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March 26, 2013

The Honorable Paul Holvey, Chairman
House Committee on Consumer Protection & Government Efficiency
900 Court Street, N.E., Room 453
Salem, Oregon 97301

RE: HB 3174
Testimony of Kent Anderson

Dear Chairman Holvey:

I am a consumer bankruptcy attorney with 35 years of experience. I have lived and worked in Lane County, Oregon all of my life, and I am certified as a consumer bankruptcy specialist by the American Board of Certification. I currently hold the office of Oregon State Chair for the National Association of Consumer Bankruptcy Attorneys, an organization founded in 1992 and made up of more than 5,000 lawyer members. This letter is intended as written testimony supporting the repeal of O.R.S. 18.300, the statutory ban on use of Federal exemptions in Oregon bankruptcy cases.

When Congress enacted the 1978 Bankruptcy Code[1], it made provision for states to opt out of a list of exemptions set forth under 11 U.S.C. § 522(d) of the new bankruptcy law. The Oregon Legislature enacted legislation to prohibit use of the new exemptions effective November 11, 1981. The statute, originally O.R.S. 23.305, is now numbered as O.R.S. 18.300 and simply prohibits the use of Federal exemptions in Oregon bankruptcy cases.

What is an Exemption?

Let me first explain what an exemption is and why it is important to Oregon citizens. The property of a judgment debtor is subject to seizure and sale by a court to satisfy a debt that has been reduced to judgment. Oregon law has long had a substantial list of assets that are exempt from seizure and sale by judgment creditors to collect their judgments. If an asset is exempt under one of the statutes, it is protected from court process and debtors are allowed to keep it despite the entry of a judgment against them in favor of a creditor.

In bankruptcy cases, the court appoints a trustee to collect and sell the assets of a debtor so that the proceeds can be used to pay unsecured creditors who file claims in the bankruptcy

[1] H.R. Rep. No. 595, 95th Cong. 1st Sess. 361 (1977).

proceeding. The rules of exemption are the same in bankruptcy as they are in the collection of a judgment by an individual creditor who has obtained a judgment. If an asset is protected from seizure and sale by a judgment creditor, it is also protected from seizure and sale by a bankruptcy trustee. Absent the use of Federal exemptions, only the Oregon exemptions, primarily listed in Chapter 18 of the Oregon Revised Statutes, can be used to protect assets from loss to the bankruptcy trustee in an Oregon filed bankruptcy proceeding.

When not barred by state statute, debtors in bankruptcy cases may elect to use either the Federal exemptions set out in the Bankruptcy Code, or state based exemptions for the state in which the bankruptcy proceeding is filed. There are currently 19 states (if Washington DC is counted as a state) permitting use of federal exemptions. The states currently allowing a choice between state or federal exemptions are Alaska, Arkansas, Connecticut, Washington D.C., Hawaii, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin. All other states and jurisdictions, including the state of Oregon, currently limit exemptions used in bankruptcy to those provided under state statute alone.

By repealing O.R.S. 18.300, Oregon would join the states permitting the use of Federal exemptions in bankruptcy cases. That would have no other effect on Oregon debtors, and would not affect the rights of judgment lien creditors to execute on assets of debtors outside of bankruptcy cases. This change would affect only individuals who had filed bankruptcy cases in the state of Oregon.

Benefits for the Debtor:

The homestead exemption provided by Oregon statute is actually more generous than the homestead exemption provided under Federal law. However, for those individuals without a homestead to claim, Federal exemptions are usually more helpful in bankruptcy cases. I have attached a list of exemptions commonly used in Oregon bankruptcy cases and the corresponding amount allowed under Federal bankruptcy exemption law. Federal exemptions are adjusted based on changes in the consumer price index every three years. The federal exemptions are scheduled to increase from current amounts to the amounts set forth in the chart I have attached on April 1, 2013.

In general Oregon and Federal exemptions are similar in amount[2]. The most important benefit of Federal exemptions is the ability to use a portion of the homestead exemption to enhance another Federal exemption or to protect an asset that is not otherwise subject to a specific exemption. This would be particularly helpful to individuals who have an automobile worth more than the $3,000.00 exemption provided under Oregon law, which may be their only valuable asset. The unused Federal homestead exemption could be used to protect a small inheritance, a savings account balance, an otherwise non-exempt tax refund, or any other asset that is not protected by a specific statute.

If a bankruptcy debtor had significant equity in their personal residence, they would probably choose to claim Oregon exemptions and forego the opportunity to claim Federal

[2] See attached list of Oregon and Federal exemptions compared.

exemptions. However, due to the protracted economic downturn, loss in value of residential real estate, and other economic changes of the past 5 years, many Oregonians no longer own a personal residence to claim as a homestead. If they own real estate, in many cases it has no equity that requires the protection of an exemption statute. Why should an individual who is lucky enough to have equity in their real estate be so much more favorably treated in a bankruptcy proceeding than somebody who either owned no residential real estate or had no equity in residential real estate?

If Oregon citizens are permitted to use Federal exemptions in bankruptcy cases then less fortunate individuals with no homestead to protect would still be allowed to retain an asset with substantial value through a bankruptcy proceeding. The exemption statutes would no longer so disproportionately favor the owners of real estate over those who are less fortunate.

Would Repeal of O.R.S. 18.300 Change the Collection of Judgments?

No, it would not. Repeal of O.R.S. 18.300 would have no impact on the collection of judgments by creditors in Oregon courts. The statutory revision would only change the nature of assets that can be protected in cases filed in Federal Bankruptcy Court. A debtor would have to file a petition in bankruptcy in order to invoke the use of federal bankruptcy objections. Federal exemptions set forth in 11 U.S.C. § 522(d) only come into play in the relationship between a debtor in bankruptcy and a bankruptcy trustee.

Benefits to the State of Oregon

The state of Oregon is benefitted by improving its exemptions in bankruptcy. Federal exemptions increase fairness in the way bankruptcy is administered in that individual debtors without homes are allowed to keep additional assets after bankruptcy. Less money will be sent out of the state by Oregon bankruptcy trustees. An increase in bankruptcy exemptions encourages small business activity in the state.

Permitting use of federal exemptions in bankruptcy helps to equalize the fresh start benefits given to debtors in bankruptcy. Homeowners will no longer have such a disproportionate benefit over those without a homestead to claim. The single mother with two children will be allowed to keep her $10,000 automobile and her full tax refund.

A high percentage of the money collected by bankruptcy trustees in Oregon is sent to out of state creditors. With the help of the US Bankruptcy Court Clerk and a University of Oregon Law School third year student I conducted a study of bankruptcy cases over the past two years with funds distributed to unsecured creditors. In a sample of distribution reports from more than 1,000 bankruptcy cases where creditors received payments from the trustee, we found that 77% of the creditors that received payments were located outside the state of Oregon. If more money remains with people in the state, it will be spent here in Oregon.

Since federal bankruptcy exemptions are more likely to be used by those who are less financially fortunate in our society, keeping money in their hands is particularly important. If people have their own resources and can pay for necessary food, shelter and medical services, they are less likely to be forced to rely on limited public services provided by the state. Oregonians are disproportionately suffering financially from the foreclosure crises and problems in the credit industry and need more protection. Many families who file bankruptcy have lost employment, have become ill, have a sick child or family member, or have suffered through a divorce or the death of a bread winner. Leaving these people only with $400 in cash assets is simply not adequate. It is a recipe for reliance on the state.

Studies have shown that higher exemption levels attract entrepreneurs. Entrepreneurs prefer to start businesses in states with higher exemptions. Multiple studies have shown this to be the case.[3] A study conducted in Europe revealed that entrepreneurs were crossing borders into countries with broader exemptions to start new businesses.[4] One study even concluded that it would be wise for states and their chambers of commerce to advertise the fact that they have higher exemptions in order to maximize this effect.[5] The state of Ohio increased its exemptions in 2009 and has seen year over year increases in small business registration for the last several years despite the difficult economic conditions.

Conclusion.

Individuals who are forced by economic circumstances to file bankruptcy in Oregon are at a substantial disadvantage if they are unable to claim the homestead exemption. If the prohibition against federal bankruptcy exemptions is repealed, bankruptcy debtors in Oregon will be permitted to choose between the exemptions permitted by Oregon statute and the list of exemptions that Congress has enacted under federal law. This provision would apply only in bankruptcy cases.

If you have any questions about this matter please feel free to contact me and I will do my best to provide any additional information that would be of help.

Respectfully Submitted,

Kent Anderson
Oregon Chair NACBA

[3] Fan, W. & White, M.J, 2003. Personal bankruptcy and the level of entrepreneurial activity. Journal of Law & Economics, 46: 543-567.; Georgellis, Y. & Wall, H., 2006; Entrepreneurship and the policy environment. Review – Federal Reserve Bank of St. Louis, 88(2): 95-111; Mathur, A., 2005. A spatial model of the impact of state bankruptcy exemptions on entrepreneurship. Small Business Administration, Office of Advocacy working paper No. 261.

[4] Amour, J. & Cummings, D. 2005, Bankruptcy Law and Entrepreneurship. Presented at the Annual Meeting of the American Law and Economics Association.

[5] Kaufman, J., Herrmann, P. & Van Auken, H. 2007, The Impact of Bankruptcy Laws on the Entrepreneurial Decision: Are Entrepreneurs Even Aware? Journal of Applied Management and Entrepreneurship.

Comparison of Common Oregon and Federal Exemptions

(Effective 4/1/2013)

Type of Exemption	Oregon	Federal
Homestead	$40,000 or $50,000 joint	$22,975 or $45,950
Wildcard	$400	$1,150 plus up to $10,825 unused Homestead applied to any other property
Automobile	$3,000	$3,675
Household Goods	$3,000	$12,250
Tools of the Trade	$5,000	$2,300
Jewelry	Part of clothing	$1,550
Clothing	$1,800	None (wildcard)
Life Insurance	Full if estate is not beneficiary	Full if not matured
Life Insurance Loan Value	Full	$12,250
Firearms	$1,000 total value of one rifle or shotgun and one pistol	None currently (HR 5627 is pending and would allow up to $3,000 for one firearm)
Bodily Injury Claims	$10,000	$22,975
Professionally Prescribed Health Aids	Full	Full
Domestic Animals	$1,000	None (wildcard)
Books, Pictures, Musical Instruments	$600	None (wildcard)

The most commonly used exemptions are similar and roughly comparable in the federal and Oregon exemption statutes. The single most important difference between the two is the federal wildcard exemption available to individuals in bankruptcy under 11 USC §522(d)(5). The wildcard, which can be applied to enhance most other exemptions or to cover otherwise non-exempt assets, permits the debtor to keep assets worth up to $12,725 for an individual or $25,450 for a married couple filing jointly. Oregon allows $400.

Federal bankruptcy exemptions along with many other dollar limitations set forth in the bankruptcy code are automatically adjusted every three years pursuant to 11 USC §104(a) to keep pace with the Consumer Price Index for All Urban Consumers published by the US Department of Labor. The update scheduled for April 1, 2013, is reflected above.

Federal law provides an extensive set of exemptions that apply to many types of financial assets or government benefits. The exemptions listed in the above chart are specifically limited for use in bankruptcy and are only a partial list of the bankruptcy statutes contained in Title 11 of the United States Code. These exemptions are the most often used and most closely analogous to common exemptions under Oregon law.