

ORS 174.010
ORS 697.005(1)(a)
ORS 697.005(1)(b)(L)(ii)
ORS 697.005(4)
ORS 697.015
ORS 697.031
ORS 697.087(1)
ORS 697.087(3)
collection agency
factor
factoring services
statutory construction

Shelton v. Krysl(In re Krysl) Adv. # 02-6244-aer
Main Case # 602-63514-aer7

1/16/04 Radcliffe Published
Amended Memorandum Opinion
(amending and superceding opinion entered
11/25/03-see E03-8(14))

Plaintiff, as assignee of a claim, brought suit under 11 U.S.C. §§ 523 and 727 to except a debt from discharge and to deny Debtors' full discharge.

Debtors/Defendants moved to dismiss for lack of standing and also sought to enjoin Plaintiff from acting as a "collection agency" until he had registered under Oregon law.

Plaintiff conceded at hearing that he fell within the general definition of a collection agency under ORS 697.005(1)(a). However, he argued that he was excluded from the definition as one providing "factoring services."

At issue was the interpretation of ORS 697.005(1)(b)(L)(ii) which provides for an exclusion from the definition of "collection agency" for persons engaged in the business of "soliciting or collecting on accounts that have been purchased from commercial clients under an agreement...."

The court examined the text of the statute, prior statutory enactments, and the common law in existence at the time of enactment, and concluded that the exclusion required more than a single agreement to purchase a single account. Rather, the statute contemplated some form of "umbrella" or ongoing relationship between the factor and its client. Plaintiff had conceded that there was no such relationship between him and his assignor. As such, he lacked standing to prosecute the claim. Further, because Plaintiff was not registered, and because Defendants had been injured, (as they had incurred attorney's

fees and costs in defending the instant proceeding), Plaintiff was enjoined from acting as a collection agency in the State of Oregon unless and until he registered with the Oregon Department of Consumer and Business Services under ORS 697.031.

E04-2(19)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

| | | |
|-----------------------------|---|---|
| In Re: |) | Bankruptcy Case No. |
| |) | 602-63514-aer7 |
| PHILIP L. KRYSL and |) | |
| KATHERINE A. WILSON(KRYSL), |) | |
| |) | |
| Debtors. |) | |
| <hr/> | | |
| LEE R. SHELTON, |) | Adversary Proceeding |
| |) | No. 02-6244-aer |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| PHILIP L. KRYSL and |) | AMENDED MEMORANDUM OPINION ¹ |
| KATHERINE A. WILSON(KRYSL), |) | |
| |) | |
| Defendants. |) | |

19 Plaintiff has commenced this adversary proceeding against the
20 defendants, debtors herein, seeking a determination that a debt
21 allegedly owing by Defendants to a third party (from whom Plaintiff
22 has acquired the debt) is excepted from Defendants' discharge
23 herein, or, in the alternative, that Defendants be denied a
24 discharge in this bankruptcy proceeding.

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26 ¹ This Amended Memorandum Opinion supercedes the Memorandum Opinion entered
November 25, 2003.

1 Defendants have moved to dismiss this case for lack of
2 standing. Defendants maintain that Plaintiff is unlawfully
3 conducting the business of a collection agency as defined by Oregon
4 law. They assert that he has not registered as required by Oregon
5 law, thus, he is barred from proceeding herein. Defendants further
6 seek an injunction, as provided under Oregon law. They also seek to
7 be awarded their reasonable attorney's fees and costs pursuant to
8 Oregon law and 11 U.S.C. § 523(d).

9 An evidentiary hearing was held concerning the motion to
10 dismiss on April 16, 2003. Thereafter, the parties were given an
11 opportunity to submit post-hearing briefs; the matter is now ripe
12 for decision.

13 FACTS

14 Based upon the submissions and the evidence received, the court
15 makes the following findings of fact:

16 ATEZ, Inc (ATEZ) is an asbestos removal company. At times,
17 Plaintiff has solicited, and thereafter purchased, ATEZ's claims
18 against third parties. In the last three years, ATEZ sold three (3)
19 claims to Plaintiff. In the last ten (10) years, ATEZ sold
20 approximately six (6) claims to Plaintiff.²

21 The sales are normally evidenced by written assignments. If a
22 collection suit is filed, Plaintiff usually files as "assignee" of
23 ATEZ. In one such case in 2000, the defendant therein paid ATEZ
24

25 ² In 2002, Plaintiff acquired four (4) or five (5) claims from parties
26 other than ATEZ.

1 directly, thereafter Plaintiff dismissed the case and considered the
2 debt satisfied.

3 There is no written agreement between Plaintiff and ATEZ
4 regarding "factoring" services. Further, Plaintiff has never
5 provided financial backing to ATEZ. Plaintiff has not registered as
6 a collection agency with the State of Oregon.

7 On or about March 18, 2002, Plaintiff purchased, from ATEZ,
8 all of its right title and interest in a \$636.87 claim against
9 Debtor, Katherine Wilson, as evidenced by a written assignment.

10 Defendants have incurred attorney's fees and costs in defending
11 against Plaintiff's complaint.³

12 DISCUSSION

13 Oregon law requires the registration of collection agencies
14 with the Department of Consumer and Business Affairs. ORS 697.015.
15 Unregistered agencies are subject to an injunction, 697.087(1) and
16 the party seeking the injunction may be awarded its reasonable
17 attorney's fees and costs. ORS 697.087(3). The term "collection
18 agency" is defined in ORS 697.005(1)(a).⁴

19 Plaintiff has conceded that he has not registered and that he
20 would ordinarily fit within the statutory definition of "collection
21

22 ³ The amount of fees and costs will be determined at a subsequent hearing.

23 ⁴ The statute defines "collection agency" in pertinent part as:

24 Any person directly or indirectly engaged in
25 soliciting claims for collection, or collecting or
26 attempting to collect claims owed, due or asserted to be
owed or due to another person or to a public body.

1 agency." He argues, however, that he is excluded from the
2 registration requirement by a statutory exclusion as one providing
3 "factoring services." The exclusion, found in ORS
4 697.005(1)(b)(L)(ii), provides:

5 "Collection agency" does not include:

6 (L) Any person while the person is providing
7 factoring services. A person is providing
8 factoring services for the purposes of this
9 subparagraph if the person engages, directly or
10 indirectly, in the business or pursuit of:

11 (i)...

12 (ii) Soliciting or collecting on
13 accounts that have been purchased
14 from commercial clients under an
15 agreement whether or not the
16 agreement:

(I) Allows recourse against the
commercial client;

(II) Requires the commercial
client to provide any form of
guarantee of payment of the
purchased account; or

(III) Requires the commercial
client to establish or maintain
a reserve account in any form.

17 The statute thus requires that the person be engaged in the
18 business of "soliciting or collecting on accounts that have been
19 purchased from commercial clients under an agreement...." Id.
20 (Emphasis added). Defendants argue there was no such agreement.
21 Plaintiff contends that the written assignment of ATEZ's claim
22 against Defendants to him is sufficient to meet the "agreement"
23 requirement.

24 The statute does not define the term "under an agreement."
25 This court did not discover any Oregon case-law construing it. It
26 appears that this is a matter of first impression.

1 The Oregon courts have provided guidance as to the construction
2 of Oregon statutes:

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4 [W]e must first examine the text and context
5 of a statute because the wording of a statute
6 is the best evidence of the legislature's
7 intent. The context of a statute relevant at
8 the first level of analysis may include other
9 provisions of the same statute and related
10 statutes, prior enactments and prior judicial
11 interpretations of that statute and related
12 statutes, and historical context of the
13 relevant enactments. Only if the intent of
14 the legislature is not clear from the first
15 level of analysis may legislative history be
16 considered. If the legislative history fails
17 to yield an unambiguous result, then
18 consideration may be given to pertinent
19 maxims of construction.

20 State v. Waechter, 163 Or.App. 282, 290, 986 P.2d 1281, 1286 (1999)
21 (internal citations and quotations omitted). Further, the court must
22 try to give effect to all provisions of the statute. ORS 174.010.⁵

23 Turning to the first level of analysis, the statute's text
24 requires purchase of accounts from a "commercial client." "Client"
25 is defined as "any person authorizing or employing a collection
26 agency to collect a claim." ORS 697.005(4) (emphasis added). Thus
the "purchase" referenced in the statute, already implies a
consensual transaction. To avoid rendering the "under an agreement"

⁵ ORS 174.010 provides:

In the construction of a statute, the office of the judge is
simply to ascertain and declare what is, in terms or in substance,
contained therein, not to insert what has been omitted, or to omit
what has been inserted; and where there are several provisions or
particulars such construction is, if possible, to be adopted as will
give effect to all. (emphasis added).

1 language surplusage, it must require something more than a single
2 agreement to purchase a single account. That is, the statute must
3 contemplate some form of "umbrella" or ongoing agreement between the
4 "factor" and its client.

5 This interpretation is supported by the statute's context,
6 which includes prior enactments. Waechter, supra. "Collection
7 agencies" have long been regulated in Oregon, either by licensure or
8 registration. In 1959, "individuals or firms who purchase or take
9 accounts receivable for collateral purposes" were excluded from the
10 definition of "collection agency business." ORS 697.020(4) (1959)
11 (amended 1975) (repealed 1977). In 1963, the legislature added to
12 the definition of "collection agency business", "any person ... who
13 solicits or accepts accounts for collection on a contingent or
14 percentage basis or by a fee or outright purchase for collection
15 purposes" ORS 697.020(3) (1963) (repealed 1977). It kept the
16 above-referenced exclusion.

17 In 1975, "factoring agencies" (as well as "billing agencies")
18 became regulated in the same statutory scheme. "Factoring agencies"
19 were those that engaged in "factoring", which consisted of lending
20 money to commercial clients, taking accounts receivable as security,
21 and collecting upon those accounts.⁶ Also in 1975, the exclusion

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23 ⁶ "Factoring or factoring service" was defined as:

24 [E]ngaging, directly or indirectly and as a primary or
25 secondary object, in the business or pursuit of lending or
26 advancing money on the security of merchandise or accounts
receivable to commercial clients and then enforcing collection
procedures on these accounts. Any agency, firm, person,

(continued...)

1 for those purchasing or taking accounts receivable for collateral
2 purposes, was replaced by an exclusion for persons "who purchase
3 accounts without recourse." This exclusion made no mention of the
4 purchase being "under an agreement" or otherwise. ORS 697.020(4)
5 (1975) (repealed 1977). It applied to "factoring services", (as
6 well as "collection agency business" and "billing services"). Id.

7 In 1977, the legislature added to the definition of "factoring
8 or factoring service", (and thus to the regulatory scheme), parties
9 who solicited or collected on commercial accounts purchased under an
10 agreement with recourse.⁷ It also continued the exclusion for any
11 person who purchased without recourse, and added to that exclusion,
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14 ⁶(...continued)

15 corporation or voluntary association lending or advancing money
16 to commercial clients on the security of merchandise or
17 accounts receivable who then enforces collection actions on
18 these accounts receivable is conducting a factoring agency
19 business....

20 ORS 697.020(11) (1975) (repealed 1977).

21 ⁷ The statute read as follows:

22 "Factoring or factoring service" means engaging, directly or
23 indirectly, in the business or pursuit of:

24 ...

25 Soliciting or collecting on accounts that have been
26 purchased from commercial clients under an agreement
which allows recourse against such commercial client, or
where such commercial client provides any form of
guarantee of payment for such purchased account, or
requires the commercial client to establish or maintain
a reserve account in any form.

ORS 697.021(10)(b) (1977) (repealed 1981).

1 persons who purchased with recourse, if the underlying account was
2 commercial.⁸

3 In 1981, the legislature removed "factoring services" (as well
4 as "billing services") from regulation. It replaced the prior
5 exclusion for "purchasers of accounts" etc., with essentially the
6 current exclusion for those providing "factoring services", labeling
7 such as an "exemption."⁹

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9 ⁸ The exclusion provided in pertinent part:

10 [T]he terms ... "factoring service"... do not include:

11 The activity of any person in soliciting
12 or collecting directly from the obligor any
13 account or account receivable purchased from
14 the owner thereof, provided such purchase is:

15 (A) Without recourse of any kind
16 against such owner, requires no
17 guarantee by such owner of the
18 payment by the obligor of such
19 account or account receivable,
20 and requires no reserve account
21 be established or maintained by
22 such owner; or

23 (B) With recourse or requires a
24 guarantee of payment or requires
25 a reserve and the account or
26 account receivable arose out of
other than a consumer
transaction.

ORS 697.025(8) (1977) (repealed 1981).

21 ⁹ The exemption, ORS 697.025(9)(b)(1981) (repealed 1995, and renumbered
22 with grammatical changes, as ORS 697.005(1)(b)(L)), read in pertinent part:

23 The following are exempt from the requirement under
24 ORS 697.015 to register under ORS 697.031 before engaging
in a collection agency business:

25 (9) A person while the person is providing factoring
26 services. A person is providing factoring services for
the purposes of this subparagraph if the person engages,

(continued...)

1 In 1995, the above exemption was renumbered, with nonmaterial
2 changes, to the current ORS 697.005(1)(b)(L)(ii), providing for an
3 "exclusion" as opposed to an "exemption."

4 This history supports the construction that the current "under
5 an agreement" language connotes an agreement that is more than an
6 agreement evidencing the purchase of any given individual account.
7 Prior to 1981, certain purchasers of accounts (no matter if under
8 "an agreement") were excluded from the regulatory scheme. In 1981,
9 the legislature supplanted the then-existing exclusion with the
10 current one for "factoring services", which requires purchases
11 "under an agreement."

12 In addition, for purposes of statutory construction, "context"
13 also requires consideration of the preexisting common law. Reed v.
14 Jackson County Citizens League, 183 Or. App. 89, 94, 50 P.3d 1287,
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16 _____
16 ⁹(...continued)

17 directly or indirectly, in the business or pursuit of:

18 (a)...

18 (b) Soliciting or collecting on accounts
19 which have been purchased from commercial
clients under an agreement whether or not the
agreement:

20 (A) Allows recourse against the
commercial client;

21 (B) Requires the commercial
client to provide any form of
22 guarantee of payment of the
purchased account; or

23 (C) Requires the commercial
client to establish or maintain
24 a reserve account in any form.

25 The 1981 legislature also lessened the regulation of "collection agencies"
26 to require "registration" instead of licensure. ORS 697.015 (1981).

1 1290 (2002). As noted above, "factoring" first became part of the
2 statutory scheme in 1975. The term "under an agreement" first
3 appeared in 1977.

4 Prior to the introduction of "factoring" to the statutory
5 scheme, the term "factor" as understood in the common law had
6 evolved from its traditional usage as a type of agent who sells
7 another's goods for commission, to its "modern" usage as one who
8 supplies financing by buying accounts receivable at a discount. As
9 explained in Am. Jur. 2d:

10 While in the past the terms "factor" and
11 "commission merchant" were used
12 interchangeably, "factoring" in modern
13 commercial practice is understood to refer to
14 the purchase of accounts receivable from a
15 business by a "factor" who thereby assumes
16 the risk of loss in return for some agreed
17 discount. Indeed, the factor has emerged
18 primarily as a financier, often a finance
19 company or similar institution, which
20 provides its clients (usually manufacturers
21 or other suppliers of goods) with needed
22 working capital and other financial
23 assistance by purchasing their accounts
24 receivable.

25 32 Am. Jur. 2d Factors and Commission Merchants § 2 (2003) (citing
26 among others, Manhattan Factoring Corp. v. Orsburn, 238 Ark. 947,
385 S.W. 2d 785 (1965)); see also, Mountain Top Manufacturing Co. v.
Business Factors Corp., 39 Misc. 2d 408, 240 N.Y.S. 2d 616 (1963).

27 Although no Oregon court expressly discussed this "modern"
28 usage before the subject legislation, it was impliedly recognized in
29 Frutiger v. Department of Revenue, 270 Or. 821, 824, 529 P.2d 910,
30 911 (1974). There, a corporation entered into a "financing
31 agreement" whereby it was assigned another business' accounts

1 receivable in consideration of advances of 85% of the face amount of
2 the accounts. Id. The court characterized the corporation as being
3 "engaged in the factoring business." Id. This "modern" usage was
4 later expressly recognized by the court in Zidell Marine Corp. v.
5 West Painting, Inc., 133 Or.App. 726, 751 (f.n. #9), 894 P.2d 481,
6 495 (1995) (dissent) ("[f]actoring' is a commonly used short-term
7 financing arrangement whereby the debtor assigns acceptable accounts
8 receivable to the creditor at a discount").

9 It is clear from the text of ORS 697.005(1)(b)(L)(ii)'s
10 predecessor legislation, as reviewed above, that the terms
11 "factoring" and "factoring service" (as originally enacted)
12 contemplated the so-called "modern" usage of the term, which in turn
13 supports the court's interpretation that some overall financing
14 agreement needs to be in place.

15 Finally, this court should not construe a statute in such a
16 manner to reach a result which is patently absurd. If Plaintiff's
17 interpretation prevails, (and all that is required is an agreement
18 to sell or assign an individual account), then the exclusion, in
19 essence, consumes the whole. Any "collection agency" could qualify
20 for the statutory exclusion for providing "factoring services".
21 This also supports the court's conclusion that some ongoing
22 agreement to purchase accounts and/or provide financing is required
23 by ORS 697.005(1)(b)(1)(ii).

24 Here, Plaintiff admits that he had no underlying financing
25 agreement or any other agreement for the purchase of ATEZ's
26 accounts. Accordingly, the court concludes that Plaintiff satisfies

1 the definition of a collection agency but does not qualify for the
2 exclusion for the providing of "factoring services". Accordingly,
3 Defendants' Motion to Dismiss should be granted; further, because
4 they have incurred attorney's fees and costs in defending against
5 Plaintiff's complaint, Defendants have been "injured" as the term is
6 used in ORS 697.087(1) and thus Defendants are entitled to an
7 injunction under that statute, as well as their reasonable
8 attorney's fees and costs incurred herein.¹⁰ An appropriate order
9 shall be entered, herein, enjoining Plaintiff from any further
10 activities as a collection agent in this district until such time as
11 he complies with the registration requirements pursuant to Oregon
12 law. Further proceedings shall be held on Defendants' Motion for
13 Sanctions, and to determine their reasonable attorney's fees and
14 costs. All other pending matters in this adversary proceeding are
15 rendered moot in light of this opinion.¹¹

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¹⁰ ORS 697.087(1) provides:

Any person injured as a result of the violation of any provision of ORS 697.015 or 697.058 or any rule adopted under ORS 697.031 or 697.085 may bring an action in an appropriate court to enjoin the practice or to recover actual damages or \$200, whichever is greater. The court or the jury may award punitive damages and the court may provide such equitable relief as it deems necessary or proper

¹¹ The office of the U. S. Trustee shall be given an opportunity to intervene regarding the claims based on 11 U.S.C. § 727.

1 The above constitutes the court's findings of fact and
2 conclusions of law under FRBP 7052. They shall not be separately
3 stated.

ALBERT E. RADCLIFFE
Chief Bankruptcy Judge

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