

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

Appeal No. 39244-5-II

**IN THE COURT OF APPEALS FOR THE  
STATE OF WASHINGTON, DIVISION II**

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UNIFUND CCR PARTNERS

Respondent

V.

PAUL B. SUNDE

Appellant

APPEAL FROM COWLITZ CASE NO. 06-2-01721-9

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**RESPONDENT'S REPLY BRIEF TO  
APPELLANT'S RESPONSE BRIEF TO  
CROSS APPEAL**

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**REPLY TO RESPONSE TO CROSS APPEAL**

**A. Delaware's Statute Of Limitation And Its Tolling Statute  
Do Not Bar The Chase Claim**

Respondent in its cross appeal contends that the trial court incorrectly ruled that the Delaware three year Statute of Limitations barred collection of the Chase Bank account holding that the Delaware tolling statute did not apply to the case.

Here Appellant Sunde did not file any affidavits in opposition to Respondent's Motion for the Summary Judgment and in his memos and oral argument in opposition to the summary judgment motion admitted that Sunde had the US Bank account and the Chase account and relied on the Chase credit card agreement to support his argument that the choice of law provision in that Chase credit card agreement and the Delaware statute of limitations barred the claim.

Appellant Sunde cites multiple cases from other jurisdictions that have found that the Delaware tolling statute should not apply to cases filed outside Delaware because that tolling statute would effectively allow the statute of limitations to never run on cases involving parties who were never residents of Delaware and who could not be sued in Delaware. He also cited to a case that the New Hampshire tolling statute did not apply to cases filed outside New Hampshire. However none of the other

jurisdictions have the same statutory Choice of Law scheme as Washington which addresses the exact factual situation in this case resulting in the application of Washington's statute of limitations.

Here the Chase credit card agreement had a forum selection clause that stated that the agreement was governed by the laws of the United States and the State of Delaware law. Delaware has a three-year statute of limitations for actions on contracts but Delaware also has a tolling provision that also must be applied in computing the statute of limitations. See, RCW 4.18.030

Delaware's Tolling Statute, 10 Del. C. § 8117 provides:

**§ 8117. Defendant's absence from State.**

If at the time when a cause of action accrues against any person, such person is out of the State, the action may be commenced, within the time limited therefore in this chapter, after such person comes into the State in such manner that by reasonable diligence, such person may be served with process. If, after a cause of action shall have accrued against any person, such person departs from and resides or remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. (Code 1852, § 2751; 20 Del. Laws, c. 594; 25 Del. Laws, c. 234; Code 1915, § 4680; Code 1935, § 5138; 10 Del. C. 1953, § 8116; 70 Del. Laws, c. 186, § 1.)

The Delaware tolling statute by its express terms does not limit the application of the tolling statute to only those persons who have to be sued

in Delaware Courts. The statute in fact expressly states that the statute applies to “any” person. 10 Del. C. § 8117 provides in relevant part:

“ . . . If at the time when a cause of action accrues against **any** person, such person is out of state, . . .” and “ . . .”If, after a cause of action shall have accrued against **any** person, such person, remains out of the State, the time of such person's absence until such person shall have returned into the State in the manner provided in this section, shall not be taken as any part of the time limited for the commencement of the action. . . .” (emphasis ours)

The recent Delaware Supreme Court stated in Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc., 866 A. 2d 1, 2005 Del LEXIS 41 (Del. Sup. Ct., 2005) at pages 38-40 states:

“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. n36 In those circumstances, the statute of limitations is tolled until the defendant becomes amenable to service of process. n37

n36 *Hurwitch v. Adams*, 52 Del. 247, 155 A.2d 591, 594, 2 Storey 247 (Del. 1959).

n37 *Brossman v. FDIC*, 510 A.2d 471, 472-73 (Del. 1986) (statute of limitations tolled until the effective date of the Delaware long-arm statute because prior to that time the nonresident defendant was not amenable to service of process).

Here, SABIC was "out of the state" and service of process upon SABIC could not have been accomplished in Delaware. Because SABIC lacked significant contacts with Delaware before it filed this lawsuit, the Delaware courts would have lacked personal jurisdiction over SABIC. Therefore, ExxonMobil could not have [\*\*39] obtained

personal jurisdiction over SABIC in Delaware. Only by voluntarily initiating this action in Delaware as plaintiff did SABIC "come[] into the State" and thereby become amenable to service of process. n38 [\*19] Thus, even if the three-year Delaware statute of limitations were found applicable to ExxonMobil's claims, the running of that statute was tolled until the date that SABIC filed its Superior Court action. n39

n38 Shortly after SABIC filed this action, ExxonMobil commenced an action in the New Jersey federal court, raising claims similar to its counterclaims here. SABIC immediately sought to dismiss that action, claiming that it was immune from suit under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et. seq.* ("FSIA") and could not be sued anywhere in the United States. The United States District Court for the District of New Jersey held that SABIC's filing suit in New Jersey waived any FSIA immunity as to the overcharge claims in New Jersey and the Delaware courts. *Saudi Basic Indus. Corp., 194 F. Supp. 2d at 401-03, vacated in part and remanded on other grounds, 364 F.3d 102 (3rd Cir. 2004)* (holding that the *Rooker-Feldman* doctrine deprived the federal court of subject matter jurisdiction over suit by ExxonMobil once final judgment on the identical issue was granted by the Delaware Superior Court.), *cert. granted, 160 L. Ed. 2d 221, 125 S. Ct. 310 (2004)*.

[\*\*40]

n39 It is undisputed that ExxonMobil asserted their overcharge counterclaims well within the three-year period from the filing of SABIC's complaint.

We conclude, for these reasons, that the Superior Court did not err by rejecting SABIC's defense (and claim-in-chief) that ExxonMobil's counterclaims are barred by the statute of limitations."

In Saudi Basic Industries Corporation v. Mobil Yanbu Petrochemical Company and Exxon Chemical Arabia, Inc. *supra* despite the fact that under Saudi Arabian law a 20 year statute of limitation

applied and even though action could have been filed in a Saudi Arabian court and the Delaware Court had no jurisdiction over the matter until SABIC voluntarily filed its suit in Delaware, the court still found that the Delaware tolling statute applied. This is the same situation that we have in the current appeal.

Appellant Sunde quotes dicta from the Hurwitch v. Adams, 155 A. 2d 591, 594 (Del. 1959) decisions that the application of the tolling statute to non residents would abolish the defense of statute of limitations involving non residents. This comment was made by a Delaware Court in 1959. The Delaware legislature has had over 50 years since Hurwitch was decided to amend the statute to address the effect of the tolling statute on non residents. The fact that the Legislature has not taken legislative action for the last 50 years to address this issue is evidence that the Delaware Legislature intended to use the language of the statute and that the tolling statute applied to “any person” not just Delaware residents. To adopt the interpretation suggested by Appellant would be to permit the Delaware Statute of Limitation to potentially be tolled forever on Delaware residents’ claims but not applicable to claims involving non residents. The Court should find that by use of the words “any person” the court intended that the tolling statute applies equally to claims involving residents and non residents and to the extent it creates an unfair situation to parties in the

current litigation, RCW 4.18.040 would apply Washington's statute of limitation period for written agreements to the Chase claim.

Appellant Sunde in responding to the cross appeal has cited no cases decided by Delaware Courts that have dealt with the application of the tolling statute on out of state residents who cannot be sued in Delaware. The Delaware tolling statute on its face is not ambiguous and by its express terms applies to any person and more importantly to any person who is out of the State of Delaware when the cause of action arises and tolls the running of the statute of limitation until that person returns to the state which is the same potential impact on claims involving Delaware residents.

None of the Delaware cases cited by Appellant Sunde limit this express language of the Delaware tolling statute to only Delaware residents or to a factual situation as in the current case. The case of Hurwitch v. Adams, supra cited by Appellant Sunde was a Delaware automobile accident case that did not apply the Delaware Tolling statute because the Defendant was subject to service through the Delaware Secretary of State.

The case of Brossman v. FDIC, 510 A.2d 471, 472-73 (Del. 1986) involved an out of state resident who was not subject to service under Delaware law until Delaware enacted its long arm statute. By implication

the Court acknowledges that the tolling statute could have continued indefinitely but for the enactment of the long arm statute.

In the case of John J. Molitor v. Feinberg, 258 A 2d 295 (1969) the Court rejected the application of the Delaware tolling statute on an out of state Defendant who had an agent in the State of Delaware and was thus subject to service of process at all times in the State of Delaware.

Appellant Sunde cites cases from Florida, California & New York McCorriston v. L.W.T., Inc., 536 F. Supp. 2d 1268 (M.D. Fla. 2008), Resurgence Financial, LLC v. Chambers, 173 Cal. App 4<sup>th</sup> Supp 1, 92 Cal. Rptr. 3<sup>rd</sup> 844 (2009), Portfolio Recovery Associates LLC v. King, 14 N.Y.3d 410, 927 N.E.2d 1059, 901 N.Y.S.2d 575 (2010) that that have found that the Delaware tolling statute does not apply to Defendants sued outside the State of Delaware because those courts interpreted that Delaware Tolling statute could have the effect that the statute of limitations would never run on some claims. These Courts concluded that the Delaware Legislature never intended that type of a result.

However none of these opinions involve states that have the same choice of law provision as in Washington, particularly RCW 4.18.040. A Washington Court acknowledged in Hein v. Taco Bell, Inc., 60 Wn App 325, 332, 803 P. 2<sup>nd</sup> 329 (1991) that Washington is one of only five (5) states which has adopted the Uniform Conflicts of Laws-Limitations.

Neither Florida nor California nor New York have the same conflicts of law provisions as Washington and therefore the court's interpretation of the Delaware tolling statute cited by Appellant Sunde should be rejected and not followed. Instead the Delaware cases interpreting its own state's statutes and the Federal District Court's and the 9<sup>th</sup> Circuit Court of Appeals analysis in Avery v. First Resolution Management Corporation, 2007 WL 1560653 at \*4-5 (D. OR) Opinion Amended and Superseded on Denial of Rehearing en banc 561 F. 3d 998, affirmed 568 F.3d 1018 (2009) Cert Denied 130 S. Ct 554, 78 USLW 3113, 78 USLW 3265, 78 USLW 3269 (2009) analyzing New Hampshire's tolling statute which is similar to Delaware's tolling statute and its effect on a suit filed in Oregon which has a conflicts of laws provision similar to RCW 4.18.040 should be followed.

Here the Respondent was required under state and Federal law to sue Appellant Sunde in the State of Washington because that is where he resided. Washington's conflict of laws provisions deals with exactly the situation in this case where the Delaware tolling statute might create an unfair burden on litigants in defending against actions governed by the Delaware tolling statute.

**B. Washington's Choice Of Law Provisions Permit The Chase Claim To Be Filed Within (6) Six Years Of The Date Of The Last Payment**

Washington has adopted the Uniform Conflicts of Laws-Limitations Act. It provides that if a claim is substantively based upon the laws of another state, the limitations period of that state applies. RCW 4.18.020(1)(a). RCW 4.18.020 provides:

RCW 4.18.020-Conflicts of Laws-Limitation Periods

(1) Except as provided by RCW 4.18.040, if a claim is substantively based:

(a) Upon the law of one other state, the limitation period of that state applies; or

(b) Upon the law of more than one state, the limitation period of one of those states, chosen by the law of conflict of laws of this state, applies. . . .

The Uniform Act also provides that if a statute of limitations of another state applies, then the other state's rules of law governing tolling and accrual apply in computing the statute:

RCW 4.18.030-Rules of Law Applicable to Computation of Limitation Period

If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply.

Washington statute also has an “escape clause” under RCW 4.18.040 which is similar to the Oregon “escape clause” under ORS § 12.450 referred to in Avery. RCW 4.18.040 provides:

RCW 4.18.040-Application of Limitation Period of Other State-Unfairness

If the court determines that the limitation period of another state applicable under RCW 4.18.020 and 4.18.030 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against, the claim, the limitation period of this state applies.

Here the Washington statutory scheme regarding Conflict of Laws addresses this exact type of potentially unfair burden addressed in the opinions cited by Appellant Sunde that might be created when applying the statutes of limitations and tolling provisions of Delaware. Under RCW 4.18.040 because the Delaware tolling provision could potentially run indefinitely and thus impose an unfair burden on the Appellant in defending against an action in Washington, Washington’s 6 year statutes of limitations for written contracts would apply by the express language of RCW 4.18.040.

Here the credit card statements attached to the Declaration, disclose that a payment was made on 1/4/2003 CP 245. Suit was filed on September 5, 2006 CP 1 and publication was commenced on April 20, 2007. CP 22 As a result, this action was commenced within the applicable

Washington 6-year statute of limitations. RCW 4.16.040. see Avery v. First Resolution Management Corporation, supra in which both a Federal District Court and the 9<sup>th</sup> Circuit Court of Appeals followed this approach when analyzing the New Hampshire tolling statute and its effect after the New Hampshire 3-year statute of limitations had run, on a suit filed in the State of Oregon against an Oregon resident who had never lived in New Hampshire. Oregon is one of the other states that have a similar choice of law provision and a similar escape clause as is present in Washington law.

The Federal District Court in Avery v. First Resolution Management Corporation, Civil No. 06-1812-HA, 2007 WL 1560653 (D. Or, 2007) specifically addressed the issue of the New Hampshire tolling statute and its application to Oregon's choice of law provisions in reaching its opinion. The Federal District Court found as a matter of law that although the New Hampshire tolling applied, under Oregon's choice of law provisions and the "escape clause", the claim was not barred because the credit card collection case was filed within Oregon's 6 year statute of limitation for actions on written contracts. See, O.R.S. § 12.080. The Federal District Court in deciding the statute of limitation issue stated:

. . . The Attorney Defendants move for partial summary judgment dismissing plaintiff's FDCPA claims to the extent they are based on an alleged attempt to collect a time-barred debt. They assert that, as a matter of law, the statute of limitations has not expired on the underlying debt.

Plaintiff opposes this motion and moves for summary judgment on the same issue, arguing that the underlying debt is time-barred as a matter of law.

At issue initially is determining which statute of limitations applies to the underlying debt. A federal court sitting in diversity must apply the choice of law rules of the forum state to determine which state's law applies. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir.1999). Under Oregon law, “if a claim is substantively based ... [u]pon the law of one other state, the limitation period of that state applies.” O.R.S. 12.430(a).

Because the Agreement is governed by the substantive law of New Hampshire, New Hampshire's three-year statute of limitations applies to the underlying debt. *See* N.H.Rev.Stat. Ann. § 508:4; *see also* A & B Lumber Co. v. Vrusho, 871 A.2d 64, 66 (N.H.2005) (citations omitted) (“Under New Hampshire law, a contract claim must be brought within three years of the contract's breach”).

Plaintiff's last payment was credited to the Account on November 5, 2001. Thus, unless tolled, the statute of limitations for the underlying debt expired on November 5, 2004.

However, the Attorney Defendants argue that New Hampshire's statute of limitations has been tolled by plaintiff's absence from that state. It is true that if New Hampshire's statute of limitations applies to the underlying debt, then that state's tolling rules also apply. *See* O.R.S. 12.440 (“If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statutes and other rules of law governing conflict of laws do not apply”).

Plaintiff concedes that she did not reside in New Hampshire before, during, or after the cause of action accrued for the underlying debt. Pl.'s Mem. Supp. Partial

Summ. J. at 15. Under New Hampshire law, “[i]f the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action.” N. H.Rev.Stat. Ann. § 508:9. Plaintiff points to no basis through which process could have been served on her in New Hampshire. Accordingly, to the extent New Hampshire's three-year statute of limitations applies to the underlying debt, it never ran in favor of plaintiff. *See Gagnon v. Croft Mfg. & Rental Co.*, 235 A.2d 522, 524 (N.H.1967) (time that a defendant corporation was absent from the state is excluded in computing the time limit for bringing the action); *Atwood v. Bursch*, 219 A.2d 285, 287 (N.H.1966) (citations omitted) (“The general statute of limitations ... runs only in favor of those who are within the state.”); *Bolduc v. Richards*, 142 A.2d 156, 158 (N.H.1958) (citation and quotations omitted) (tolling the statute of limitations because of the debtor's absence from the state requires that process cannot be served upon the debtor); *Paine v. Drew*, 44 N.H. 306 (N.H.) (1862) (“tolling provision applies to defendants who have never resided in the State, as well as to those who have resided in it and have removed from it”).

\*5 The Attorney Defendants acknowledge that New Hampshire's tolling provision, which would preclude the statute of limitations from ever running on the underlying debt, may impose an unfair burden on plaintiff. Mem. Supp. Defs.' Mot. for Partial Summ. J. at 4. Accordingly, Oregon's limitation provisions apply:

If the court determines that the limitation period of another state applicable under ORS 12.430 and 12.440 is substantially different from the limitation period of this state and has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim, the limitation period of this state applies.

O.R.S. 12.450; *see also Fields v. Legacy Health Sys.*, 413 F.3d 943, 954 (9th Cir.2005) (citation omitted) (describing

identical Washington provision as an “ ‘escape clause,’ allowing a court to evaluate the disparate effect of a foreign statute of limitations and choose to apply a local limitations period to avoid unfairness”).

However, this provision fails to save plaintiff because, as plaintiff conceded at oral argument, under Oregon law her underlying debt is not time-barred and the Underlying Lawsuit was timely. Oregon law provides a six-year statute of limitations for breach of contract claims. *See* O.R.S. 12.090. The cause of action for the underlying debt accrued on the day that plaintiff made her last payment, which was November 5, 2001. *See* O.R.S. 12.450 (cause of action on debt shall be deemed to have accrued from the time of the last charge or payment proved in the account). Accordingly, under Oregon law the statute of limitations on the underlying debt will not expire until November 5, 2007, and the Underlying Lawsuit was timely.

In sum, this court finds as a matter of law that the underlying debt is not time-barred, pursuant to New Hampshire's tolling provisions and, alternatively, the application of Oregon's six-year statute of limitations period. As such, summary judgment is warranted in favor of defendants on plaintiff's FDCPA claims to the extent they depend upon an attempt to collect an allegedly time-barred debt.

On appeal the 9<sup>th</sup> Circuit Court of Appeals did not address the identical issue decided by the District Court. However the Court did not find that the Federal District Court's decision should be reversed and affirmed the Federal District Court. The 9<sup>th</sup> Circuit Court of Appeals Court in Avery v. First Resolution Management Corporation, *supra* stated:

Both parties agree that under the terms of the original agreement between Avery and Providian National Bank, New Hampshire law applies to this dispute. Under Oregon

law, applied by the district court sitting in diversity, if a claim is based upon the law of another state, the limitations period of that state applies, as do the laws of that state governing tolling and accrual. OR. REV. STAT. §§ 12.430(1)(a), 12.440. Accordingly, because New Hampshire law covers First Resolution's claim against Avery, New Hampshire law also controls *\*1022* the applicable statute of limitations, as well as tolling and accrual provisions.

[5] The New Hampshire statute of limitations for an action on a credit card is three years. N.H. REV. STAT. ANN. § 508:4. However, this statutory period is tolled if a defendant is absent from and residing out of the state at the time the cause of action accrued. Id. § 508:9 (“If the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action.”). Avery contends that “the state” referred to in the New Hampshire statute should be interpreted to mean “the forum state,” in this case, Oregon, and not New Hampshire.

All available case law interpreting this statute suggests that its intent and purpose is to toll New Hampshire's statute of limitations when the defendant is not available to be served by a plaintiff suing in the state of New Hampshire. *Bolduc v. Richards*, 101 N.H. 303, 142 A.2d 156, 158 (N.H.1958) (holding that the statute of limitations is only tolled when a defendant could not otherwise be served in New Hampshire due to lack of personal jurisdiction); *Quarles v. Bickford*, 64 N.H. 425, 13 A. 642, 643 (1887) (same); see also *Atwood v. Bursch*, 107 N.H. 189, 219 A.2d 285, 287 (1966) (holding that the statute of limitations runs only in favor of those who are within the state).

[6] Although the analysis in this case is otherwise simple enough to be addressed in an unpublished opinion, we address this issue to hold that, under OR. REV. STAT. §§ 12.430 and 12.440, when parties lawfully adopt a state's

law for the purposes of resolving disputes arising from an agreement, they adopt that state's statute of limitations provision and tolling provision *in toto*. Avery agreed to abide by New Hampshire's statute of limitations as well as its tolling provisions, which have consistently been interpreted by New Hampshire courts to apply when defendants are absent from New Hampshire, not from any other state. . . .

[7] Avery's theory rests on the premise that Oregon's choice of law regime converts the foreign jurisdiction's substantive law into Oregon's for the purposes of that lawsuit. That premise is not borne out by the plain language of the Oregon statutes. *See* OR. REV. STAT. § 12.440 (providing “the other state's statutes and other rules of law governing tolling and accrual **\*1023** apply”); OR. REV. STAT. § 81.120 (providing “the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen”). Taken together, these provisions simply require Oregon courts to apply the substantive law of another jurisdiction *as a court of the foreign jurisdiction would*, not to transform that foreign substantive law into domestic law for a particular case. Avery's suggested gloss of New Hampshire's tolling statute in light of Oregon's conflict of law regime is wholly unwarranted; it seeks to take advantage of the portions of New Hampshire law that are favorable to Avery and ignore the balance.

Plaintiff contests the constitutionality of the New Hampshire tolling statute's application to her, citing *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir.1990), which in turn relied on *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988). We need not decide whether the New Hampshire tolling statute's application to Avery is unconstitutional because, even if it were, Oregon law provides that Oregon's limitation period applies if the limitation period of another state that otherwise would apply imposes an unfair burden in defending against the claim. OR. REV. STAT. § 12.450. The applicable Oregon statute of limitations for contractual claims is six years, *id.*

§ 12.080, and the action against Avery was filed within six years.

Because Avery was absent from New Hampshire at all relevant times, the statute of limitations on the claim against her was tolled under New Hampshire law and had not run by the time the Attorneys brought suit against her in Oregon. Even if the New Hampshire tolling statute were unconstitutional, OR. REV. STAT. § 12.450 would replace New Hampshire's statute of limitations with Oregon's six-year limitations period, under which the suit was timely. Accordingly, the district court did not err in granting summary judgment to the Attorneys on the claim that they had violated the FDCPA by attempting to collect on a time-barred debt. The district court was also correct in denying Avery's claim for summary judgment on this issue.<sup>FN2</sup>

Appellant Sunde cites a Florida case, Gaisser v. Portfolio Recovery Associates LLC, 571 F. Supp. 2d 1273 (S.D. Fla., 2008) interpreting the tolling provision of the New Hampshire statute and an unpublished Oregon Circuit Court letter opinion in Unifund CCR Partners v. Deboer, 2009 WL 6355439 in support of his argument that Avery opinions and the Washington “escape clause” should not apply. The Florida case dealt with another state’s statutory scheme that is different than the Uniform Conflicts of Laws provisions that have been codified in both Washington and Oregon. The opinions by the District Court and the 9<sup>th</sup> Circuit Court of Appeals in Avery dealt with nearly identical facts, identical tolling provisions and identical choice of law provisions as in the present case would carry much greater weight than a letter opinion from an Oregon

Circuit Court decision. The Avery opinions should be followed and the decision of the Superior Court holding that the Delaware State of Limitations barred the Chase claim and the Delaware tolling statute did not apply should be reversed.

Here, the evidence before the trial Court by the Appellant's own statement of the facts to the trial court, was that the action by the Respondent was commenced 3 ½ years after Sunde's last payment on the Chase account. This was well within the 6 year statute of limitation under Washington law for actions on written contract express or implied. To the extent that the Delaware tolling statute might permit a claim to be tolled indefinitely, by the application of RCW 4.18.040, Washington's statute of limitations would apply to the facts in this case. Because the Chase action involves a written contract and the case was filed within 6 years of the date of last payment, the trial Court's decision on Summary Judgment on the Chase claim should be reversed and Summary Judgment granted in favor of the Respondent on the Chase claim. RCW 4.16.040.

**C. Washington's "Escape Clause" Provision Under RCW 4.18.040 Is Controlling**

Next Appellant Sunde cites Hein v. Taco Bell, Inc., *supra* as authority for why this Court should ignore the "escape clause" of RCW 4.18.040 because there is no evidence offered to the court to show that the

Delaware statute of limitation would be contrary to a fundamental policy of Washington. Appellant Sunde ignores the plain meaning of RCW 4.18.040 and the Legislature's use of "or" creating two alternate provisions that would allow application of the "escape" statute which in turn would apply Washington's statute of limitations. One provision provides an escape if the other state's statute does not allow a "fair opportunity to sue" which is the issue the Court dealt with in Hein. The second provision of the statute provides an "escape" if the other state's statute "imposes an unfair burden in defending against, the claim." This second provision would govern the current situation where the application of the Delaware statute of limitations and its tolling statute to the facts in this case could potentially toll the statute of limitations indefinitely. The Washington choice of law "escape" provisions would not permit a claim based on Delaware law to be tolled indefinitely but would require the application of Washington's statutes of limitation to the Chase claim.

**D. Washington's (6) Six Year Statute Of Limitations On Written Agreements Would Govern This Action On The Chase Credit Card Agreement**

Next Appellant Sunde contends that Washington's 3 year statute for oral agreements should apply to the facts in this case. In responding to the cross appeal Appellant Sunde argues that since there is nothing signed

by Mr. Sunde, thus there is no written agreement and the Washington's oral contract statute of limitation should apply. However Appellant Sunde conceded in his summary judgment memos and in oral argument in opposition to summary judgment that Appellant Sunde had the Chase account and then used the Chase written credit card agreement and its choice of law provision to argue at the trial level and now on appeal that the parties chose that Delaware law would apply and that Delaware's 3 year statute of limitations should apply. Appellant Sunde is now judicially estopped to argue that there is no written agreement after Appellant Sunde used the parties written credit card agreement and its choice of law provisions to support his arguments at the trial level.

Secondly Washington's 6 year statute of limitation does not require that the written agreement be signed to be governed by RCW 4.16.040 provides:

The following actions shall be commenced within six years:

(1) An action upon a contract in writing, or liability express or implied arising out of a written agreement. . . .

Finally on page four (4) of Appellant's Response Brief, Appellant states that "Delaware has a substantial relationship to the parties since Delaware is the home of either bank (Chase or US Bank) that Respondent

has alleged was the account holder.” This is not an accurate statement and is not supported as a matter of fact or by the record. The US Bank Agreement that is in evidence has an express provision that Federal & North Dakota Law governs the agreement. CP 60 & 100. Appellant’s statement should be ignored.

**E. Delaware Statute Regarding Attorney’s Fees Does Not Apply to This Action**

Appellant Sunde cites 6 Del. C. § 4344 as authority for his attorney’s fees. The chapter that 6 Del. C. § 4344 is codified under relates to the Delaware Retail Installment Agreements and Contracts and is not applicable to this case. Under the Definitions for “Retail Installment Contracts” and “Contracts”, 6 Del. C. § 4301(9), “contracts” for purpose of the statute are defined as follows:

Unless the context or subject matter otherwise requires, the definitions given in this section govern the construction of this chapter. . .

(9) "Retail installment contract" or "contract" means any contract for a retail installment sale between a buyer and seller, entered into or performed in this State, which provides for repayment in installments, whether or not such contract contains a title retention provision, and in which a time price differential is computed upon and added to the unpaid balance at the time of sale or where no time price differential is added but the goods or services are available at a lesser price if paid by cash. When taken or given in connection with a retail installment sale, the term includes but is not limited to a chattel mortgage, a conditional sales contract and a contract for the bailment or leasing of goods

by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their value and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner of the goods upon full compliance with the terms of the contract.

The Chase credit card agreement is neither a Retail Installment Contract nor a Contract as defined by the chapter that 6 Del. C. § 4344 specifically applies to and therefore is not a basis to award attorneys fees under Delaware law.

Appellant Sunde also argues that Washington's statute on reciprocal contractual attorney's fees authorizes an award if they prevail on the Chase issue. However Appellant Sunde has consistently argued that the express provisions of the Chase credit card agreement require the agreement to be governed by Delaware law and he has cited no Washington authority to support his argument that Delaware law should apply on the statute of limitations issue but Washington law should apply to any award of attorney's fees. The Delaware statute on attorney's fees for Retail Installment Contracts cited by Appellant as authority for an award of attorney's fees does not apply to this case. Because of his argument that Delaware law should apply to the Chase case because of the choice of law provision in the written credit card agreement, Appellant is judicially estopped to argue now that the written agreement and the

Delaware Choice of Law Provision should be ignored and Washington law should apply to any potential award of attorney fees.

### **CONCLUSION**

Here the Washington statutory scheme under RCW chapter 4.18 regarding Conflict of Laws addresses this exact type of potentially unfair burden addressed in the opinions cited by Appellant Sunde that might be created when applying the statutes of limitations and tolling provisions of Delaware. Under RCW 4.18.040 because the Delaware tolling provision could potentially run indefinitely and thus impose an unfair burden on the Appellant in defending against an action in Washington, Washington's 6 year statutes of limitations for written contracts would apply. RCW 4.16.040 & RCW 4.18.040.

Because it was undisputed that the Chase claim was filed within 6 years of the date of last payment, the decision of the trial court denying Summary Judgment on the grounds that the action was not tolled under Delaware law should be reversed. The provisions of RCW 4.18.040 should be applied and Washington's 6 year statute of limitations applied to the facts in this case. This Court should reverse the Summary Judgment decision of the trial court and grant Summary Judgment in favor of Respondent on the Chase claim.

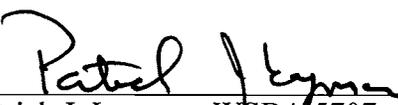
Dated this 21 day of October, 2010

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