

Senate Judiciary Committee
February 18, 2013
Richard Slottee, Testimony in Support of SB 396

Chair Floyd Prozanski
Members of the Committee

I am a professor at Lewis & Clark Law School and Director of the Lewis & Clark Legal Clinic. The Legal Clinic is one of several teaching clinics for the Law School. During my 30 years as Director of the Legal Clinic, I have represented numerous low income Oregonians in Chapter 7 bankruptcies.

I am submitting this testimony in favor of the amendment to SB 396 which would allow Oregonians who file Chapter 7 bankruptcy to use the exemptions set out in the Bankruptcy Code at 11 USC §522 (*e.g.* the “federal exemptions”).

The Bankruptcy Code is a federal law which allows debtors to obtain relief from their debts. When a debtor files bankruptcy, essentially all of the debtor’s property as of the date of filing becomes part of a bankruptcy estate. The Bankruptcy Court appoints a trustee to liquidate the property and distribute the proceeds to the debtor’s creditors.

The Code has a goal of providing debtors with a fresh start, and therefore allows debtors to exempt, or protect, certain property. The Code provides that a debtor who files a Chapter 7 bankruptcy may choose either the exemptions provided in the Code (*e.g.* “federal exemptions”), or the exemptions available to a judgment debtor in the jurisdiction in which the debtor resides. The debtor must choose one or the other list of exemptions. The Code also allows any state legislature to “opt out” of this dual choice option, and provide that debtors may choose only from the exemptions available to a judgment debtor in the jurisdiction in which the debtor resides.

Washington is a dual choice state, which means that a Washington debtor who files bankruptcy may choose either the federal exemptions or the exemptions available to a judgment debtor under Washington Law. Oregon is an opt out state, which means that Oregon debtors who file bankruptcy may choose only from the list of Oregon exemptions. There are certain exemptions which are available to every debtor, regardless of the list in the Code or state law. Most notably, these exemptions are for Social Security and Veterans benefits, Civil Service benefits, and a portion of wages.

A debtor may file a Chapter 7 bankruptcy in Oregon only if the debtor has resided in Oregon for the greater part of the 180 days immediately prior to filing bankruptcy. However, the Code provides that before a debtor may use the exemptions of the state where the debtor resides, the debtor must have resided in that state for at least two years prior to the date the bankruptcy is filed. If the debtor has not resided in the state for at least two years, the debtor must use the exemption scheme of the state where the debtor resided for the greater part of the 180 days immediately before the start of the two year period.

Consequently, a debtor who files Chapter 7 bankruptcy in Oregon, but has not resided in Oregon for two years, is required to use the exemption scheme of the prior state of residency.

This prior state may be a dual choice state or an opt out state. If the state is a dual choice state, the Oregon debtor may then use either the federal exemptions or the exemptions of that state.

Some states require that the debtor be an actual current resident of the state before the debtor may use the state exemptions. In this situation, if the state is an opt out state but requires the debtor to be a current resident, the debtor is entitled to use the federal exemptions, since the debtor would otherwise not have any available exemptions.

Currently, there are twenty one dual choice states and jurisdictions. These include Alaska, Arkansas, Connecticut, District of Columbia, Hawaii, Kentucky, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Puerto Rico, Rhode Island, Texas, Vermont, Virgin Islands, Washington, and Wisconsin.

California is an opt out state, but allows debtors to choose from either of two state exemption lists, one of which is more liberal than the federal exemptions. Although New Mexico is an opt out state, it allows debtors who file bankruptcy to use exemptions which are virtually equivalent to the federal exemptions. New York became a dual choice state in 2011, after twenty nine years as an opt out state.

There is little doubt that the federal exemptions would provide the debtor who files bankruptcy in Oregon, and does not own a residence, with greater protection for many assets. For instance:

| Federal Exemptions | Oregon Exemptions |
|--|--|
| \$3,450 in an automobile | \$3,000 in an automobile |
| \$1,450 in jewelry | \$1800 in jewelry and clothes |
| \$2,175 in tools of trade | \$5,000 in tools of trade |
| \$11,525 in total for household goods, clothes, books, animals, crops, musical instruments (but no single item greater than \$550) | \$600 in books, pictures and musical instruments \$1,000 in domestic animals and poultry \$3,000 for household goods |
| \$0 for the earned income tax credit | 100% of the earned income tax credit |

Probably the biggest difference between the federal exemptions and the Oregon exemptions is what is known as the “wild card”. ORS 18.345(1)(o) provides that the debtor may exempt up to \$400 of any property (including money) that is not otherwise covered by an exemption. In contrast, the federal exemptions provide for a \$21,625 homestead exemption, but allow the debtor who does not use the entire amount of the homestead exemption to use up to \$10,825, plus the wild card of \$1,150, in any property.

A single Oregon debtor currently has a \$400 wild card exemption and a \$40,000 homestead exemption. Under the federal exemptions, a single debtor has a \$1,150 wild card exemption and \$21,625 homestead exemption, of which up to \$10,825 could be used to exempt property other than the debtor’s equity in a homestead.

The benefit to Oregon debtors of the federal exemptions is not in the ability to protect more valuable personal property. Those debtors with property of significant value will choose to file a Chapter 13 bankruptcy and pay any excess property values into the plan. Rather, the benefit is the ability to protect liquid assets which are fundamental for the debtor to maintain a minimal standard of living.

A typical Oregon bankruptcy trustee will consider pursuing liquid assets of a debtor as they approach \$1,000. Some trustees will claim assets of a much smaller amount.

A single debtor typically will have:

Accrued but unpaid net wages owing. If the debtor is paid weekly, the debtor can protect 100% of the wages, but only up to \$218.

Cash on hand

Bank account balances not otherwise protected (*e.g.* Social Security benefits, etc.)

The right to receive state and federal tax refunds. While the earned income tax credit is 100% protected, the debtor often has a right to receive the Oregon earned income tax credit, Child Tax Credit, Additional Child Tax Credit, Making Work Pay Credit, the various educational credits, all of which are intended for low income individuals. In addition to the foregoing, there are the periodic *kicker* rebates, and the refund of overpaid taxes.

The debtor has an exemption of only \$400 to use to try to protect cash on hand, bank balances, and tax refunds. Tax refunds in particular are often the most significant asset the debtor will acquire during the year, and often represent the only opportunity to save money for future living expenses.

If a debtor files bankruptcy and forfeits, for instance, \$2500 in non-exempt cash on hand, bank account balances and forthcoming tax refunds, the financial impact could be significant, particularly for the lower income debtor. A creditor has the option of filing a proof of claim and sharing in the distribution of the non-exempt assets. The amount which a creditor would typically receive, however, would be minimal.

For many debtors, the ability to use the federal exemptions, and protect more property, will have little negative impact on creditors but a significant beneficial impact on debtors. A creditor's minimal distribution under the current exemption scheme would be reduced because there would be fewer cases with assets to distribute.

Thank you for your consideration.