. 3d 844 (2009) were better reasoned. *Izquierdo v. Easy Loans Corp.*, 2014 U.S. Dist. LEXIS 84483, 2014 WL 2803285 (D. Nev. Jun. 18, 2014) (collecting and reviewing cases).

D. Panico was Subject to Service of Process.

PRA overstated Panico's position by claiming Panico would apply § 8117 "only when a non-resident defendant is *nowhere* subject to process or jurisdiction." Appellee's Brief at 22; see, also, at 11. Under such a rule, PRA argued, the claim in *Saudi Basic* would not be tolled because "*Any* defendant—including the defendant in *Saudi Basic* itself—will always be subject to process in *some* forum… ." *Id.* Panico never posited such a preposterous proposition.

Once again, PRA missed the point. Following the rationale of the Delaware decisions, when a New Jersey court applies the Delaware statute of limitations, § 8117 authorizes tolling to protect the freshness of plaintiff's claim when the defendant cannot be summoned to court because the defendant is not amenable to service of process. When, however, the defendant can be served, the purpose of § 8117 has been met and the

plaintiff's claim will become stale by its failure to exercise reasonable diligence in serving process.

Consistent with Panico's position that Delaware courts enforce § 8117 based on its purpose (as opposed to its literal terms), when a New Jersey court applying Delaware law considers whether to toll under § 8117, the analysis should be based on whether the defendant can be summoned to respond to the New Jersey court. New Jersey courts exercise personal jurisdiction limited only by due process of law. *N.J. Court Rule* 4:4-4(b). Thus, unless a defendant hides or due process limits the court's jurisdiction, there is no tolling. Neither condition exists here.

Panico was not merely amenable to service, he was actually served in the lawsuit PRA commenced in a New Jersey state court. Accordingly, there is no basis for tolling.

Panico does not advocate the view seemingly advanced by PRA that a New Jersey court would apply § 8117 to toll unless Panico could be served in a hypothetical action commenced in a Delaware court. Indeed, none of the New Jersey decisions have ever applied Delaware law in that manner. If, however, such a view were adopted, there would be no tolling because Panico was amenable to service of process in such an action. His Agreement with PRA's predecessor was made in Delaware and, as the District Court

found, Panico consented to litigate in Delaware. Appx. 54 and 4, respectively. Thus, Panico had at least as much contact with Delaware to fall within Delaware's long-arm statute as was the contact of the non-Delaware defendant in *Brossman* who, prior to Delaware's adoption of a long arm statute, could not be served but became amenable to service upon adoption.

PRA's interpretation which tolls under these circumstances flies directly in the face of the Delaware decisions. Although PRA, as a debt collector attempting to collect a consumer debt, would have liability for damages under the Fair Debt Collection Practices Act for suing Panico anywhere but in his home court, Panico's predecessor, as the original creditor, and its in-house counsel are not governed by the Act. *See*, 15 U.S.C. § 1692a(6)(A) (excluding a creditor and its employees), 15 U.S.C. § 1692a(6)(F)(ii) (excluding those who obtained the debt *before* default), 15 U.S.C. § 1692i (venue requirements), and 15 U.S.C. § 1692k(a) (liability for damages). Thus, the original creditor could have sued Panico in Delaware and, following PRA's reading of § 8117, there would have been perpetual tolling—a result expressly rejected in *Hurwitch* when, as here, Panico can be *and was* served.

PRA argued, however, that the ambiguous legal conclusion stated in the Parties' Stipulation Nos. 15 and 16 foreclosed Panico from

demonstrating his amenability to service in a hypothetical Delaware action. Those Stipulations provided:

> 15. Plaintiff has never been amenable to service of process in Delaware.
>
> 16. Plaintiff has never been subject to personal jurisdiction in Delaware.

By their terms, the Stipulations do not mean "Plaintiff has never been amenable to service of process *outside of* Delaware," or "Plaintiff has never been subject to personal jurisdiction *outside of* Delaware." Thus, the Stipulations do not foreclose the conclusion that Plaintiff *was* amenable to service of process and to personal jurisdiction *outside of* Delaware, *i.e.*, as a non-resident of Delaware. Contrary to PRA's argument (Appellee's Brief at 21), such a reading does not render any other Stipulation superfluous.

To the extent the Stipulations are ambiguous, the summary judgment standard requires the ambiguity be reasonably construed favorable to Panico for two reasons. First, PRA is the movant for summary judgment. Second, PRA bears the burden of proof. See, Opening Brief at 27 (PRA did not dispute its burden of proof).

Therefore, based on the summary judgment standard, Panico was subject to the personal jurisdiction of the Delaware state courts and § 8117 does not toll the statute of limitations in a hypothetical Delaware action.

E. New Jersey Applies Delaware's Limitations Law.

In Appellee's Brief, PRA raised the question as to whether "Delaware law appl[ies] to PRA's underlying collection action against Panico." PRA contended the Court can apply New Jersey law and not Delaware law as "an alternate basis" to affirm. Appellee's Brief at 29 n.12; see, also, 11 at n.2. PRA had not previously raised this issue.

Rather, PRA waived the issue in the District Court. In the Introduction to its Summary Judgment Motion Brief filed in the District Court, at 1, PRA unequivocally stated, "For purposes of this motion only, PRA will presume that Plaintiff's allegation as to the applicable state law [*i.e.*, Delaware] and statute of limitation [*i.e.*, 10 Del.C. § 8106] is correct." Supplemental Appendix 1.

Panico only superficially discussed the conflict rules as background to explain why the issue here concerned Delaware law. Opening Brief at 26. PRA's improper raising of this issue after waiving it in the District Court requires of more detailed discussion.

PRA contended there must be a procedural-substantive distinction when considering the importation of foreign statutes of limitation. Appellee's Brief at 11 n.2, 28 n.11, 31 n.13. Not so. This Court repeatedly and clearly recognized that, since *Heavner v. Uniroyal, Inc.*, 63 N.J. 130

(1973), the statute of limitations follows the conflicts decision as to the law governing the merits without regard to whether the statute of limitations is procedural or substantive. In *Henry v. Richardson-Merrell, Inc.*, 508 F.2d 28, 32 n.9 (3d Cir. 1975), the Court stated, after *Heavner* "[t]he decision to borrow or not must be made irrespective of whether the foreign limitation period is considered substantive or procedural." *See, Schum v. Bailey*, 578 F.2d 493, 495 (3d Cir. 1978); *Warriner v. Stanton*, 475 F.3d 497, 500 n.2 (3d Cir. 2007); and, *Jackson v. Midland Funding, LLC*, 754 F. Supp. 2d 711, 715 (D.N.J. 2010), *aff'd*, 468 F. Appx. 123 (3d Cir. 2012). Furthermore, the Supreme Court recognized *Heavner* as a case where the substantive-procedural distinction was abandoned for conflict of laws purposes. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988).

Thus, no basis exists for PRA's arguments based on a procedural-substantive distinction when it comes to New Jersey's conflicts regime applying foreign statutes of limitation.

The three cases relied on by PRA are patently inapposite.

PRA, Appellee's Brief 28 n.11, included a quote from *Mack Trucks Inc v Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18, 20 (3d Cir. 1966) but this counsel could not find the purported quote anywhere in the Court's decision. Moreover, the decision involved the application of

Pennsylvania's conflicts rules, not New Jersey's.

Next, PRA cited *Gatto v Meridian Medical Assoc. Inc.*, 1989 WL 23125, 1989 U.S. Dist. LEXIS 1672 (D.N.J.), *aff'd*, 882 F.2d 840 (3d Cir. 1989). Like *Mack Trucks*, *Gatto* did not involve New Jersey's conflicts of law rules. Instead, it involved a federal securities claim applying this Court's decision holding that federal law—and not state law—determines the statute of limitations. The case did not involve issues of New Jersey's conflicts law.

The last case cited by PRA was *Crowley v Chait*, 2004 WL 5434953, 2004 U.S.Dist. LEXIS 27238 (D.N.J. Aug. 25, 2004). Unlike the instant case where there is an enforceable choice-of-law contract, *Crowley* involved business torts and the District Court properly applied *Heavner*'s factor-balancing test to decide the choice-of-law question.

The import of *Heavner* in the present matter is its mandate to apply Delaware's statute of limitations when Delaware law applies to the merits of PRA's claim.

PRA confused a different issue resolved by *Heavner*. Appellee's Brief at 28 n.12. *Heavner* articulated factors to be balanced when deciding whether to apply a foreign statute of limitations to a *tort case* brought in New Jersey with multi-state features. PRA argued that the Court should engage in the same factor balancing analysis here. Factor balancing,

however, does not come into play when, as is the case here, there is an enforceable choice-of-law contract.

> New Jersey … follows the principles of the *Restatement (Second) of Conflict of Laws* §§ 6, 145, 187–88 (1971), and applies the most significant relationship test in tort and contract cases, ***unless*** the agreement underlying a contractual dispute includes a choice of law provision, in which case the courts follow the parties' choice so long as there is a substantial relationship between the state selected and the contract.

Schmidt v. Celgene Corp., 425 N.J. Super. 600, 606 (App. Div. 2012) (emphasis added); and, *see*, *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 130 N.J. 324, 341 (1992). Here, there is such an agreement and, consequently, factor balancing has no place.

F. Avery Cannot Be Expanded Beyond its Expressed Limits.

PRA spent much time discussing *Avery v. First Resolution Mgmt. Corp.*, 568 F.3d 1018 (9th Cir. 2009). Appellee's Brief at 12, 27, 28, 29, 30, 33. PRA argued that *Avery* is "particularly instructive." *Id.* at 29. It is not and the Ninth Circuit took pains to delineate the decision's narrow scope.

By way of background, PRA conceded that courts construing a New Hampshire tolling statute have looked to decisions construing § 8117 due to the statutes' similarity. Appellee's Brief at 29. Indeed, two of the decisions involved PRA and, ruling against PRA, rejected the very arguments PRA

advances here. *Diaz v. Portfolio Recovery Associates, LLC*, 2012 WL 661456, 2012 U.S. Dist. LEXIS 25802 (E.D.N.Y. Feb. 28, 2012) *report and recommendation adopted*, 2012 WL 1882976 (E.D.N.Y. May 24, 2012), and *Gaisser v. Portfolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273 (S.D. Fla. 2008).

In *Avery*, the plaintiff argued that "Oregon's choice of law regime converts the foreign jurisdiction's substantive law into Oregon's for the purposes of that lawsuit." *Avery*, at 1022. Based on that argument, the plaintiff would "transform that foreign substantive law into domestic law." *Avery*, at 1023. Hence, plaintiff argued Oregon's conflicts of law rules would construe the word "state" in New Hampshire's tolling statute to mean Oregon.

While decisions interpreting § 8117 have been used in other cases to construe New Hampshire's law (but no decisions involving New Hampshire's law have been used to construe § 8117), the Ninth Circuit did not do so in *Avery*. Instead, the Ninth Circuit rejected the premise of plaintiff's argument because it was "not borne out by the plain language of the *Oregon* statutes." *Avery*, at 1022 (emphasis added). The Ninth Circuit only decided how Oregon's conflicts rule would import New Hampshire law. PRA ignored the court's limited focus and completely overlooked the

Opinion's first footnote detailing the narrow scope of the decision. Consequently, the full text of that two-paragraph footnote warrants quotation:

> Several advocacy groups filed a brief as amici curiae in support of Avery's petition for rehearing en banc, suggesting that our opinion overlooks the ramifications of allowing perpetual tolling against out-of-state debtors under New Hampshire's tolling provision. We do not purport to construe definitively the scope of New Hampshire's tolling provision or to determine conclusively its effect when lawsuits are filed outside New Hampshire courts. Rather, we address only the narrow statutory argument Avery has made: that ***under Oregon's choice of law regime***, "the state" referred to in N.H. REV. STAT. ANN. § 508:9 is Oregon when a lawsuit is filed in Oregon but New Hampshire law otherwise governs.
>
> ***We express no opinion*** on arguments Avery did not raise, including, without limitation: (1) whether New Hampshire courts would construe N.H. REV. STAT. ANN. § 508:9 to allow perpetual tolling against an out-of-state defendant on a cause of action that could not, as a matter of law, be brought in New Hampshire courts, see 15 U.S.C. § 1692i (requiring debt collectors to bring action on debt against a consumer in the judicial district where the consumer signed a contract or where the consumer resides); or (2) whether a credit card agreement would be unconscionable under New Hampshire law if it led to perpetual tolling when the debt collector was free to sue the card holder at any time in the card holder's home jurisdiction.

Avery, 568 F.3d at 1023 (emphasis added).

Thus, *Avery* had nothing to do with *New Jersey's* conflicts rules, Delaware's tolling statute, or how a *New Jersey* court would apply Delaware law. Instead, it was expressly limited to how an Oregon court would apply Oregon law to interpret a New Hampshire statute. There is nothing instructive about the decision.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Andrew Panico, respectfully requests that the District Court's entry of summary judgment be reversed.

Respectfully submitted,

s/Philip D. Stern

Dated: January 25, 2017

Philip D. Stern
philip@sternthomasson.com

s/Andrew T. Thomasson

Dated: January 25, 2017

Andrew T. Thomasson
andrew@sternthomasson.com

Attorneys for Plaintiff-Appellant, Andrew Panico

COMBINED CERTIFICATIONS

A. Bar Membership

I, Philip D. Stern, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/Philip D. Stern
Dated: January 25, 2017 Philip D. Stern

I, Andrew T. Thomasson, hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

s/Andrew T. Thomasson
Dated: January 25, 2017 Andrew T. Thomasson

B. Certificate of Compliance (Form 6)

The undersigned counsel of record for Plaintiff-Appellant hereby certifies:

(1) This document complies with the word limit of the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): 4,348 words.

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s/Philip D. Stern
Dated: January 25, 2017 Philip D. Stern

C. Identical Compliance of Briefs

I, Philip D. Stern, hereby certify that the text of the E-Brief and Hard Copies of the foregoing REPLY BRIEF OF APPELLANT are identical.

s/Philip D. Stern
Dated: January 25, 2017 Philip D. Stern

D. Virus Check

I, Philip D. Stern, hereby certify that a virus check was performed on the PDF file of the foregoing REPLY BRIEF OF APPELLANT prior to electronic filing.

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Philip D. Stern

Dated: January 25, 2017

E. Certificate of Service

I, Philip D. Stern, do hereby certify that a true and accurate copy of the foregoing Reply Brief of Appellant was served upon all counsel via the Court's CM/ECF system on January 25, 2015, upon the following counsel as follows:

TROUTMAN SANDERS LLP
Attorneys for Defendant-Appellee
875 Third Avenue
New York, New York 10022
(212) 704-6227

s/Philip D. Stern
Philip D. Stern

Dated: January 25, 2017