

OREGON STATE BAR
Legislative Proposal
Part I – Legislative Summary

RE: HB 2307 Excluding outright debt buyer from ORS Ch. 697 regulation of collection agencies

Submitted by: Debtor/Creditor Section

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1. **This bill would amend ORS Statute:** ORS 697.005
2. **PROBLEM PRESENTED** (including level of severity): Potentially HIGH

Collection agencies often collect debts for an original creditor in return for the right to retain a portion of the amount collected; the agency returns the amount collected, less the agency’s fee, to the client or customer. Oregon’s collection agency statute, ORS 697.005-.115, regulates collection agencies. Among other things, the statute requires escrow accounts, audits, and surety bonds, all to protect clients or customers of the agency. An agency that does not register with the state may not use state courts to collect an assigned debt and is subject to injunction, damages, and attorney fees. The statute imposes duties on agencies that have the effect of protecting clients or customers of the agency, rather than debtors. By contrast, both the federal Fair Debt Collection Practices Act and the Oregon Fair Debt Collection Practices Act provide ample and appropriate regulation of the relationship between a creditor and a debtor. Among other things, those debtor-protection statutes regulate the manner in which creditors communicate with and collect information about debtors.

Each of the collection agency statute’s protections is necessary only because and to the extent a collection agency holds property of the client or customer. None of those protections is necessary or appropriate with respect to an outright debt sale, *i.e.*, with no agreement by the buyer to return any portion of the amount collected to the seller. An *agency* is an agent, or representative, of a principal to whom the agent owes duties. Thus, a collection *agency* necessarily owes duties to a principal, its client or customer. One of the statute’s several definitions of *collection agency* is a person who collects claims “owed, due or asserted to be owed or due to another person.” ORS 697.005(1) (a) (A). In view of the duties imposed on collection agencies by the statute, that definition makes sense only if applied to a person who collects a claims that is *presently, i.e.*, at the time of the collection, “owed, due or asserted to be owed or due to another person”; to apply the definition to an outright claim buyer because the seller previously owned the claim (which of course will always be the case with bought claims) would be to apply the

statute to a relationship not addressed by the duties the statute imposes.

A number of persons in Oregon and elsewhere buy debts from original creditors who prefer to obtain some immediate cash for a debt rather than incurring the risk, expense, and delay of attempting to collect full payment from the debtor. In fact, there exists a robust claims-trading market in bankruptcy cases, especially large commercial cases. In many of those large cases, multiple claims traders compete with each other to buy trade creditors' claims. The interest and ability of claims buyers and traders to buy claims, especially those against debtors in bankruptcy, provides important liquidity to creditors who prefer to receive something now rather than risking receiving more later.

A 2004 Oregon bankruptcy decision held that an outright debt buyer was a collection agency. *In re Krysl*, 304 B.R. 425 (Bankr. D. Or. 2004). The buyer was not represented by a lawyer, and the court did not squarely address whether a claim bought outright is one "owed, due or asserted to be owed or due to another person." Because the claim buyer had not registered as a collection agency, the court invoked ORS 697.087 to enjoin the buyer's collection of the claim and held that the debtor could recover from the buyer the debtor's attorney fees and costs. In addition to the full-time claim traders, several debt buyers in Oregon buy only a few debts each year. If an outright debt buyer cannot afford to or otherwise does not register as a collection agency, the *Krysl* holding, if followed by other courts, could result in complete loss of any right to collect a legitimate debt. When more widely known, that result could in turn dry up liquidity available to Oregon creditors seeking to sell debts.

3. SOLUTION:

Eliminate any ambiguity in the definition in two ways.

- Amend ORS 697.005(1)(a)(A) to clarify that a person is covered by that definition of collection agency only if the claim the person is collecting is *then* owed to another; after an outright debt purchase, the debtor would owe the debt to the buyer, not the seller.
- Add a new exemption from collection agency status for "Any person who receives a debt assignment in any form without any obligation to pay the assignor any portion of any amount the transferee collects on account of the debt," *i.e.*, any outright debt buyer would not be a collection agency.

4. PUBLIC POLICY IMPLICATION:

The bill would clarify that an outright claim buyer may collect a purchased claim without registering as a collection agency, freeing the buyer from complying with duties that make no sense because the buyer does not handle property of the seller. The bill would prevent a debtor from avoiding payment of a legitimate debt based on a technicality

arising from a statute unrelated to debtor protection. The bill would not affect debtor protections, which are in the federal and state debt collection statutes.

5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education?

No. As a problem of statutory interpretation, the problem can be fixed only by a statutory change. The Director of the Department of Consumer and Business Services may exempt from the collection agency registration requirement any person the director determines “that the protection of the public health, safety and welfare does not require registration with the department as a collection agency,” ORS 697.005(1)(b)(Q), but it is unclear whether the statute permits the Director to exempt a category of persons, as opposed to individuals who apply for exemption. In addition, any administrative exemption could be repealed at any time.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** If so, have you suggested it to the section or group?

No, the OSB Debtor/Creditor section is the most appropriate group.

7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

In theory, it is possible that debtors, or those who represent them, would oppose the bill purely because *Krysl* gives debtors a defense to enforcement of an otherwise legitimate debt, and the bill would remove that defense. However, there could be no principled objection to this bill.