

AUG 27 2014

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-13-1590-KuDJu
)		
6	RICHARD STERBA and OLGA STERBA,)	Bk. No.	13-10245
)		
7	Debtors.)		
	_____)		
8	RICHARD STERBA; OLGA STERBA,)		
)		
9	Appellants,)		
)		
10	v.)	OPINION	
)		
11	PNC BANK,)		
)		
12	Appellee.)		
13	_____)		

Argued and Submitted on July 24, 2014
at San Francisco, California

Filed - August 27, 2014

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Appearances: Thomas P. Kelly, III argued for appellants Richard
Sterba and Olga Sterba; Douglas Provencher of
Provencher & Flatt LLP argued for appellee PNC
Bank.

Before: KURTZ, DUNN and JURY, Bankruptcy Judges.

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1 KURTZ, Bankruptcy Judge:

2 **INTRODUCTION**

3 Chapter 7¹ debtors Richard and Olga Sterba appeal from an
4 order overruling their objection to the proof of claim filed by
5 PNC Bank. The Sterbas maintain that, under California law, PNC's
6 claim was barred by the applicable four-year statute of
7 limitations. The bankruptcy court held instead that Ohio law
8 applied based upon the choice of law provision set forth in the
9 promissory note on which PNC's claim was based. Under Ohio's
10 six-year statute of limitations for actions on a negotiable
11 instrument, PNC's claim was timely.

12 In overruling the Sterbas' claim objection, the bankruptcy
13 court improperly relied upon California's choice of law rules.
14 Binding Ninth Circuit authority states that choice of law issues
15 in bankruptcy cases are governed by federal choice of law rules.
16 While both the federal rules and the California rules generally
17 follow the Restatement (Second) Conflict of Laws, the bankruptcy
18 court improperly focused on California's interpretation of the
19 Restatement. More importantly, the bankruptcy court apparently
20 was unaware of a Ninth Circuit case on point, which held as a
21 matter of law that standard contractual choice of law provisions
22 do not cover conflicts between statutes of limitations.

23 Accordingly, we REVERSE.

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 **FACTS**

2 The facts are undisputed. In 2007, the Sterbas purchased a
3 condominium in Santa Rosa, California. The Sterbas financed
4 their purchase by taking out two loans: a \$340,000 loan from Bank
5 of America secured by a first deed of trust against the
6 condominium and a \$42,000 loan from National City Bank secured by
7 a second deed of trust against the condominium. The National
8 City loan is memorialized in a Fixed Rate Consumer Note and
9 Security Agreement dated as of March 30, 2007.

10 In early 2008, the Sterbas defaulted on both loans, and in
11 June 2009, Bank of America completed a nonjudicial foreclosure
12 against the condominium. This foreclosure extinguished National
13 City's junior lien against the property.

14 The Sterbas filed their bankruptcy case in February 2013.
15 PNC, as the successor in interest to National City's rights as
16 lender under the \$42,000 note, filed a proof of claim in the
17 Sterbas' bankruptcy case in April 2013. The Sterbas then filed
18 an objection to PNC's claim. The Sterbas asserted that, pursuant
19 to California's four-year statute of limitations for actions on
20 an obligation founded on a written instrument, Cal. Code Civ.
21 Proc. § 337, PNC's claim was time-barred.²

22 _____
23 ² Cal. Code Civ. Proc. § 337 provides in relevant part:

24 Within four years. 1. An action upon any contract,
25 obligation or liability founded upon an instrument in
26 writing . . . ; provided, that the time within which
27 any action for a money judgment for the balance due
28 upon an obligation for the payment of which a deed of
trust or mortgage with power of sale upon real property
or any interest therein was given as security,

(continued...)

1 In response to the claim objection, PNC pointed out that the
2 note contained a choice of law provision, which states as
3 follows:

4 [the Sterbas] agree that . . . (i) the Bank is a
5 national bank located in Ohio and Bank's decision to
6 make this Loan to you was made in Ohio. **Therefore,**
7 **this Note shall be governed by and construed in**
8 **accordance with . . . the laws of Ohio,** to the extent
Ohio laws are not preempted by federal laws or
regulations, and without regard to conflict of law
principles

9 Fixed Rate Consumer Note and Security Agreement (March 30, 2007)
10 at ¶ 13 (emphasis added). PNC further contended that, pursuant
11 to Ohio Revised Code § 1303.16, Ohio's limitations period for
12 actions on a promissory note is six years.³ Therefore, PNC
13 reasoned, its claim based on the note was timely.

14 After additional briefing and a court hearing, the
15 bankruptcy court issued a memorandum decision in which it agreed
16 with PNC that Ohio's statute of limitations applied. According
17 to the bankruptcy court, the note's choice of law provision was
18 controlling and dictated that Ohio law applied. The bankruptcy
19 court therefore concluded that PNC timely asserted its claim on

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21 ²(...continued)
22 following the exercise of the power of sale in such
23 deed of trust or mortgage, may be brought shall not
extend beyond three months after the time of sale under
such deed of trust or mortgage.

24 ³ Ohio Revised Code § 1303.16 provides in relevant part:

25 (A) Except as provided in division (E) of this section,
26 an action to enforce the obligation of a party to pay a
27 note payable at a definite time shall be brought within
28 six years after the due date or dates stated in the
note or, if a due date is accelerated, within six years
after the accelerated due date.

1 the note in light of Ohio's six-year limitations period for
2 actions on a promissory note.

3 On November 25, 2013, the bankruptcy court entered an order
4 overruling the Sterbas' objection to claim, and on December 7,
5 2013, the Sterbas timely filed a notice of appeal.

6 JURISDICTION

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
9 § 158.

10 ISSUE

11 Did the bankruptcy court err when it held that the choice of
12 law provision in the Sterbas' note governed the choice of law
13 issue concerning the applicable statute of limitations?

14 STANDARDS OF REVIEW

15 Review of the bankruptcy court's ruling requires us to
16 resolve intertwined conflict of law and statute of limitations
17 issues. We review such issues de novo. See Huynh v. Chase
18 Manhattan Bank, 465 F.3d 992, 996 (9th Cir. 2006); see also Green
19 v. Zukerkorn (In re Zukerkorn), 484 B.R. 182, 188 (9th Cir. BAP
20 2012).

21 DISCUSSION

22 The Sterbas argue that the bankruptcy court should have
23 applied the four-year California statute of limitations instead
24 of the six-year Ohio statute of limitations. The parties agree
25 that this argument is governed by conflict of laws principles.

26 As a threshold matter, we must decide whose choice of law
27 rules apply. See Huynh, 465 F.3d at 997. The bankruptcy court
28 held that, when a federal court considers claims based on state

1 law, the forum state's choice of law rules apply. See, e.g.,
2 Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 420 n.16
3 (9th Cir. 2011) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313
4 U.S. 487, 496 (1941)). This rule typically is applied in
5 diversity-of-citizenship cases. See, e.g., Patton v. Cox, 276
6 F.3d 493, 495 (9th Cir 2002) (citing Klaxon and stating that
7 "[w]hen a federal court sits in diversity, it must look to the
8 forum state's choice of law rules to determine the controlling
9 substantive law."). It also is applied in federal question cases
10 when the federal court is exercising supplemental jurisdiction
11 over state law claims. Paracor Finance, Inc. v. General Elec.
12 Capital Corp., 96 F.3d 1151, 1164 (9th Cir. 1996).

13 Here, in contrast, we are dealing with a bankruptcy court
14 exercising federal question jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b)(2)(B). As a result, federal choice of law
16 rules apply. See Liberty Tool & Mfg. v. Vortex Fishing Sys.,
17 Inc. (In re Vortex Fishing Sys., Inc.), 277 F.3d 1057, 1069 (9th
18 Cir. 2002); Lindsay v. Beneficial Reinsurance Co. (In re
19 Lindsay), 59 F.3d 942, 948 (9th Cir. 1995).⁴

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21 ⁴ If we were writing on a clean slate, we might be inclined
22 to apply the forum state's choice of law rules when, as here, the
23 bankruptcy court was deciding issues that required it to apply
24 state law to determine the rights of the parties. Indeed, the
25 principles set forth in Butner v. United States, 440 U.S. 48, 55
26 (1979), would seem to militate in favor of applying the forum
27 state's choice of law rules. We also should note that this panel
28 has held that, under certain specific circumstances, the forum
state's choice of law rules should be applied. See, e.g., Allen
v. U.S. Bank, N.A. (In re Allen), 472 B.R. 559, 565 n.4 (9th Cir.
BAP 2012); Veal v. Am. Home Mortg. Serv., Inc. (In re Veal), 450
B.R. 897, 921 n.41 (9th Cir. BAP 2011). However, in light of In
(continued...)

1 In the Ninth Circuit, federal choice of law rules generally
2 follow the Restatement (Second) of Conflict of Laws
3 ("Restatement"). See In re Vortex Fishing Sys., Inc., 277 F.3d
4 at 1069. The choice of law rules of the forum state generally
5 are "irrelevant" in answering choice of law questions in federal
6 question cases. Berger v. AXA Network LLC, 459 F.3d 804, 810
7 (7th Cir. 2006); see also In re Lindsay, 59 F.3d. at 948 ("In
8 federal question cases with exclusive jurisdiction in federal
9 court, such as bankruptcy, the court should apply federal, not
10 forum state, choice of law rules.").

11 We start with the section of the Restatement specifically
12 governing the choice between conflicting statutes of limitations.
13 Historically, that section provided that the statute of
14 limitations of the forum state ordinarily should be applied
15 because such statutes typically are considered to be rules of
16 procedure. See Restatement § 142 (1971); Peterson v. Kennedy,
17 771 F.2d 1244, 1251 n.4 (9th Cir 1985); see also Restatement
18 § 122, Cmt. a.

19 However, Restatement § 142, as amended in 1988, now reflects
20 an intent to apply the same general conflict of law principles to
21 statutes of limitations as are applied to "substantive"
22 provisions of law. As stated in the Reporter's Note accompanying
23 the 1988 amendments to Restatement § 142:

24 _____
25 ⁴(...continued)
26 re Lindsay and In re Vortex Fishing Sys., Inc., we are bound to
27 apply federal common law choice of law rules here. See also
28 Mandalay Resort Group v. Miller (In re Miller), 292 B.R. 409, 413
(9th Cir. BAP 2003)("In the Ninth Circuit, federal common law
choice of law rules apply in bankruptcy cases.").

1 This section is designed to replace original §§ 142 and
2 143. It takes the position that the statute of
3 limitations should not be treated as procedural for
4 choice of law purposes. Instead, it advocates that
choice of law questions relating to the statute of
limitations should be decided in much the same way as
other questions of choice of law.

5 Id.; see also Restatement § 142, cmt. e (1988); Berger, 459 F.3d
6 at 811-12.

7 Part and parcel of the modern Restatement process for
8 selecting between two states' conflicting statutes of limitations
9 is a need to consider any applicable contractual choice of law
10 provision. See Wang Laboratories, Inc. v. Kagan, 990 F.2d 1126,
11 1128-29 (9th Cir. 1993) (applying contractual choice of law
12 provision to determine which of two states' statutes of
13 limitation applied to breach of insurance contract claim). See
14 also Western Group Nurseries, Inc. v. Estate of Adams (In re
15 Western United Nurseries, Inc.), 2000 WL 34446155 (D. Ariz.
16 2000), partially vacated on rehr'g on other grounds, 2000 WL
17 34448963 (holding that, under revised version of Restatement
18 § 142, parties could choose a particular state's statute of
19 limitations provided that the parties complied with the
20 requirements of Restatement § 187).⁵

21 Restatement § 187 governs contractual choice of law
22 provisions. The parties agree that, under Restatement § 187, the
23 bankruptcy court generally can and should enforce the contractual
24 choice of law provision as long as: (1) the chosen state has a

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26 ⁵ In re Vortex Fishing Sys., Inc., cited supra, also
27 indicates that a bankruptcy court may apply a contractual choice
28 of law provision in accordance with Restatement § 187 in order to
resolve a choice of law issue involving conflicting statutes of
limitations. See id. at 1069.

1 "substantial relationship" to the parties or the transaction; and
2 (2) the forum state has no "fundamental policy" that is
3 inconsistent with the chosen state's law.

4 The Sterbas argue that the bankruptcy court incorrectly
5 determined that the substantial relationship requirement was
6 satisfied. The Sterbas claim that the only cognizable connection
7 between Ohio on the one hand and the note and the parties on the
8 other hand was that National City Bank, PNC's predecessor in
9 interest, was incorporated in Ohio. According to the Sterbas,
10 this limited connection to Ohio was insufficient to satisfy the
11 substantial relationship requirement.

12 The record does not support the Sterbas' argument. The
13 record instead supports the bankruptcy court's substantial
14 relationship determination. In addition to Ohio being National
15 City's state of incorporation, the note on its face recites that
16 National City's offices are located in Ohio and that it made the
17 decision to make the loan in Ohio. Furthermore, the Sterbas
18 agreed by executing the note to make payments to National City in
19 Ohio, and thus the place for performance of the Sterbas' note
20 obligations was Ohio. The Sterbas did not offer any evidence to
21 controvert any of these facts.

22 Accordingly, under these facts, we cannot say that the
23 bankruptcy court erred in making its substantial relationship
24 determination. Cf. Nedlloyd Lines B.V. v. Superior Court,
25 3 Cal. 4th 459, 467 (1992) (applying Restatement § 187 and
26 stating that state of one party's incorporation is sufficient
27 contact to allow parties to choose that state's laws to govern
28 their contract).

1 The Sterbas also argue that the bankruptcy court should have
2 held that California had a fundamental policy inconsistent with
3 Ohio's six-year statute of limitations for actions on a written
4 instrument. In essence, the Sterbas assert that California has a
5 fundamental policy favoring its own four-year statute of
6 limitations under Cal. Code Civ. Proc. § 337 to the exclusion of
7 any longer limitations period provided for by other states. We
8 disagree. California has no such fundamental policy. As stated
9 in ABF Capital Corp. v. Osley, 414 F.3d 1061, 1066 (9th Cir.
10 2005), "California has 'no fundamental state policy against
11 applying a foreign jurisdiction's statutes of limitations to
12 claims brought within California courts.'" Id. (quoting
13 Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc., 38
14 Cal. App. 4th 1532, 1548-49 (1995)).

15 The Sterbas' final argument is the one we must parse the
16 most carefully. This argument is based on the 1971 version of
17 Restatement § 142. Citing a Sixth Circuit decision originating
18 from Ohio, Cole v. Mileti, 133 F.3d 433, 437-38 (6th Cir. 1998),
19 the Sterbas claim that contractual choice of law provisions
20 generally do not apply to conflicting statutes of limitations.
21 The Sterbas attempt to persuade us (unsuccessfully) that Ohio
22 choice of law rules apply to their appeal in order to take
23 advantage of Mileti. We already have explained above that
24 federal choice of law rules apply to this appeal. But there is
25 no need for the Sterbas to put their eggs in the Mileti basket.
26 The Ninth Circuit has its own version of Mileti. See Des Brisay
27 v. Goldfield Corp., 637 F.2d 680, 682 (9th Cir. 1981).

28 In Des Brisay, a group of shareholders sued the corporation

1 in which they held stock alleging, among other things, federal
2 securities fraud. The operative agreement between the parties
3 had a "standard" choice of law provision very similar to the one
4 in the Sterbas' note: "This agreement shall be governed by and
5 interpreted according to the laws of the province of British
6 Columbia." Id. The district court dismissed the shareholders'
7 action as time-barred, and the shareholders appealed.

8 In affirming the district court's dismissal, Des Brisay held
9 that the district court correctly applied Washington's three year
10 statute of limitations for securities claims instead of British
11 Columbia's six year statute of limitations for such claims. In
12 so holding, Des Brisay explained that, in the absence of a
13 controlling choice of law provision, federal courts presiding
14 over a federal securities lawsuit apply the forum state's
15 limitations period for securities claims. Id.

16 Des Brisay further explained that the choice of law
17 provision in the parties' agreement did not control the choice
18 between the conflicting statutes of limitations:

19 Clause 17 of the Exchange Agreement makes no mention of
20 statutes of limitation, but rather is a standard choice
21 of law clause for application to the substantive
22 interpretation of a contract. Such clauses generally
23 do not contemplate application to statutes of
24 limitation. Limitations periods are usually considered
25 to be related to judicial administration and thus
26 governed by the rules of local law, even if the
27 substantive law of another jurisdiction applies.
28 Restatement (Second) of Conflict of Laws, § 122,
comment (a). Thus, we believe the intention of the
parties to contractually agree upon a limitations
period should be clearly expressed before we will
consider whether it is permissible to do so in a
federal securities case.

27 Id.

28 In other words, Des Brisay held that, as a matter of law, a

1 standard contractual choice of law provision does not cover
2 choice of law questions involving statutes of limitations because
3 the Restatement generally characterizes statutes of limitations
4 as procedural in nature and hence controlled by the forum state's
5 laws. See Restatement § 122, Cmt. a (1971); see also Restatement
6 § 142, Cmt. d (1971) ("Each state determines for itself the
7 period during which suit may be brought in its courts upon a
8 particular claim. Hence no action can be maintained that is
9 barred by the statute of limitations of the forum.").

10 As noted above, the 1988 amendments to Restatement § 142
11 fundamentally altered this choice of law rule so that conflicts
12 involving statutes of limitations are now handled "in much the
13 same way" as other choice of law issues. Reporter's Note
14 accompanying the 1988 amendments to Restatement § 142; see also
15 Berger, 459 F.3d at 811-12. Consequently, the 1988 amendments to
16 Restatement § 142 appear to have undermined the rationale for
17 Des Brisay's holding. Moreover, In re Vortex Fishing Sys., Inc.,
18 Wang Laboratories and In re Western United Nurseries, Inc., cited
19 above, all suggest that the Ninth Circuit would not decide Des
20 Brisay the same way today.

21 Even so, Des Brisay is binding Ninth Circuit precedent,
22 which this Panel is bound to follow. See Am.'s Servicing Co. v.
23 Schwartz-Tallard (In re Schwartz-Tallard), 751 F.3d 966, 971 n.3
24 (9th Cir. 2014). Even if we suspect that the Ninth Circuit would
25 decide Des Brisay differently today, it is not our role to decide
26 which Ninth Circuit decisions no longer represent good law. That
27 prerogative is enjoyed only by the Ninth Circuit and the Supreme
28 Court. Cf. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)(noting

1 that court of appeals properly followed 1968 Supreme Court case
2 notwithstanding its doubts regarding its continuing validity
3 because, "it is this Court's prerogative alone to overrule one of
4 its precedents.").

5 Even though the Ninth Circuit generally follows the course
6 set by the Restatement, we know of no authority indicating that
7 the Ninth Circuit is obliged to follow the change of course
8 reflected in the 1988 amendments to Restatement § 142. In fact,
9 the Sixth Circuit's Mileti decision indicates that the Sixth
10 Circuit still cleaves to the 1971 version of Restatement § 142.
11 And, as recently as 2006, the Seventh Circuit noted: "it would be
12 against the weight of precedent to apply a broad choice-of-law
13 provision to limitations issues where, as here, the provision
14 does not extend expressly to statutes of limitations." Berger,
15 459 F.3d at 813 n.15. Mileti and Berger bolster our conviction
16 that we must let the Ninth Circuit decide for itself whether Des
17 Brisay should be overruled.

18 CONCLUSION

19 For the reasons set forth above, we REVERSE the bankruptcy
20 court's order overruling the Sterbas' objection to claim.
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