

The Consequences of Cashing-In on Death

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David Horton, [Borrowing in the Shadow of Death: Another Look at Probate Lending](#), 59 WM. & Mary L. Rev. 2447 (2018).

For decades, state and federal governments have increased their watch on fringe lending practices such as payday loans, title loans, tax refund anticipation loans, and pension loans. The main reason for this increased regulation is that these loans often have astronomical interest rates which may force borrowers to come back for renewal loans. Probate loans are a lesser known form of fringe lending that have managed to slip below the radar of nearly all regulatory bodies in the United States.

[Professor David Horton](#) identifies the issues and discusses the alarming consequences of probate loans in his article entitled *Borrowing in the Shadow of Death: Another Look at Probate Lending*. His article examines three common methods of fringe finance, tax refund anticipation loans (RALs), payday loans, and pension loans, and then focuses on probate loans by drawing comparisons between the methods and identifying similarities.

Professor Horton explains the background for short-term lending practices and the current regulatory scheme for each method. In 1968, Congress passed the [Truth in Lending Act \(TILA\)](#) mandating the disclosure of information by lenders to prospective borrowers in an effort to protect consumers. This Act prevents lenders from keeping borrowers in the dark about the terms of the loans into which they enter. Many state legislatures have enacted their own laws to further protect consumer by regulating loans. A key development occurred in 2010 when the IRS announced it would no longer provide RAL issuers with the “debt indicator” used to estimate a prospective borrower’s anticipated tax return. Following this announcement, the Federal Deposit Insurance Commission warned all RAL lenders of the riskiness of RALs, resulting in a reduction of total RAL sales per year.

Probate loans are similar to other methods of fringe lending in many respects, but starkly different is the circumstance in which probate loans arise and the average loan amount. Professor Horton explains that probate loans are different as the practice tends to target people who are in the process of grieving. This makes probate loans especially predatory especially when there are few if any laws in place to regulate them. The average probate loan is more than \$10,000; a sum much larger than the average payday loan. Most alarming is the reality that probate loans tend to have interest rates over 50%.

Professor Horton explains his groundbreaking empirical study of probate loans, starting with the identification of each estate administration involved in probate lending over a period of time in Alameda County, California. He devised a formula to calculate annual parentage rate of interest on the loans. Professor Horton determines that over a period of a few years in Alameda County, lending companies made nearly \$5,000,000 on a total investment of just over \$3,000,000. Most borrowers repaid within a year or two after the assignment of the loan. This results in an average APR on probate loans of around 50%.

Probate loans raise special concerns as California is the only state with a specialized probate lending statute on the books. Professor Horton explains that the current handling of these loans by using traditional legal theories such as usury and unconscionable is inadequate. An heir or beneficiary can assign an entire inheritance for instant cash, only to end up owing anywhere from 150% to more than 900% of the total loan amount upon conclusion of the estate administration.

Professor Horton is to be highly commended for addressing an issue that continues to fly below the radar of nearly every state and federal regulatory body. His extensive research to analyze the prevalence of probate lending and to calculate the expected cost of the loan uncovered an alarming trend that calls for rapid change in the legal system to protect consumers who elect to cash in early on their inheritances. I echo Professor Horton's plea that legislatures and courts take prompt action so that consumers who elect to seek a probate loan can do so in "a transparent and fair fashion."

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