

House Bill 2969

Sponsored by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Provides that only prevailing plaintiff may be awarded attorney fees in certain actions relating to violation of laws on securities, mortgage lending, unlawful trade practices and antitrust. Eliminates prohibition on award of attorney fees when certain statutory causes of action are brought as class action proceeding.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to attorney fees; creating new provisions; amending ORS 59.115, 59.127, 59.137, 59.255,
3 59.890, 59.925, 646.638, 646.760, 646.770, 646.775 and 646.780; and declaring an emergency.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 59.115 is amended to read:

6 59.115. (1) A person is liable as provided in subsection (2) of this section to a purchaser of a
7 security if the person:

8 (a) Sells or successfully solicits the sale of a security, other than a federal covered security, in
9 violation of the Oregon Securities Law or of any condition, limitation or restriction imposed upon
10 a registration or license under the Oregon Securities Law; or

11 (b) Sells or successfully solicits the sale of a security in violation of ORS 59.135 (1) or (3) or by
12 means of an untrue statement of a material fact or an omission to state a material fact necessary
13 in order to make the statements made, in light of the circumstances under which they are made, not
14 misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden
15 of proof that the person did not know, and in the exercise of reasonable care could not have known,
16 of the untruth or omission.

17 (2) The purchaser may recover:

18 (a) Upon tender of the security, the consideration paid for the security, and interest from the
19 date of payment equal to the greater of the rate of interest specified in ORS 82.010 for judgments
20 for the payment of money or the rate provided in the security if the security is an interest-bearing
21 obligation, less any amount received on the security; or

22 (b) If the purchaser no longer owns the security, damages in the amount that would be recov-
23 erable upon a tender, less the value of the security when the purchaser disposed of it and less in-
24 terest on such value at the rate of interest specified in ORS 82.010 for judgments for the payment
25 of money from the date of disposition.

26 (3) Every person who directly or indirectly controls a seller liable under subsection (1) of this
27 section, every partner, limited liability company manager, including a member who is a manager,
28 officer or director of such seller, every person occupying a similar status or performing similar
29 functions, and every person who participates or materially aids in the sale is also liable jointly and
30 severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted.
New sections are in **boldfaced** type.

1 that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of
 2 the existence of facts on which the liability is based. Any person held liable under this section shall
 3 be entitled to contribution from those jointly and severally liable with that person.

4 (4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function
 5 in connection with the sale of a security is to provide ministerial functions of escrow, custody or
 6 deposit services in accordance with applicable law is liable only if the person participates or mate-
 7 rially aids in the sale and the purchaser sustains the burden of proof that the person knew of the
 8 existence of facts on which liability is based or that the person's failure to know of the existence
 9 of such facts was the result of the person's recklessness or gross negligence.

10 (5) Any tender specified in this section may be made at any time before entry of judgment.

11 (6) Except as otherwise provided in this subsection, no action [*or suit*] may be commenced under
 12 this section more than three years after the sale. An action under this section for a violation of
 13 subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the sale
 14 or two years after the person bringing the action discovered or should have discovered the facts on
 15 which the action is based, whichever is later. Failure to commence an action on a timely basis is
 16 an affirmative defense.

17 (7) An action may not be commenced under this section solely because an offer was made prior
 18 to registration of the securities.

19 (8) Any person having a right of action against a broker-dealer, state investment adviser or
 20 against a salesperson or investment adviser representative acting within the course and scope or
 21 apparent course and scope of authority of the salesperson or investment adviser representative,
 22 under this section shall have a right of action under the bond or irrevocable letter of credit provided
 23 in ORS 59.175.

24 (9) Subsection (4) of this section shall not limit the liability of any person:

25 (a) For conduct other than in the circumstances described in subsection (4) of this section; or

26 (b) Under any other law, including any other provisions of the Oregon Securities Law.

27 (10) [*Except as provided in subsection (11) of this section,*] The court may award reasonable at-
 28 torney fees to [*the*] a prevailing [*party*] **plaintiff** in an action under this section.

29 [*(11) The court may not award attorney fees to a prevailing defendant under the provisions of*
 30 *subsection (10) of this section if the action under this section is maintained as a class action pursuant*
 31 *to ORCP 32.*]

32 **SECTION 2.** ORS 59.127 is amended to read:

33 59.127. (1) A person is liable as provided in subsection (2) of this section to the person selling
 34 the security, if the person:

35 (a) Purchases or successfully solicits the purchase of a security, other than a federal covered
 36 security, in violation of any condition, limitation or restriction imposed upon a registration under
 37 the Oregon Securities Law; or

38 (b) Purchases or successfully solicits the purchase of a security in violation of ORS 59.135 (1)
 39 or (3) or by means of an untrue statement of a material fact or an omission to state a material fact
 40 necessary in order to make the statements made, in light of the circumstances under which they
 41 were made, not misleading (the seller not knowing of the untruth or omission), and if the person
 42 does not sustain the burden of proof that the person did not know, and in the exercise of reasonable
 43 care could not have known, of the untruth or omission.

44 (2) The seller may recover:

45 (a) Upon a tender of the consideration paid for the security, the security plus interest from the

1 date of purchase equal to the greater of the rate of interest specified in ORS 82.010 for judgments
 2 for the payment of money, or the rate provided in the security if the security is an interest-bearing
 3 obligation;

4 (b) Damages in the amount that would be recoverable upon a tender, plus any amount received
 5 on the security, less the consideration paid for the security; or

6 (c) If the purchaser no longer owns the security, damages equal to the value of the security
 7 when the purchaser disposed of it plus interest on such value at the rate of interest specified in ORS
 8 82.010 for judgments for the payment of money from the date of disposition, less the consideration
 9 paid for the security.

10 (3) Every person who directly or indirectly controls a purchaser liable under subsection (1) of
 11 this section, every partner, limited liability company manager, including a member who is a man-
 12 ager, officer or director of such purchaser, every person occupying a similar status or performing
 13 similar functions, and every person who participates or materially aids in the purchase is also liable
 14 jointly and severally with and to the same extent as the purchaser, unless the nonpurchaser sustains
 15 the burden of proof that the nonpurchaser did not know, and, in the exercise of reasonable care,
 16 could not have known, of the existence of facts on which the liability is based. Any person held li-
 17 able under this section shall be entitled to contribution from those jointly and severally liable with
 18 the person.

19 (4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function
 20 in connection with the purchase of a security is to provide ministerial functions of escrow, custody
 21 or deposit services in accordance with applicable law is liable only if the person participates or
 22 materially aids in the purchase and the seller sustains the burden of proof that the person knew of
 23 the existence of facts on which liability is based or that the person's failure to know of the existence
 24 of such facts was the result of the person's recklessness or gross negligence.

25 (5) Any tender specified in this section may be made at any time before entry of judgment.

26 (6) Except as otherwise provided in this subsection, no action [*or suit*] may be commenced under
 27 this section more than three years after the purchase. An action under this section for a violation
 28 of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the
 29 purchase or two years after the person bringing the action discovered or should have discovered the
 30 facts on which the action is based, whichever is later. Failure to commence an action on a timely
 31 basis is an affirmative defense.

32 (7) Any person having a right of action against a broker-dealer, state investment adviser or
 33 against a salesperson or investment adviser representative acting within the course and scope or
 34 apparent course and scope of the authority of the salesperson or investment adviser representative,
 35 under this section shall have a right of action under the bond or irrevocable letter of credit provided
 36 in ORS 59.175.

37 (8) Subsection (4) of this section shall not limit the liability of any persons:

38 (a) For conduct other than in the circumstances described in subsection (4) of this section; or

39 (b) Under any other law, including any other provisions of the Oregon Securities Law.

40 (9) [*Except as provided in subsection (10) of this section,*] The court may award reasonable at-
 41 torney fees to [*the*] a prevailing [*party*] **plaintiff** in an action under this section.

42 [*(10) The court may not award attorney fees to a prevailing defendant under the provisions of*
 43 *subsection (9) of this section if the action under this section is maintained as a class action pursuant*
 44 *to ORCP 32.*]

45 **SECTION 3.** ORS 59.137 is amended to read:

1 59.137. (1) Any person who violates or materially aids in a violation of ORS 59.135 (1), (2) or (3)
 2 is liable to any purchaser or seller of the security for the actual damages caused by the violation,
 3 including the amount of any commission, fee or other remuneration paid, together with interest at
 4 the rate specified in ORS 82.010 for judgments for the payment of money, unless the person who
 5 materially aids in the violation sustains the burden of proof that the person did not know and, in
 6 the exercise of reasonable care, could not have known of the existence of the facts on which the
 7 liability is based.

8 (2) Any person who directly or indirectly controls a person liable under subsection (1) of this
 9 section and every partner, limited liability company manager, including a member who is a manager,
 10 officer or director or a person occupying a status or performing functions of a person liable under
 11 subsection (1) of this section, is jointly and severally liable to the same extent as a person liable
 12 under subsection (1) of this section, unless the person who may be liable under this subsection sus-
 13 tains the burden of proof that the person did not know and, in the exercise of reasonable care, could
 14 not have known of the existence of the facts on which the liability is based.

15 (3) Any person held liable under this section is entitled to contribution from those persons
 16 jointly and severally liable with that person.

17 (4) *[Except as provided in subsection (5) of this section,]* The court may award reasonable attorney
 18 fees to *[the]* a prevailing *[party]* **plaintiff** in an action under this section.

19 *[(5) The court may not award attorney fees to a prevailing defendant under the provisions of sub-*
 20 *section (4) of this section if the action under this section is maintained as a class action pursuant to*
 21 *ORCP 32.]*

22 *[(6)]* (5) An action *[or suit]* may be commenced under this section within the later of:

23 (a) Three years after the date of the purchase or sale of a security to which the action *[or*
 24 *suit]* relates; or

25 (b) Two years after the person bringing the action *[or suit]* discovered or should have discovered
 26 the facts on which the action *[or suit]* is based.

27 *[(7)]* (6) Failure to commence an action *[or suit]* under this section on a timely basis is an af-
 28 firmative defense.

29 **SECTION 4.** ORS 59.255 is amended to read:

30 59.255. (1) Whenever it appears to the Director of the Department of Consumer and Business
 31 Services that a person has engaged, is engaging or is about to engage in an act or practice consti-
 32 tuting a violation of any provision of the Oregon Securities Law or any rule or order of the director,
 33 the director may bring suit in the name and on behalf of the State of Oregon in the circuit court
 34 of any county of this state to enjoin the acts or practices and to enforce compliance with the Oregon
 35 Securities Law or such rule or order. Upon a proper showing, a permanent or temporary injunction,
 36 restraining order or writ of mandamus shall be granted.

37 (2) The court may fine the person against whom the order is entered not more than \$20,000 for
 38 each violation, which shall be entered as a judgment and paid to the General Fund of the State
 39 Treasury. Each violation is a separate offense. In the case of a continuing violation, each day's
 40 continuance is a separate violation, but the maximum penalty for any continuing violation shall not
 41 exceed \$100,000. If the court finds that the defendant has violated any provision of the Oregon Se-
 42 curities Law or any such rule or order, the court may appoint a receiver, who may be the director,
 43 for the defendant or the defendant's assets. The court may not require the director to post a bond.

44 (3) The court *[may]* **shall** award reasonable attorney fees to the director if the director prevails
 45 in an action under this section. *[The court may award reasonable attorney fees to a defendant who*

1 *prevails in an action under this section if the court determines that the director had no objectively*
 2 *reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision of*
 3 *the trial court.]*

4 (4) The director may include in any action authorized by this section:

5 (a) A claim for restitution or damages under ORS 59.115, 59.127 or 59.137, on behalf of the per-
 6 sons injured by the act or practice constituting the subject matter of the action. The court shall
 7 have jurisdiction to award appropriate relief to such persons, if the court finds that enforcement of
 8 the rights of such persons by private civil action, whether by class action or otherwise, would be
 9 so burdensome or expensive as to be impractical; or

10 (b) A claim for disgorgement of illegal gains or profits derived. Any recovery under this para-
 11 graph shall be turned over to the General Fund of the State Treasury unless the court requires
 12 other disposition.

13 (5) The provisions of this section do not apply to:

14 (a) A failure to file a notice and pay a fee pursuant to ORS 59.049 (1), (2) or (3);

15 (b) A failure to file a notice and pay a fee pursuant to ORS 59.165 (7);

16 (c) A failure to pay a fee pursuant to ORS 59.175 (8); or

17 (d) A violation of any rule adopted by the director pursuant to ORS 59.049 (1), (2) or (3), 59.165
 18 (7) or 59.175 (8).

19 **SECTION 5.** ORS 59.890 is amended to read:

20 59.890. (1) Whenever the Director of the Department of Consumer and Business Services has
 21 reasonable cause to believe that a person has been engaged or is engaging in any violation of any
 22 provision of ORS 59.840 to 59.980 or any rule or order of the director, the director may bring suit
 23 in the name and on behalf of the State of Oregon in the circuit court of any county of this state to
 24 enjoin the violation and to enforce compliance with any provision of ORS 59.840 to 59.980 or such
 25 rule or order. Upon a proper showing, a permanent or temporary injunction, restraining order or
 26 writ of mandamus shall be granted. The court may fine the person against whom the order is entered
 27 not more than \$5,000 for each violation, which shall be entered as a judgment and paid to the
 28 General Fund of the State Treasury. Each violation is a separate offense. In the case of a continuing
 29 violation, each day's continuance is a separate violation, but the maximum penalty for any contin-
 30 uing violation shall not exceed \$20,000 for each offense. If the court finds that the defendant has
 31 violated any provision of ORS 59.840 to 59.980 or any such rule or order, the court may appoint a
 32 receiver, who may be the director, for the defendant or the defendant's assets. The court may not
 33 require the director to post a bond. The court *[may]* **shall** award reasonable attorney fees to the
 34 director if the director prevails in an action under this section. *[The court may award reasonable*
 35 *attorney fees to a defendant who prevails in an action under this section if the court determines that*
 36 *the director had no objectively reasonable basis for asserting the claim or no reasonable basis for ap-*
 37 *pealing an adverse decision of the trial court.]*

38 (2) The director may include in any action authorized by subsection (1) of this section:

39 (a) A claim for restitution or damages under ORS 59.925 on behalf of the persons injured by the
 40 act or practice constituting the subject matter of the action. The court shall have jurisdiction to
 41 award appropriate relief to such persons, if the court finds that enforcement of the rights of such
 42 persons by private civil action, whether by class action or otherwise, would be so burdensome or
 43 expensive as to be impractical; or

44 (b) A claim for disgorgement of illegal gains or profits derived. Any recovery under this para-
 45 graph shall be turned over to the General Fund of the State Treasury unless the court requires

1 other disposition.

2 **SECTION 6.** ORS 59.925 is amended to read:

3 59.925. (1) As used in this section, “mortgage banker transaction” and “mortgage broker trans-
4 action” mean a transaction in which a person, in order to engage in the transaction, is required to
5 be licensed as a mortgage banker or a mortgage broker under ORS 59.840 to 59.980.

6 (2) A mortgage banker or mortgage broker is liable as provided in subsection (3) of this section
7 to any person who suffers any ascertainable loss of money or property, real or personal, in a mort-
8 gage banker transaction or a mortgage broker transaction if the mortgage banker or mortgage
9 broker:

10 (a) Transacts business as a mortgage banker or mortgage broker in violation of any provision
11 of ORS 59.840 to 59.980; or

12 (b) Transacts business as a mortgage banker or mortgage broker by means of an untrue state-
13 ment of a material fact or an omission to state a material fact necessary in order to make the
14 statements made, in light of the circumstances under which they are made, not misleading, and who
15 does not sustain the burden of proof that the person did not know, and in the exercise of reasonable
16 care could not have known, of the untruth or omission.

17 (3) The person suffering ascertainable loss may recover damages in an amount equal to the
18 ascertainable loss.

19 (4) A person whose sole function in connection with a transaction is to provide ministerial
20 functions of escrow, custody or deposit services in accordance with applicable law is liable only if
21 the person participates or materially aids in the transaction and the plaintiff sustains the burden
22 of proof that the person knew of the existence of the facts on which liability is based or that the
23 person’s failure to know of the existence of such facts was the result of the person’s recklessness
24 or gross negligence.

25 (5) Except as otherwise provided in this subsection, an action [*or suit*] may not be commenced
26 under this section more than three years after the transaction. An action under this section for a
27 violation under subsection (2)(b) of this section or ORS 59.930 may be commenced within three years
28 after the transaction or two years after the person bringing the action discovered or should have
29 discovered the facts on which the action is based, whichever is later, but in no event more than five
30 years after the date of the transaction. Failure to commence an action on a timely basis is an af-
31 firmative defense.

32 (6) A person has a right of action under the bond or irrevocable letter of credit provided in ORS
33 59.850 if the person:

34 (a) Signs a mortgage banking loan or mortgage loan application; and

35 (b) Has a right of action against a mortgage banker or mortgage broker under this section.

36 (7) Subsection (4) of this section does not limit the liability of any person:

37 (a) For conduct other than in the circumstances described in subsection (4) of this section; or

38 (b) Under any other law.

39 (8) [*Except as provided in subsection (9) of this section,*] The court may award reasonable attorney
40 fees to [*the*] a prevailing [*party*] **plaintiff** in an action under this section.

41 [*(9) The court may not award attorney fees to a prevailing defendant under the provisions of sub-*
42 *section (8) of this section if the action under this section is maintained as a class action pursuant to*
43 *ORCP 32.*]

44 **SECTION 7.** ORS 646.638 is amended to read:

45 646.638. (1) Except as provided in subsection [(8)] (7) of this section, any person who suffers any

1 ascertainable loss of money or property, real or personal, as a result of willful use or employment
 2 by another person of a method, act or practice declared unlawful by ORS 646.608, may bring an in-
 3 dividual action in an appropriate court to recover actual damages or \$200, whichever is greater. The
 4 court or the jury, as the case may be, may award punitive damages and the court may provide the
 5 equitable relief the court considers necessary or proper.

6 (2) Upon commencement of any action brought under subsection (1) of this section the party
 7 bringing the action shall mail a copy of the complaint or other initial pleading to the Attorney
 8 General and, upon entry of any judgment in the action, shall mail a copy of the judgment to the
 9 Attorney General. Failure to mail a copy of the complaint shall not be a jurisdictional defect, but
 10 a court may not enter judgment for the plaintiff until proof of mailing is filed with the court. Proof
 11 of mailing may be by affidavit or by return receipt of mailing.

12 (3) *[Except as provided in subsection (4) of this section,]* The court may award reasonable attorney
 13 fees to *[the]* a prevailing *[party]* **plaintiff** in an action under this section.

14 *[(4) The court may not award attorney fees to a prevailing defendant under the provisions of sub-*
 15 *section (3) of this section if the action under this section is maintained as a class action pursuant to*
 16 *ORCP 32.]*

17 *[(5)]* (4) Any permanent injunction or final judgment or order of the court made under ORS
 18 646.632 or 646.636 is prima facie evidence in an action brought under this section that the re-
 19 spondent used or employed a method, act or practice declared unlawful by ORS 646.608, but an as-
 20 surance of voluntary compliance, whether or not approved by the court, shall not be evidence of the
 21 violation.

22 *[(6)]* (5) Actions brought under this section shall be commenced within one year from the dis-
 23 covery of the unlawful method, act or practice. However, whenever any complaint is filed by a
 24 prosecuting attorney to prevent, restrain or punish violations of ORS 646.608, running of the statute
 25 of limitations with respect to every private right of action under this section and based in whole
 26 or in part on any matter complained of in said proceeding shall be suspended during the pendency
 27 thereof.

28 *[(7)]* (6) Notwithstanding subsection *[(6)]* (5) of this section, in any action brought by a seller
 29 or lessor against a purchaser or lessee of real estate, goods or services, the purchaser or lessee may
 30 assert any counterclaim the purchaser or lessee has arising out of a violation of ORS 646.605 to
 31 646.652.

32 *[(8)]* (7) This section does not apply to any method, act or practice described in ORS 646.608
 33 (1)(aa). Actions for violation of laws relating to odometers are provided under ORS 815.410 and
 34 815.415.

35 **SECTION 8.** ORS 646.760 is amended to read:

36 646.760. (1) The Attorney General may prosecute an action for appropriate injunctive relief and
 37 civil penalties in the name of the state for any violation of ORS 646.725 or 646.730. The court may
 38 assess for the benefit of the state a civil penalty of not more than \$250,000 for each violation of ORS
 39 136.617, 646.705 to 646.805 and 646.990. Any act or series of acts by one or more individual persons
 40 (officers, agents or partners) on behalf of a corporation or other business entity may be found to
 41 constitute a violation or violations by such individual person or persons as well as by the corpo-
 42 ration or other business entity, and separate penalties may be imposed against each of such indi-
 43 vidual defendants and corporate or other business entity defendants for such a violation. The court
 44 *[may]* **shall** award reasonable attorney fees, expert witness fees and costs of investigation to the
 45 Attorney General if the Attorney General prevails in an action under this section. *[The court may*

1 *award reasonable attorney fees, expert witness fees and costs of investigation to a defendant who pre-*
 2 *ails in an action under this section if the court determines that the Attorney General had no objec-*
 3 *tively reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision*
 4 *of the trial court.]*

5 (2) The complaint may also seek and the court may order, in an appropriate case, the forfeiture
 6 of any corporate franchise, professional or business license, right to do business or to use an as-
 7 sumed business name, where the court finds the use by any defendant of such franchise, license or
 8 right has been material to a violation of ORS 646.725 or 646.730.

9 (3) The court shall take into consideration in mitigation of any penalty assessed under this
 10 section, any fine or penalty imposed against the defendant by a United States court in a final judg-
 11 ment under sections 1 to 45 of Title 15 of the United States Code, which the court finds to be based
 12 on the same or substantially the same acts of defendant.

13 **SECTION 9.** ORS 646.770 is amended to read:

14 646.770. [(1)] Any person including the state or any municipal corporation or political subdivi-
 15 sion threatened with injury in its business or property by a violation of ORS 646.725 or 646.730 may
 16 prosecute a suit for equitable relief, and in addition to such relief shall recover the costs of suit,
 17 including necessary reasonable investigative costs, [and reasonable] experts' fees **and attorney**
 18 **fees.**

19 [(2) *Except as provided in subsection (3) of this section, in an action brought under the provisions*
 20 *of this section by a person other than the state or any municipal corporation or political subdivision*
 21 *of the state, the court may award reasonable attorney fees to the prevailing party. Except as provided*
 22 *in subsection (3) of this section, in a civil action brought under the provisions of this section by the*
 23 *state or any municipal corporation or political subdivision of the state:]*

24 [(a) *The court may award reasonable attorney fees to the state or political subdivision of the state*
 25 *if the state or political subdivision prevails in the action; and]*

26 [(b) *The court may award reasonable attorney fees to a defendant who prevails in an action under*
 27 *this section if the court determines that the state or any municipal corporation or political subdivision*
 28 *of the state had no objectively reasonable basis for asserting the claim or no reasonable basis for ap-*
 29 *pealing an adverse decision of the trial court.]*

30 [(3) *The court may not award attorney fees to a prevailing defendant under the provisions of sub-*
 31 *section (2) of this section if the action under this section is maintained as a class action pursuant to*
 32 *ORCP 32.]*

33 **SECTION 10.** ORS 646.775 is amended to read:

34 646.775. (1)(a) The Attorney General may bring a civil action in the name of the State of Oregon,
 35 on behalf of a political subdivision in this state or as parens patriae on behalf of a natural person,
 36 in any circuit court in which venue is proper under ORS 646.790, to secure equitable and monetary
 37 relief as provided in this section for injury sustained by the natural person or political subdivision
 38 to the natural person's or political subdivision's property by reason of a violation of ORS 646.725
 39 or 646.730. The Attorney General may bring the action authorized by this paragraph regardless of
 40 whether the natural person or political subdivision dealt directly or indirectly with the adverse
 41 party.

42 (b) The court shall exclude from the amount of monetary relief awarded in an action pursuant
 43 to paragraph (a) of this subsection any amount of monetary relief:

44 (A) That duplicates amounts that have been awarded for the same injury; or

45 (B) That is properly allocable to natural persons who have excluded their claims pursuant to

1 subsection (2)(b) of this section, or to any business entity.

2 (c)(A) Subject to paragraph (b) of this subsection, the court shall award the state as monetary
 3 relief three times the total damages sustained by natural persons and political subdivisions and the
 4 costs the state incurs in the action.

5 (B) The court *[may]* **shall** award reasonable attorney fees to the Attorney General if the Attor-
 6 ney General prevails in an action under this section.

7 *[(C) The court may award reasonable attorney fees to a defendant who prevails in an action under
 8 this section if the court determines that the Attorney General had no objectively reasonable basis for
 9 asserting the claim or no reasonable basis for appealing an adverse decision of the trial court.]*

10 (d) Notwithstanding paragraph (c) of this subsection, the court shall award the state only the
 11 actual damages sustained by natural persons and political subdivisions in an action in which:

12 (A) The Attorney General prevails solely on the basis of a judgment entered in a proceeding
 13 under 15 U.S.C. 1 to 45 or in another action by the state under ORS 646.760, 646.770 or 646.780, used
 14 as collateral estoppel against the defendant under ORS 646.805; or

15 (B) The natural person or political subdivision dealt indirectly with the adverse party and the
 16 Attorney General establishes a violation other than a per se violation of ORS 646.725.

17 (2)(a) In any action pursuant to subsection (1)(a) of this section, the Attorney General shall, at
 18 the times, in the manner and with the content the court directs, give notice by publication. If the
 19 court finds that notice given solely by publication would deny due process of law to a natural person
 20 or political subdivision, the court may direct further notice to the natural person or political sub-
 21 division according to the circumstances of the case.

22 (b) Any natural person or political subdivision on whose behalf an action is brought pursuant
 23 to subsection (1)(a) of this section may elect to exclude from adjudication the portion of the claim
 24 for monetary relief attributable to the natural person or political subdivision by filing notice of the
 25 election with the court within the time specified in the notice given pursuant to paragraph (a) of this
 26 subsection.

27 (c) The final judgment in an action pursuant to subsection (1)(a) of this section shall be res
 28 judicata as to any claim under this section by any natural person or political subdivision on behalf
 29 of whom such action was brought and who fails to give the notice specified in paragraph (b) of this
 30 subsection within the period specified in the notice given pursuant to paragraph (a) of this sub-
 31 section.

32 (3) An action pursuant to subsection (1)(a) of this section shall not be dismissed or compromised
 33 without the approval of the court, and the notice of any proposed dismissal or compromise shall be
 34 given in the manner the court directs.

35 (4) In any action pursuant to subsection (1)(a) of this section in which there has been a deter-
 36 mination that a defendant agreed to fix prices in violation of ORS 646.725, damages may be proved
 37 and assessed in the aggregate by statistical or sampling methods, by the computation and pro rata
 38 allocation of illegal overcharges, or by any other reasonable system of estimating aggregate damages
 39 as the court in its discretion may permit without the necessity of separately proving the individual
 40 claim of, or amount of damage to, natural persons or political subdivisions on whose behalf the suit
 41 was brought.

42 (5)(a) Monetary relief recovered in an action pursuant to subsection (1)(a) of this section shall
 43 be distributed in the manner the court in its discretion may authorize, subject to the requirement
 44 that any distribution procedure adopted afford each natural person or political subdivision on whose
 45 behalf the suit was brought a reasonable opportunity to secure an appropriate portion of the net

1 monetary relief.

2 (b) The Attorney General shall deposit that portion of the monetary relief awarded by the court
 3 as costs of suit and a reasonable attorney fee in the Consumer Protection and Education Revolving
 4 Account established pursuant to ORS 180.095.

5 (c) To the extent that the monetary relief awarded by the court is not exhausted by distribution
 6 pursuant to paragraphs (a) and (b) of this subsection, the remaining funds shall be deemed a civil
 7 penalty by the court and assessed as such for the benefit of the state pursuant to ORS 646.760.

8 (6) The powers granted in this section are in addition to and not in derogation of the common
 9 law powers of the Attorney General to act as parens patriae, or the powers of the Attorney General
 10 to sue as a representative party on behalf of a class pursuant to ORCP 32.

11 **SECTION 11.** ORS 646.780 is amended to read:

12 646.780. (1)[(a)] A person including the state or any political subdivision in the state injured in
 13 its business or property by a violation of ORS 646.725 or 646.730 may sue for the injury and shall
 14 recover three times the damages sustained **and the reasonable attorney fees, expert witness fees**
 15 **and investigative costs incurred by the person.** The state may bring the action authorized by this
 16 paragraph regardless of whether the state dealt directly or indirectly with the adverse party.

17 [(b)] (2) Notwithstanding [paragraph (a) of this] subsection (1) **of this section**, the state may
 18 recover only the state’s actual damages sustained and [any] **the reasonable** attorney fees, expert
 19 witness fees [or] **and** investigative costs [that the court may award under subsection (3) of this
 20 section,] **incurred by the state** if the state:

21 [(A)] (a) Brings an action under ORS 646.760;

22 [(B)] (b) Commences a prosecution under ORS 646.815 and 646.990 (2); or

23 [(C)] (c) Brings an action for an injury that the state suffered by dealing indirectly with the
 24 adverse party and the state establishes a violation other than a per se violation of ORS 646.725.

25 [(c)] (3) Notwithstanding [paragraph (a) of this] subsection (1) **of this section**, in any action
 26 under this section in which the plaintiff prevails solely on the basis of a judgment or decree entered
 27 in a proceeding under 15 U.S.C. 1 to 45 or in another action by the state under ORS 646.760, 646.770
 28 or this section, used as collateral estoppel against a defendant pursuant to ORS 646.805, plaintiff’s
 29 recovery shall be limited to the actual damages sustained and [any] **the reasonable** attorney fees,
 30 expert witness fees [or] **and** investigative costs [that may be awarded under subsection (3) of this
 31 section] **incurred by the party.**

32 [(2)] (4) Unless there is a subsequent judgment that the court lacks jurisdiction, the taking of
 33 any testimony at the commencement of trial on a civil complaint for damages filed under the anti-
 34 trust laws of the United States shall constitute an absolute bar and waiver of any right of a plaintiff
 35 in such action to recover damages from the same defendant under this section for the same or sub-
 36 stantially the same acts of plaintiff.

37 [(3)(a) Except as provided in subsection (4) of this section, in an action brought under the pro-
 38 visions of this section by a person other than the state or any political subdivision in the state, the court
 39 may award reasonable attorney fees, expert witness fees and investigative costs to the prevailing
 40 party.]

41 [(b) Except as provided in subsection (4) of this section, in a civil action brought under the pro-
 42 visions of this section or under ORS 646.760 by the state or any political subdivision in the state:]

43 [(A) The court may award reasonable attorney fees, expert witness fees and investigative costs to
 44 the state or political subdivision if the state or political subdivision prevails in the action; and]

45 [(B) The court may award reasonable attorney fees, expert witness fees and investigative costs to

1 *a defendant who prevails in an action under this section if the court determines that the state or poli-*
2 *tical subdivision had no objectively reasonable basis for asserting the claim or no reasonable basis for*
3 *appealing an adverse decision of the trial court.]*

4 *[(4) The court may not award attorney fees, expert witness fees or investigative costs to a prevailing*
5 *defendant under the provisions of this section if the action is maintained as a class action pursuant to*
6 *ORCP 32.]*

7 **SECTION 12.** (1) **Except as provided in subsection (2) of this section, the amendments to**
8 **ORS 59.115, 59.127, 59.137, 59.255, 59.890, 59.925, 646.638, 646.760, 646.770, 646.775 and 646.780**
9 **by sections 1 to 11 of this 2009 Act apply to all causes of action, whether arising before, on**
10 **or after the effective date of this 2009 Act.**

11 **(2) The amendments to ORS 59.115, 59.127, 59.137, 59.255, 59.890, 59.925, 646.638, 646.760,**
12 **646.770, 646.775 and 646.780 by sections 1 to 11 of this 2009 Act do not apply to a cause of**
13 **action for which a judgment was entered before the effective date of this 2009 Act.**

14 **SECTION 13.** **This 2009 Act being necessary for the immediate preservation of the public**
15 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
16 **on its passage.**

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