

# Merrick Mediation

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## Testimony in support of HB 2733 and HB 2734

March 2, 2017

Chair Barker and committee members,

Thank you for your service to the people of Oregon.

My name is Jeff Merrick. I have been an Oregon lawyer since 1984. Since 2012, I have served as a volunteer mediator for small claims courts for Clackamas and Multnomah Counties.

### Restore the Goal of Small Claims Court

Small claims court is *supposed* to be a just, speedy and inexpensive way to achieve rough justice between two parties who represent themselves. HB 2733 and 2734 will help restore that goal and improve fairness.

### Small Claims Have Big Consequences

"Small claims" - up to \$10,000 - can have huge consequences. Many people summoned to court barely make ends meet. A judgment and garnishment of wages can drain take-home enough so that people cannot pay rent, leading to eviction and homelessness.

### Professionals vs. Financially Vulnerable Amateurs

Most people I see in small claims court cannot afford attorneys to represent them. In theory, that's not a problem because attorneys are not allowed in small claims court for either side.<sup>1</sup> But, there is a loophole. Collection agents can pursue claims on behalf of others, even when they do not own the claim. Collection agents are in court every day and are skilled at mediating and presenting claims; they are as adept as any attorney. In effect, creditors have "an attorney" against someone who might have zero acquaintance with legal proceedings.

In theory, even when it is pro vs. amateur,

*I believe if some charitable organizations who use collection agents WERE in the room, sometimes, they would act pursuant to their mission and do charity. Would a truly charitable organization garnish wages to collect a \$1,500 debt when garnishment might result in eviction and homelessness to a middle-aged couple, for example?*

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<sup>1</sup> ORS 46.415(4).

the judge should ensure that justice is done. BUT, more often than not, the parties never get to a judge in counties that summon people to mediation, including Multnomah and Clackamas Counties. Parties do not see the judge unless mediation fails to settle the lawsuit (or they refuse to mediate after showing up to court).

Mediation has many wonderful benefits. The opportunity to exchange information and negotiate a payment plan, for example, is great. Other times, mediation is less-than-fair because the professional “attorney” asserts a position with a strong voice of authority, and the debtor does not have the experience, knowledge or, frankly, the smarts to question what the pro states.

Mediator ethics prevent mediators from taking sides. Simplified, a *mediator's* job is to make sure the process is voluntary and without bullying, for example. Mediators may not ensure a just settlement. If a professional negotiator makes a sharp bargain, that's his or her job. By contrast, would a *judge* permit the continuation of 33% interest on a 200,000-mile car that broke down within 60 days? Maybe not.

More importantly, when the alleged debtor truly disputes the bill, the professional negotiator often claims he or she does not have the client's authority to negotiate. (Q. "Can you budge on the amount due or interest?" A. "No.") And when the consumer thinks the quality of work or product was subpar or constituted malpractice, the clinic or true party is not in the room to listen and evaluate the concern. *I believe if some charitable organizations who use collection agents WERE in the room, sometimes, they would act pursuant to their mission and do charity.* Would a truly charitable organization garnish wages to collect a \$1,500 debt when garnishment might result in eviction and homelessness to a middle-aged couple?

### No Secret Courts / Secret Parties

Who are the faceless entities using professional negotiators with no authority to actually negotiate? Who are the repeat players? Can a newspaper do an expose' on a business or charity? No, because the claims are pursued in the name of the collection agent.

In every lawsuit other than small claims, the claim must proceed in the name of the “real party in interest.”<sup>2</sup> It is time add sunshine to small claims court by requiring parties to pursue their claims in their own names. HB 2734 requires creditors and others to file suit in their own names. The amendments also require the actual party to show up for mediation and trial, closing the loophole that permits only the creditor to have professional representation in court-ordered mediation or trial.

### One Spouse is Enough.

HB 2734 addresses another important issue. Often, spouses are jointly responsible for a debt or jointly want to sue someone. Often, they have child care issues or cannot afford to take time from work. The proposed law permits one spouse to appear on behalf of both. This seems like a common sense clarification.

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<sup>2</sup> ORCP 26A.

### Legal Rate of Interest.

The “legal rate of interest” in Oregon is 9% (except for medical malpractice judgments, which accrue interest at 5%).<sup>3</sup> Many who volunteer in small claims court see how that high rate can crush people, especially when creditors wait several years to file their claim. For example, a young person who moved frequently never learned that her medical insurance had not paid her medical bill in full until she received a lawsuit five years later. By then, her \$900 balance had ballooned to nearly \$1,400.00.

Federal courts use a market rate of interest.<sup>4</sup> HB 2733 would make the legal rate of interest the greater of 1% or the market rate.

The committee should consider whether to have tiered rates of interest: Perhaps one legal rate for claims under \$10,000 and a different rate for other claims.

### Conclusion

Thank you for considering these issues. Passing any one of these reforms will help, some. Passing all of them will help a lot to restore the goal of small claims court a just, speedy and inexpensive resolution of claims.

Sincerely,

Jeff Merrick

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<sup>3</sup> ORS 82.010.

<sup>4</sup> 28 USC § 1961.

March 2, 2017

## Testimony in support of HB 2733 and HB 2734

### **Address Small Claims in Justice Courts, not only Circuit Courts**

Chair Barker and committee members,

I write this testimony to supplement my other testimony.

HB 2734 addresses small claims cases before circuit courts, but it omits reference to small claims cases before justice courts.

ORS 46.405 mandates small claims departments in circuit courts. Then, the law sets forth procedures for small claims cases.

ORS 55.011 mandates small claims departments in justice courts. Then, the law sets forth procedures for small claims cases in justice courts, which are similar to, but not identical with, ORS 46.405 *et. seq.*

HB 2734 should be amended to reform the small claims departments of both the circuit and justice courts.