STATE OF VERMONT
ORANGE COUNTY

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| UNIFUND CCR PARTNERS | ) | |
| | ) | Orange Superior Court |
| v. | ) | Docket No. 158-7-09 Oecv |
| | ) | |
| ALFRED H. JENKINS | ) | |

Decision Re: Defendant's Motion to Dismiss

This credit card collection matter is before the court on defendant's motion to dismiss. Plaintiff is represented by Alan Bjerke. Defendant is represented by Devon Green. Counsel presented oral argument on November 9, 2009.

For purposes of ruling on this motion only, the court takes the following facts as set forth in the complaint as not being in dispute:

Defendant Alfred Jenkins entered into two credit card accounts. Both cardmember agreements specified that the accounts would be governed by Delaware law and federal law. Mr. Jenkins defaulted on both accounts in March 2006.

The complaint was filed in July 2009. There is every indication the complaint was not timely filed under Delaware law because actions to recover a debt in that state must be filed within three years of the time the cause of action accrued.[1] 10 Del. C. § 8106.

Under the Vermont statute of limitations applicable to civil actions, however, the complaint was timely filed, because civil actions may be filed within six years of the time the cause of action accrued. 12 V.S.A. § 511. The first question is whether Delaware law or Vermont law provides the relevant statute of limitations

Vermont courts generally resolve choice-of-law problems by applying the principles set forth in the Restatement (Second) of Conflict of Laws. *McKinnon v. F.H. Morgan & Co.*, 170 Vt. 422, 423–24 (2000); *Amiot v. Ames*, 166 Vt. 288, 291–92 (1997); *Pioneer Credit Corp. v. Carden*, 127 Vt. 229, 233 (1968). There are different rules governing the law to be applied depending upon whether the claim sounds in tort or contract. In contract cases, Vermont courts generally look to determine whether the parties themselves have chosen the law to be applied, and if they have, Vermont courts will give effect to that choice. Restatement (Second) of Conflict of Laws §§ 186–87.

[1] Plaintiff reserves argument as to whether, if Delaware's statute of limitations applies, that staute was tolled due to defendant's absence from the state. For reasons outlined below this court does not reach that issue.

Even when parties have chosen the substantive law of another state, however, Vermont courts still apply local law when determining procedural issues prescribing how the litigation shall be conducted, such as rules regarding evidence and pleading requirements. See, e.g., *Wursthaus, Inc. v. Cerreta*, 149 Vt. 54, 55 n.* (1987) (explaining that forum states apply their own laws when determining issues such as whether setoff may be pleaded as affirmative defenses or rather must be asserted as a counterclaim).

Vermont law characterizes the statute of limitations as a procedural issue, and therefore the general rule is that "[w]hen a cause of action is brought in Vermont, Vermont law determines the accrual date and the limitations period." *Marine Midland Bank v. Bicknell*, 2004 VT 25, ¶ 7, 176 Vt. 389; *Jacques v. Jacques*, 128 Vt. 140, 141–42 (1969). The following passage is the most recent statement of Vermont law on this issue:

> Thus, a cause of action accrued in a foreign jurisdiction cannot be maintained after the time limit imposed by the Vermont statute for the same kind of action has expired. *Conversely, an action timely brought in Vermont can be maintained here even if time-barred in the jurisdiction where the action arose*. The only exception to this rule occurs when a foreign statute creates a new right of action and prescribes a specific limitation period. That is not the case here, however. An action upon a judgment is a well recognized common law action.

*Bicknell*, 2004 VT 25, ¶ 7 (citing *Jacques*, 128 Vt. at 141–42) (emphasis added).

Accordingly, existing Vermont law establishes that an action may be brought in Vermont even if time-barred in the action where the jurisdiction arose. The exception referenced by *Bicknell* and *Jacques* does not apply here because an action upon a debt or an action for breach of contract (however characterized) is a common-law action rather than a purely statutory cause of action.

Defendant argues that the court should distinguish *Bicknell* on the facts and adopt a new rule set forth by the 1988 Revision to the Restatement (Second) of Conflict of Laws § 142. The argument is as follows.

In the original 1971 edition of the Restatement (Second) of Conflict of Laws, the American Law Institute set forth what was then the prevailing rule regarding the choice of law in statute-of-limitations problems: the local law of the forum determines whether an action is barred by the statute of limitations. Restatement (Second) of Conflict of Laws § 142 (1971). The practical effect of the rule was that an action that accrued in another state could not be maintained in the forum state after the expiration of the forum state's statute of limitations, but that conversely, maintenance of an action in the forum state was not ordinarily precluded by the fact that it was barred by the statute of limitations of another state—even if the parties specified that their contractual agreement

was to be governed by the law of another state. Vermont followed this rule. See *Jacques v. Jacques*, 128 Vt. 140, 141–42 (1969).

The 1971 Restatement comments conceded that the rule was subject to criticism on the ground that it permitted forum-shopping, and also acknowledged that many writers had urged the American Law Institute to adopt a new rule that applied the statute of limitations of the state of the otherwise applicable law, or even a rule that, as between the forum state and the state of the otherwise applicable law, the shorter statute of limitations should be applied. These criticisms were thought to promote the real purpose of the statute of limitations period, which was to protect both the parties and the local courts against the prosecution of stale claims. See Restatement (Second) of Conflict of Laws § 142 cmt. (d)–(g) (1971).

Over time, many states rejected the 1971 Restatement approach and adopted one of the two other rules suggested by commentators either through legislative enactment or judicial decision. By 1988, the American Law Institute decided that times had changed, and that a new rule was now appropriate. The ALI accordingly adopted a revision to the Restatement that provides that the forum state should apply its own statute of limitations barring a claim, and that the forum state should apply its own statute of limitations permitting a claim unless (1) maintenance of the claim would serve no substantial interest of the forum and (2) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence. See Restatement (Second) of Conflict of Laws § 142 (1988). Although this is awkwardly worded, the net effect is that forum states should no longer permit claims to be maintained when they are barred by the statute of limitations of the state which has the most significant relationship to the parties. Under the new Restatement approach, therefore, the Delaware statute of limitations would apply here.

The new Restatement approach makes sense on a number of levels. It promotes freedom of contract and does away with the awkward characterization of the statute of limitations as a procedural issue affecting only the remedy rather than a substantive issue affecting the right to relief. It prevents forum-shopping after-the-fact by identifying concretely the statute of limitations that will apply at the time the contract is made. And it ensures that a party who benefits from the laws of one state will also be subject to the determination of that state as to when the claim becomes stale. See Restatement (Second) of Conflict of Laws § 142 cmt. (e)–(g) (1988).

Yet, for all the guidance the Restatement offers, it does not reflect the current state of the law in Vermont. In *Bicknell,* the Vermont Supreme Court restated the rule from *Jacques* and the 1971 Restatement and stated clearly that "an action timely brought in Vermont can be maintained here even if time-barred in the jurisdiction where the action arose." *Marine Midland Bank v. Bicknell*, 2004 VT 25, ¶ 7, 176 Vt. 389.

Defendant argues that *Bicknell* involved an action to enforce a judgment, and as such, is distinguishable from this case which seeks to establish an initial judgment.

Moreover, the statement from *Bicknell* is arguably dicta since it was not strictly necessary for the Court to justify the more narrow holding in that statement of the law.

Yet, the fact remains *Bicknell* court did make the statement, and in doing so, the court expressly relied upon and reaffirmed its 1969 holding in *Jacques v. Jacques*, 128 Vt. 140 (1969). [2] Under *Jacques*, therefore, the controlling rule is clear: the Vermont statute of limitations applies in the present case rather than the Delaware statute of limitations. And under *Bicknell*, the rule in *Jacques* has survived the 1988 revisions to the Restatement. This means the plaintiff's action is timely filed.

As a secondary argument, defendant contends plaintiff may not make a claim for unjust enrichment in the same case as a claim for breach of contract. The rationale is that unjust enrichment is a quasi-contractual remedy that cannot be maintained in a case where the parties have entered into a contractual agreement. Calamari & Perillo, The Law of Contracts 2 (3d ed. 1987); *DJ Painting, Inc. v. Baraw Enters., Inc.*, 172 Vt. 239, 242–43 (2001); *In re Estate of Elliott*, 149 Vt. 248, 252–53 (1988).

However, unjust enrichment claims may be maintained in cases where the contract is unenforceable or where the contract must be implied because it would be inequitable for the defendant to retain the benefit received. *Johnson v. Harwood*, 2008 VT 4, 183 Vt. 157.

Moreover, Vermont Civil Procedure Rule 8(e)(2) expressly permits pleading in the alternative, and there is nothing impermissible in pursuing inconsistent or alternative theories in the same case. *Lewis v. Cohen*, 157 Vt. 564, 571 (1991).

Order

The defendant's motion to dismiss is denied.

Dated at Chelsea, Vermont, this 10th day of November, 2009.

SO ORDERED.

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Hon. Thomas J. Devine
Presiding Judge

[2] In *Jacques* the parties had gotten into a car accident in Quebec but filed their negligence action in Vermont. The Supreme Court allowed the case to proceed in Vermont even though it would have been time-barred if filed in Quebec (apparently, Quebec had a one-year statute of limitations on personal injury actions, and Vermont had a three-year statute of limitations on personal injury actions). In so doing, the *Jacques* court expressly held that "if the action is properly brought here, and within the time limitation of our statute, it may be maintained even though time has run out at the place where the action arose." 128 Vt. at 142.