No. 07-35726

Panel Opinion filed April 2, 2009
Circuit Judges Susan P. Graber, Raymond C. Fisher and Milan D. Smith, Jr.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBIN L. AVERY,
Plaintiff-Appellant,
v.

FIRST RESOLUTION MANAGEMENT CORPORATION, a foreign corporation,
FIRST RESOLUTION INVESTMENT CORPORATION, an unregistered entity,
DERRICK E. McGAVIC, ESQ.,
KRISTIN K. FINNEY, ESQ.
Defendants-Appellees

On Appeal from the United States District Court
for the District of Oregon
The Honorable Ancer L. Haggerty

BRIEF OF *AMICI CURIAE* PUBLIC GOOD, EAST BAY COMMUNITY LAW CENTER, LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, BAY AREA LEGAL AID, AND LEGAL ASSISTANCE TO THE ELDERLY IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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RULE 29(c) CORPORATE DISCLOSURE STATEMENT

The East Bay Community Law Center is a non-profit, tax exempt California corporation qualified under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it ever issued shares or securities.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area is a non-profit, tax exempt California corporation qualified under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it ever issued shares or securities.

Bay Area Legal Aid is a non-profit, tax exempt California corporation qualified under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it ever issued shares or securities.

Legal Assistance to the Elderly is a non-profit, tax exempt California corporation qualified under section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, nor has it ever issued shares or securities.

STATEMENT OF INTEREST OF AMICI CURIAE

Public Good is a newly-formed public interest organization dedicated to the proposition that all are equal before the law. Through amicus participation in cases of particular significance for consumer protection and civil rights, Public Good seeks to ensure that the law is interpreted to protect all people, regardless of station. Public Good's interest in this case arises from the possibility – indeed, the likelihood – that credit card companies, along with other large-scale holders of consumer debt, would seek to use the panel opinion to circumvent statutes of limitations on debt collection. Without effective statutes of limitation, creditors could assess steep penalty fees and interest indefinitely, and then seek to collect the accumulated debt years later from unsuspecting cardholders or former cardholders. It is precisely this kind of exploitation of imbalanced relationships between consumers and businesses that Public Good works to prevent.

The East Bay Community Law Center is a nationally recognized, community-based provider of legal services to low-income residents of the San Francisco Bay Area and the largest provider of free legal services in the East Bay. EBCLC's Neighborhood Justice Clinic operates a general legal clinic serving hundreds of East Bay residents annually. Over 1/3 of the clinic's clients seek legal help because they are facing abusive debt collection lawsuits. Debt collectors often file suits against these individuals without regard for when the debt was

incurred, or despite the fact that through identity theft or confusion of similar names the "defendant" never incurred the debt at all. For example, one older client, Ms. M., settled a debt with a creditor in 1999. She kept a copy of her check reading "paid in full" for years – long past any limitations period – but eventually destroyed or misplaced it. In early 2009, a debt collector sued her on that settled account. Were the statute of limitations tolled, Ms. M. would now have no way of establishing that the debt had in fact been settled and no defense against the lawsuit. EBCLC seeks to participate in this case as *amicus curiae* in order to ensure that its clients are not deprived of one of the few tools they have against abusive debt collection practices.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (LCCR) is affiliated with the national Lawyers' Committee for Civil Rights Under Law, begun in 1963 at the request of President John F. Kennedy. LCCR was formed in 1968 to champion the rights of minority and low-income persons by offering free legal assistance in civil matters and by litigating on behalf of the traditionally underrepresented. In addition, LCCR actively monitors judicial decisions and legislation that affect the traditionally disadvantaged, and advocates for policies that promote equal opportunity. LCCR's Tuesday Night Legal Clinic provides pro bono representation to low-income individuals in the Bay Area, including many people being sued and harassed by

debt collectors. The statute of limitations is a strong and necessary tool to protect these clients' interests.

Bay Area Legal Aid (BayLegal) is the largest legal services program in the San Francisco Bay Area, providing free legal assistance to very low-income residents of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, and Santa Clara Counties. Of the 1,500 telephone calls handled by the agency's Legal Advice Line each month, approximately 200 involve legal problems directly related to an inability to pay a debt, fair or unfair. In addition, one of BayLegal's priority areas is access to health care. Many clients face collection cases stemming from their inability to afford health care; in many cases the debts were incurred through credit cards. Because of difficulties of proof, the statute of limitations can provide the most effective, if not only, resolution for many clients.

Legal Assistance to the Elderly (LAE) is a non-profit legal service, funded in part through the Older Americans Act, which has been providing advice and representation to San Francisco residents age sixty and over since 1979 and to adults with disabilities since 2007. LAE serves approximately 1,100 clients per year in substantive legal areas including housing, public benefits, elder abuse prevention, and consumer and debt collection issues. With the deteriorating economy, LAE is seeing a significant increase in the number of clients presenting debt collection issues, often involving credit card debt, coupled with more

aggressive tactics by debt collectors. LAE is deeply concerned about the effect of these tactics, and believes that debt collectors are likely to take advantage of the panel's decision by using tolling provisions to the further detriment of vulnerable clients.

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SUMMARY OF ARGUMENT

Statutes of limitations provide a vital and efficient means of achieving repose in debt collection actions, and a crucial protection for credit card borrowers from overreaching debt collectors. The panel opinion here suggests, however, that statutes of limitations may be permanently tolled in any proceeding involving a borrower who, by operation of a choice-of-law provision in her cardholder agreement, lives in a state different from the state whose law governs the proceeding. Such a rule would apply to the vast majority of credit card holders in the United States.

Recognizing the perils of a regime under which card issuers could readily eliminate all statutes of limitations for debt collection, courts applying the law of New Hampshire (the state at issue here) or of Delaware (a common choice-of-law designee) have consistently rejected the argument that the limitations period is tolled on credit card debt as long as a defendant is absent from the designated state. This case marks the first deviation from that course.

New Hampshire law does not compel the conclusion reached by the panel here. To the contrary, New Hampshire courts do not apply New Hampshire's tolling provision in situations where doing so would not serve the purposes of the statute. None of those purposes – protecting the rights of

New Hampshire citizens to bring their claims in New Hampshire court, protecting the state's interest in adjudicating matters of interest to the state, and ensuring defendants do not evade process – is present here. Crucially, the state's interest is not served by tolling when a case could never have been brought in New Hampshire at all.

Moreover, the tolling statute, as interpreted in the panel opinion, could implicate the commerce clause by impeding potential defendants' ability to move freely to or from the state of their choice. It could also make all adhesion contracts with a New Hampshire choice-of-law provision unconscionable.

Given the wide-ranging negative effects this decision could have on consumers, particularly in a time of recession, it is surely not enough to hope that forum states will uniformly substitute their own limitations period on the grounds that New Hampshire's (with perpetual tolling) violates their law or policy. *Amici* therefore respectfully request either that the court grant the petition for rehearing *en banc* or that the panel, on its own motion, do one of the following: (1) modify the opinion to remove language suggesting that the statute of limitations should be tolled because of a borrower's absence from a state in which she has never resided or done business; (2) withdraw the opinion and certify the operative question to the New Hampshire Supreme

Court; or (3) withdraw the opinion and reissue it as an unpublished memorandum.

ARGUMENT

The panel opinion in this case could be read to create a state-law regime never contemplated by a state legislature, one that – however unintentionally – could significantly harm consumers while providing an unsought benefit to the most unscrupulous debt collectors. *En banc* review is eminently appropriate, Fed. R. App. P. 35(b)(1)(B), as is, in the alternative, *sua sponte* modification or withdrawal of the opinion by the panel.

The case involves a question of exceptional importance: Does a state statute tolling the limitations period for the duration of a defendant's absence from the state apply when the defendant's only "contact" with that state consists of a choice of law provision in her credit card agreement?

Although the question might appear a technical one, the answer holds enormous consequences for consumers throughout the United States. The panel's opinion appears to allow credit card companies to circumvent statutes of limitations through the simple expedient of a contractual choice of law provision. Indeed, the same expedient could be employed by any business that extends credit to residents of states other than its own.

The importance of granting rehearing here lies not so much in the outcome of this oddly-postured case, in which a plaintiff rather than a defendant seeks a shorter statute of limitations, and a consumer argues for application of the law of a state in which she does not reside. Rather, it lies with the danger of creating a precedent that could be employed as a weapon by debt collectors seeking to collect stale debts.

As the repercussions for other cases were not argued by the parties, the panel may well not have had the opportunity to fully consider the ramifications of its decision. *Amici* believe that when the court does so it will conclude, as have the courts that have considered this issue in other cases, that where there never was any prospect of the case being brought in the designated choice-of-law state, and where that state is otherwise wholly unconnected to the proceeding, the statute of limitations should not be – and is not – tolled.

I. THE PANEL OPINION MAY HAVE SEVERE NEGATIVE CONSEQUENCES FOR CONSUMER BORROWERS.

A. The Opinion Threatens the Virtual Abolition of the Statute of Limitations in Consumer Debt Cases.

The panel opinion, in its current form, appears to contemplate no limits on when a debt may be collected under New Hampshire law from residents of other states. The reasoning of section A of the opinion's

Discussion section could apply equally to actions brought on the underlying debt five, ten, or even twenty years from now, so long as the borrower had not for some reason moved to New Hampshire (and spent three years there).

By this reasoning, credit card issuers could circumvent all statutes of limitations by placing in their form contract a choice of law provision selecting a state that tolls the limitations period while a defendant is absent from the state, thereby ending protection by statute of limitation for the great majority of credit card holders, who live in different states from the issuers of their credit cards.

Most consumers would be unaware of the rights they had given up in accepting the credit card company's contract. *See, e.g.,* Carolyn Carter, *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. Banking Inst. 23, 50-51 (2006) (noting that credit card terms are – by design – seldom read, especially when mailed separately, and "are full of dense, impenetrable legal jargon").

Amici are confident that it is not the intention of this court to render statutes of limitation inapplicable to most cases of consumer debt. But it is difficult to see how this result is to be averted.

Laches would not provide effective relief. Equitable defenses are not generally available in actions at law governed by a statute of limitations. *UA*

Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1474 n.3 (9th Cir. 1994); *First Citizens' Nat'l Bank v. MacAllister,* 371 A.2d 1175, 1176 (N.H. 1977). In particular, "[l]aches within the term of the statute of limitations is no defense at law," *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958); therefore, where a statute of limitations is perpetually tolled, laches must be barred. Even were the defense available, the debtor would "bear the burden of proving both that the delay was unreasonable, and that prejudice resulted from the delay." *Jenot v. White Mountain Acceptance Corp.*, 474 A.2d 1382, 1387 (N.H. 1984). The vacuum left by the elimination of the statute of limitations would in no way be adequately filled by this equitable defense, and no court to have considered the issue has held otherwise. *See, e.g. Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988) (noting that "forfeiture of the limitations defense" means "remaining subject to suit . . . in perpetuity").

B. The Consequences of Indefinite Tolling Could Be Severe.

Indefinite tolling would subvert time-honored policies. The statute of limitations has long been recognized in this country as "a wise and beneficial law," *Bell v. Morrison*, 26 U.S. 351, 360 (1828) (Story, J.), and remains "an integral part of the legal system." *Bendix*, 486 U.S. at 893.

The latitude afforded debt collectors by an unmodified panel opinion could only worsen a climate already rife with abuses. The Federal Trade Commission receives more complaints about debt collectors than about any other industry. Federal Trade Commission, *Annual Report 2009: FDCPA*, at 4, available at http://www.ftc.gov/os/2009/02/P094804fdcpareport.pdf. Debt collection abuses are so prevalent that in Oregon alone the state's Department of Justice receives nearly a thousand written complaints a year. Oregon Dept. of Justice, *Media Release*, Apr. 9, 2009, *available at* http://www.doj.state.or.us/releases/2009/rel040909.shtml (describing midnight calls and intimidation by debt collectors).

Those who seek shelter from debt collectors under statutes of limitations are frequently victims of identity theft, internet fraud, or mistaken identity. Sewell Chan, *An Outcry Rises as Debt Collectors Play Rough*, New York Times, July 5, 2006 at A1, *available at* http://www.nytimes.com/2006/07/05/nyregion/05credit.html. The FTC reports that are over 8 million victims of identity theft annually in the United States; that 85% of those victims report misuse of some kind of account, especially credit card accounts; and that, depending on the type of fraud, up to 48% of those victimized reported being "harassed" by a debt collector. Federal Trade Commission, *2006 Identity Theft Survey*, *available at*

http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf, at 3,13, 41. In other words, hundreds of thousands, if not millions, of people each year are harassed about debts that they did not incur.

Debt collectors often fail to investigate claims that a debt is fraudulent, or has already been paid, continuing to harass and threaten innocent consumers. Chan, *An Outcry Rises*, at A1. Precipitately filing or threatening to file lawsuits against alleged debtors, regardless of the merits, has become a cheap, favored collection method. MFY Legal Services, *Justice Disserved* at 3 (June 2008), *available at* http://www.mfy.org/Justice_Disserved.pdf. Many debt collection actions are brought in small claims courts that are too over-burdened to prevent abuse of unrepresented defendants by collectors, who are seldom asked to prove the debts they claim. Beth Healy, *Dignity Faces a Steamroller*, Boston Globe, July 31, 2006, *available at* http://www.boston.com/news/specials/debt/part2_main.

Statutes of limitations, and the consumer protection provisions of the Fair Debt Collection Practices Act forbidding suit or threat of suit on stale debts, *e.g.*, 15 U.S.C. §1692e(5), may often be consumers' final defense against endless harassment and threats. If debt collectors could legally bring suit to collect stale debts, the already pervasive harassment would only increase.

Finally, the possibility of skirting statutes of limitations is particularly noxious in the context of credit card debt collection, because delays in debt collection lead to a piling on of finance charges and late fees. *See* Carter et al., *supra* at 28-30 (describing credit card holder living on social security disability income who, with a balance of $1963, stopped using her credit card, paid $3492 over six years and, as a result of interest and late fees, still faced a balance due of $5564 and a collection action). In the instant case, all except $2971.82 of an alleged $7762.24 debt represented interest and late fees. *Avery v. First Resolution Mgmt. Corp.*, Civil No. 06-1812-HA, slip op. at 3-4 (D. Or. 2007). Under the regime threatened by this decision, credit card companies (and those who purchase their debts) have every incentive to delay suit in order to drastically increase the debt claimed.

In sum, the reasoning of the panel court's decision threatens severe ramifications for consumer borrowers. The virtual elimination of the statute of limitations for those who owe or are alleged to owe credit card debt is simply not the proper application of the law of New Hampshire (or any other jurisdiction), and was surely not intended by the legislature of either New Hampshire or Oregon.

II. THE OPINION CONFLICTS WITH THE OTHER CASES ON POINT.

Other courts interpreting New Hampshire law and analogous Delaware law have concluded that it cannot have been the intent of legislators to effectively eviscerate the statute of limitations for consumer debt. As far as *amici* are aware, in all cases besides this one that have examined whether the limitations period for credit card debts is tolled when the defendant is an out-of-state borrower, the court has answered the question in the negative.

In *Gaisser v. Portfolio Recovery Assocs., LLC*, 571 F. Supp. 2d 1273 (S.D. Fla. 2008), the court considered a scenario nearly identical to this case. A Florida man sued a debt collection agency for violating the FDCPA by initiating a collection lawsuit more than three years after his credit card account with Providian National Bank had fallen into default. As in this case, the credit card agreement provided for the contract to be governed by New Hampshire law; as in this case, the cardholder had never been a resident of New Hampshire during the period at issue. The defendants moved to dismiss the action for failure to state a claim, arguing that New Hampshire's three-year statute of limitations was tolled by the cardholder's absence from the state. The court rejected their argument. After noting that applying New Hampshire's tolling statute "would result in the indefinite

tolling of the time for filing suit," 571 F.Supp.2d at 1277, the court refused to dismiss the suit, because "interpreting the tolling provision such that the statute of limitations would never run on Defendants' claim in the state court does not serve the purposes of statutes of limitations and produces an illogical and unreasonable result." *Id.* at 1288.

The district court's decision in *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268 (M.D. Fla. 2008) also involved a Florida resident who had been unable to pay her credit card debt. In that case the card agreement's choice of law provision designated Delaware law, which like New Hampshire law imposes a three-year statute of limitations that is tolled by statute when the debtor is out of the state. *See* Del. Code Ann. tit. 10, § 8117. An action in Florida state court to collect the debt had been dismissed with prejudice as time-barred, because it had been brought almost four years after the account was closed for failure to make payments. *Id.* at 1270-71. The debtor then sued the debt collectors for violating the FDCPA by bringing suit to collect a time-barred debt. The collectors argued that Delaware's limitations period was tolled by the cardholder's absence from Delaware. *Id.* at 1275-76. Noting that such an application of the tolling statute would effectively abolish the statute of limitations in actions against non-residents, the court described it as a "strained construction" of the

tolling statute, leading to "an illogical and unreasonable result," *id.* at 1276; the court found the argument "unconvincing, if not plain wrong." *Id.* at 1277.[1]

A recent California state court case reached the same conclusion. The proceeding in *Resurgence Financial, LLC v. Chambers*, 2009 Cal. App. LEXIS 596 (Cal. Super. Ct., App. Div., No. 1-08-AP-000571 (January 12, 2009)) (certified for publication) involved a collection action against a credit card holder, brought under a credit card contract designating that Delaware law would govern any disputes. The action was brought almost four years after the cardholder had allegedly violated the terms of the credit card agreement. The court dismissed the case as time-barred, rejecting the argument that limitations periods are tolled during a defendant's absence from the state. The court concluded that Delaware's tolling statute "can be most reasonably read to apply only to actions that are actually filed in a Delaware court or actions that could have been filed in a Delaware court." *Id.* at *6-7.

[1] The court ultimately held that the debt collectors were not liable under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, because they (barely) had a "bona fide error" defense under section 1692k of the Act. 536 F.Supp.2d at 1236. In this Circuit, however, the FDCPA "does not immunize mistakes of law, even if properly proven." *Baker v. G.C. Services Corp.,* 677 F.2d 775, 779 (9th Cir.1982).

III. THE OPINION MISAPPLIES NEW HAMPSHIRE LAW.

The conclusion of the *Gaisser* court reflected a correct understanding of New Hampshire law. New Hampshire has not interpreted its own tolling statute in a formalistic manner. Instead, it has looked to the statute's purposes, the consequences of a proposed interpretation, and "compelling considerations of policy." *Bolduc v. Richards*, 142 A.2d 156, 158 (N.H. 1958). The purposes of the statute are not served by applying it in a case such as this one, which lacks any connection to New Hampshire.

As this court noted, the undisputed purpose of New Hampshire's tolling provision for absence from the state, N. H. Rev. Stat. § 508:9, is to protect New Hampshire plaintiffs who wish to bring suit in New Hampshire on causes of action arising in the state, but are unable to do so because the defendant is not available to be served. *Cf. Schmidt v. Polish People's Republic*, 742 F.2d 67, 71 (2d Cir. 1984) (statutes tolling limitations periods because of defendant's absence from a jurisdiction are "largely intended to diminish the incentive to avoid service of process"). While a New Hampshire resident can usually bring suit in a defendant's home state, the statute protects his ability to bring the defendant into a New Hampshire court where appropriate. *See, e.g.*, *Bolduc*, 142 A.2d at 157 (motor vehicle accident).

The New Hampshire Supreme Court has made clear that section 508:9 should not be applied mechanically, to effect unintended results. *Bolduc*, 142 A.2d at 158. The seminal case concerned an action in New Hampshire court against a non-resident driver for damages arising from a New Hampshire motor vehicle collision. *Id*. The Court found that the driver's absence from New Hampshire was immaterial because he could be brought into New Hampshire court at any time under New Hampshire's nonresident motorist statute, which provided jurisdiction over the out-of-state driver through proxy service on the Motor Vehicle Commissioner. Although the literal language of section 508:9 might have allowed the limitations period to be tolled as long as the driver remained away from New Hampshire, the Court refused to apply that provision because tolling in that case would not serve the purposes of the statute and "would allow suits to be postponed indefinitely." *Id.* The Court reasoned that it "should not ascribe to [the] Legislature an intent which would lead to such unfortunate consequences." *Id.*

Application of section 508:9 to an out-of-state credit card debt case would have equally unfortunate consequences, and would no more serve the purposes of the statute (or indeed any discernible purpose). *See Gaisser*, 571 F. Supp. 2d at 1278 (relying on *Bolduc* Court's treatment of "a related

scenario" in determining how to apply section 508:9 to out-of-state credit card debt dispute). Absence from New Hampshire is entirely immaterial to an action brought in another forum, particularly when, as here, the action could not as a matter of law have been brought in New Hampshire, *see* 15 U.S.C. § 1692i (debt collection action must be brought in state where debtor resides or where contract was signed), the defendant was amenable to service in the forum state at all times (and was served), and New Hampshire could have no interest in exercising jurisdiction over the case. The cause of action did not arise in New Hampshire. No events relevant to the case occurred in New Hampshire. None of the parties here reside in New Hampshire. Consequently, none of the purposes of the tolling statute would be served by reading it to apply in this case.

Other courts have reasoned similarly in declining to apply Delaware's very similar tolling statute to cases governed by Delaware law but proceeding in other states pursuant to contract: "the defendant was always subject to suit in the only forum where she was amenable to suit. There is no reason for the Delaware legislature to extend the limitations period with respect to actions that are not filed in Delaware and could not be filed in Delaware." *Chambers*, 2009 Cal.App. LEXIS 596, at *6-7. The *McCorriston* court similarly concluded that applying Delaware's tolling

statute to a credit card case filed in Florida was "plainly problematic" in that it "would indefinitely toll lawsuits filed in states other than Delaware, notwithstanding that those lawsuits were filed against account holders who were never in Delaware, but who are subject to service in the state in which the suit was filed." 536 F. Supp. 2d at 1276.

Courts "are not required to interpret a statute in a formalistic manner when such an interpretation would produce a result contrary to the statute's purpose or lead to unreasonable results." *United States v. Combs*, 379 F.3d 564, 569 (9th Cir. 2004). The New Hampshire Supreme Court has interpreted section 508:9 in light of that principle. *Amici* respectfully request that this court follow its lead.

If the court has continued questions about the New Hampshire Supreme Court's interpretation of that statute, it may certify those questions to that court. *See* N.H. Rules S. Ct., Rule 34 (permitting court to answer " questions of law certified to it by . . . a court of appeals of the United States").

IV. APPLICATION OF THE TOLLING STATUTE COULD VIOLATE THE COMMERCE CLAUSE.

The panel's interpretation of New Hampshire's tolling provision would raise questions about that statute's constitutionality. Similar tolling statutes have been found to violate the "dormant" aspect of the commerce

clause of the United States Constitution, art. I, sec. 8, cl. 3, when they impose burdens on interstate commerce that exceed any legitimate state interest advanced by the statute. *Bendix*, 486 U.S. at 891.

The Court in *Bendix* found unconstitutional an Ohio statute tolling the limitations period for defendants who were absent from the state. The burden on out-of-state companies wishing to do business in Ohio outweighed the benefit to the state's interest in protecting its citizens from corporations that moved out of state after committing acts giving rise to liability, given that those companies could be brought into Ohio courts under Ohio's long-arm statute. *Id.* at 891-94; *see also Abramson v. Brownstein*, 897 F.2d 389, 392-393 (9th Cir. 1990) (extending analysis to similar burdens on out-of-state individuals). Statutes tolling limitations periods for absence can be unconstitutional even as applied to individuals not directly engaged in commerce, because they "burden[… defendants'] ability to move from state to state, which falls afoul of the Commerce Clause." *State ex rel. Bloomquist v. Schneider*, 244 S.W. 3d 139, 143 (Mo. 2008) (*accord Heritage Marketing & Ins. Servs., Inc. v. Chrustawka*, 160 Cal. App. 4th 754, 762-63 (2008)).

Under the panel's interpretation, New Hampshire's tolling law would burden Providian credit card holders who wish to move away from New

Hampshire or who wish to remain domiciled elsewhere. Much as Ohio's interest in protecting its citizens did not require tolling the limitations period against absent defendants who could be reached by long-arm statute, so New Hampshire's interest in protecting its citizens does not provide any reason to extend the limitations period in a case that does not concern New Hampshire citizens or events and could never have been brought in New Hampshire.

Thus there is at least a significant possibility that, under the panel's interpretation, New Hampshire's tolling statute would unconstitutionally burden interstate commerce. At the least, the doctrine of constitutional avoidance counsels against this interpretation of New Hampshire law, given the availability of another interpretation at least as plausible. *See Clark v. Suarez Martinez*, 543 U.S. 371, 380-381 (2005).

V. APPLICATION OF THE TOLLING STATUTE COULD RENDER THE CREDIT CARD CONTRACT UNCONSCIONABLE.

Finally, the court's interpretation of New Hampshire law cannot be correct, for it would threaten to make unconscionable, under New Hampshire's own law, any contract with a New Hampshire choice of law provision. A contract is unconscionable if there is "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Pittsfield*

Weaving Co. v. Grove Textiles, 430 A.2d 638, 639 (N.H. 1981). In forming the credit card contract underlying this case, there was no opportunity for meaningful choice by the card subscriber, who simply received an adhesion contract in the mail separately from the card, *cf. id.* at 640, and would be unlikely to understand the consequences of the choice of law provision even if she were in a position to bargain over it. As applied by this court to the statute of limitations, the choice of law provision is unreasonably favorable to the card issuer. The credit card company will not be absent from its own state, and the limitations period will therefore not be tolled against it. The limitations period will always, however, be tolled against the great majority of cardholders who are not New Hampshire residents.

CONCLUSION

For the foregoing reasons, and above all to avert the possibility that the court's decision will be read to sanction the surely unintended consequence of indefinitely tolled limitations periods against debtors who are subjected to choice of law provisions in adhesion contracts, *amici* support plaintiff-appellant's petition for rehearing *en banc*. Alternatively, *amici* respectfully request that the panel rehear the case *sua sponte* and modify its discussion to forestall serious adverse consequences to consumers, or withdraw the opinion and either certify the state-law question

to the New Hampshire Supreme Court or reissue the opinion as an unpublished memorandum.

DATED: May 4, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 29(D) AND 9TH CIR. R. 32-1 FOR CASE NO. 07-35726

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached *amicus* brief is proportionately spaced, has a type space of 14 points, and contains 4184 words.

The typeface is Times New Roman 14 point, prepared using Microsoft Word.

May 4, 2009

s/ Thomas Bennigson
Thomas Bennigson

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2009, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the CM/ECF system.

Participants in the case, who are registered CM/ECF users, will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF user. On May 4, 2009 I enclosed a true copy of the foregoing in a sealed envelope with postage fully prepaid thereon. I then placed the envelope in a U.S. Postal Service mailbox in Oakland, California, addressed as follows:

Daniel N. Gordon
4023 W. First Ave.
P.O. Box 22338
Eugene, OR 97402

May 4, 2009

s/ Thomas Bennigson
Thomas Bennigson