

**Testimony before the House Consumer Protection and
Government Efficiency Committee
Presented by Jim Markee
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Oregon Debt Collection Practices

Regulatory Background:

The Oregon unlawful debt collection practices act outlines the dos and don'ts of collecting debts in Oregon. The Oregon act applies to anyone collecting a debt originating from a consumer transaction. This includes third party debt collectors such as collection agencies, as well as first party debt collectors such as a business collecting their own debts. Anyone who "willfully" violates a provision of this act while attempting to collect a debt is subject to legal action by the debtor for \$200.00 or actual damages, together with attorney fees, costs and disbursements, and potential punitive damages. In addition, under the provisions of SB328 which was passed into law by the Oregon Legislature in 2009, the Attorney General has enforcement power over any violation of this act as an unfair trade practice violation. This subjects debt collectors to civil penalties of up to \$25,000.00 for violations of the act.

The UDCPA was enacted by the Oregon Legislature in 1979, a short time after Congress enacted the Federal Fair Debt Collection Practices Act. The federal act is administered by the Federal Trade Commission, and also contains a right of private action by a debtor for \$1,000.00 or actual damages, together with attorney fees, and costs and disbursements. There are no punitive damages or injunctive relief available under the federal act. Collection agencies, debt buyers, and attorneys collecting a debt for another are the only entities regulated under the Federal Fair Debt Collection Practices Act. The Oregon Legislature saw the somewhat narrow scope of the federal act as a shortcoming and enacted the Oregon act to cover anyone collecting a debt from a consumer transaction. In Oregon, collection agencies, debt buyers, and attorneys are covered under both the federal act and the state act, while all other persons collecting consumer debt are covered under the Oregon act only. The original Oregon legislation was nearly identical to the federal act. Over the years, there have been some changes to both acts, and the Federal Trade Commission has had evolving interpretations of the federal act, so that now there are more differences in the acts than existed when the Oregon act was adopted.

Collection agencies are also registered by the Oregon Department of Consumer and Business Services. Under the registration act, anyone soliciting debt collection business from an Oregon company, or collecting consumer debts originated from an Oregon company, must be registered. Registered Oregon collection agencies must carry a surety bond in the amount of \$10,000.00. There are also requirements for Oregon registered

collection agencies to have an office located in Oregon that is open during regular business hours, and to keep all their records, trust accounts, and bank accounts in Oregon. DCBS is authorized to waive these requirements for collection agencies if they deem appropriate. The Department has waived the requirements for most collection agencies domiciled outside Oregon who have requested a waiver. Generally, these out of state collection agencies are required to post a larger bond than in state collections agencies. Under the registration statutes, collection agencies have duties to remit to clients within certain periods of time, and to maintain a client trust account. Many of these provisions were established to protect the clients of collection agencies rather than debtors. Collection agencies are subject to civil penalties and possible suspension or revocation of their registration for violation of these provisions. Collection agencies domiciled outside Oregon, who are only attempting to collect a debt originated outside Oregon, on a debtor currently in Oregon, generally do not have to register with DCBS, unless their state would require an Oregon domiciled collection agency to register when collecting an Oregon originated debt in their state.

The Department is also given authority to suspend or revoke a registration for "any unlawful or fraudulent activity". The Department has not used this authority to enforce the UDCPA, mostly due to staffing concerns, and lack of more direct authority. DCBS and the Department of Justice meet regularly to discuss enforcement issues.

History of Complaints:

The Department of Justice testified to the House Interim Committee on Consumer Protection on June 17, 2008 that they received 719 written complaints on collection agencies and 623 written complaints on "first party" debt collectors in the year 2007. For 2006, they testified they had received 483 written complaints on collection agencies, and 617 written complaints on "first party" debt collectors. Analysis of the complaints on collection agencies has shown that approximately 90% of the complaints received by the Department of Justice are on collection agencies domiciled outside Oregon. For the year 2007, we found about 70 complaints on Oregon domiciled collection agencies, out of the 719 received by DOJ. During that year, the Oregon Collectors Association reported 2.5 million debtor contacts by their members, all Oregon domiciled companies. Years prior to 2006 have shown fewer complaints and many fewer Oregon registered collection agencies. The number of Oregon registered collection agencies increased from just over 200 agencies in 2001, to over 700 today. The increase followed closely DCBS's decision to waive in state office and record requirements for collection agencies domiciled outside Oregon. This correlation went mostly unnoticed by the regulatory agencies because of their lack of coordination with one another. The number of Oregon domiciled companies registered with DCBS has remained more constant, and if anything has fallen, while the majority of complaints continue to be on creditors located outside Oregon.

Impact of Lawsuits:

Through the right of private action granted to consumers under both the federal act and the state act, many lawyers have come to specialize in the bringing of lawsuits against debt collectors. Over the years there have been significant case law established with respect to the interpretation of both the state and federal provisions as to what constitutes a violation of the law. These court decisions which have established precedence in the law, not only come into play in court, but also in negotiations between plaintiff and defense lawyers in attempting to settle cases. Many of the cases brought against debt collectors involve technical violations which have caused little damage to the debtor. In such cases, defendants often settle out of court to avoid the high cost of defending the claim. In most cases that are settled, the payment of the plaintiff's attorney fees by the defendant far exceeds any payment made to the consumer for his damages. My clients tell me that nearly 90% of these cases are settled out of court. Some of the more important precedents established by case law are outlined below.

What is Willful?

The Oregon Supreme Court has defined "willful" as "no more than proof of ordinary negligence by a defendant in not knowing, when it should have known" State ex rel Redden v. Discount Fabrics, Inc., 289 Or. 375, 615, P.2d 1034, 1039 (1980). The standard of ordinary negligence therefore applies to this act, and debt collectors who violate the act through ordinary negligence by not knowing something it is determined they should have known are liable under the act. This is a much lower threshold than existed at the time the law was enacted by the legislature.

The federal act provides for strict liability on the part of a covered debt collector, but also provides a "bonafide error" defense.

When is legal action a violation?

The Oregon Supreme Court has also ruled that the filing of a lawsuit (even for an incorrect amount or for a debt not owed) is not a violation of the unfair debt collection practices act in and of itself. Porter v. Hill, 314 Or. 86, 838 P.2d 45 (1992). The Porter versus Hill case involved an attorney, Charles Porter, suing a former client for \$26,000.00 in attorney fees. The former client alleged he did not owe the debt. The Court found in this case that filing a legal action resolves issues surrounding the debt in a proper manner, not duplicitously or coercively. This allows for the fact that the amount of a debt, or indeed the very existence of the debt, can be legitimately in dispute, and that our legal system can and should be a venue open to parties to resolve those disputes.

HB 2826

The Oregon Collectors Association supports meaningful solutions where a problem can be shown to exist but those solutions should be balanced so as to minimize their impact on legitimate businesses who are trying to follow the rules. HB 2826 fails this test in that many of its provisions will do little or nothing to solve any problem, while creating major problems for honest debt collectors attempting to collect legitimate debts owed to Oregon businesses.

Section 1 of HB 2826 attempts to regulate debt buyers by requiring them to send a notice to a debtor 30 days before taking legal action against the debtor. This notice, and the many components required to be in the notice, will cause delays and problems for debt buyers, collection agencies collecting purchased debt, and attorneys. The bill requires that the original account number of the debt be included in the notice whether or not known to the collector. This original account number may not even exist. It also requires the collector to include a statement regarding the statute of limitations and the effect of making a payment relative to the statute of limitations that is not an accurate description of Oregon law on this matter. Additionally the collector of a purchased account would be required to obtain affidavits from the original creditor and any previous owners or sellers of the debt, which in many might be impossible to obtain. These affidavits would be required to be submitted with an initial pleading. The list of requirements is substantial both in the 30 day notice and attachments required with the pleading. Most are entirely unnecessary. These requirements will make the collection of legitimate debts impossible in many cases that would otherwise be collectable.

Section 1 of the bill also would limit the amount of interest that could be charged on a judgment obtained by a debt buyer to an amount that does not exceed the weekly average one-year constant maturity Treasury yield that the Board of Governors of the Federal Reserve System publishes in the calendar week that precedes the date of the judgment. Many of these debts might arise from a contract that specifies a different rate of interest than the one prescribed by the bill, and in those cases this provision will be in conflict to other Oregon statutes prescribing interest charges in such cases. For debts arising from other kinds of transactions, Chapter 82 of the Oregon Revised Statutes prescribes the legal rate of interest as 9% for all open accounts and judgments. This interest provision in HB 2826 will also be in conflict with the legal rate provision in Chapter 82.

The bill also makes changes to the unlawful debt collection practices act that will apply to anyone collecting a debt in Oregon.

Section 2 of the bill contains a provision that would require much of the same information required of debt buyers to be given to debtors by all debt collectors.

This section also would prohibit a debt collector from asking for a payment on a debt in which the statute of limitations has expired. Currently expiration of the statute of

limitations prohibits enforcement of the debt through legal means, but does not prohibit asking for payment. This provision is in conflict with other Oregon statutes.

Section 3 of the bill makes a substantial change to the availability of attorney fees in unlawful debt collection cases. Currently when a debtor sues a debt collector for an alleged violation of the act, the court may award reasonable attorney fees to a prevailing party. Under the provisions of the bill, there is no provision to allow attorney fees to a defendant in these cases.

Section 3 of the bill also changes the statute of limitations for unlawful debt collection cases from the present one year from the date of the injury, to the later of two years from the date of the discovery of the injury or two years from the date of a court dismissal or entry of judgment. The new language could mean that this statute of limitations would run for many years, and would create more litigation of these matters.

Section 3 of the bill also increases the statutory damage provision of the unlawful debt collection practices act from the present \$200.00, to \$1,000.00. We believe this increase is excessive.

We urge the committee to vote no on this overreaching bill. It will create many problems for debt collectors attempting to collect legitimate debts, while not really solving any problem.