

Senate Bill 497

Sponsored by Senator BONAMICI (Pre-session filed.)

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**.

Modifies law regarding recoverable attorney fees and costs in certain antitrust and wage claim proceedings.

A BILL FOR AN ACT

1
2 Relating to costs recoverable in legal proceedings; creating new provisions; and amending ORS
3 646.760, 646.770, 646.775, 646.780 and 653.055.

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

5 **SECTION 1.** ORS 646.760 is amended to read:

6 646.760. (1) The Attorney General may prosecute an action for appropriate injunctive relief and
7 civil penalties in the name of the state for any violation of ORS 646.725 or 646.730. The court may
8 assess for the benefit of the state a civil penalty of not more than \$250,000 for each violation of ORS
9 136.617, 646.705 to 646.805 and 646.990. Any act or series of acts by one or more individual persons
10 (officers, agents or partners) on behalf of a corporation or other business entity may be found to
11 constitute a violation or violations by such individual person or persons as well as by the corpo-
12 ration or other business entity, and separate penalties may be imposed against each of such indi-
13 vidual defendants and corporate or other business entity defendants for such a violation. The court
14 may award reasonable attorney fees, expert witness fees and costs [*of investigation*], **including in-**
15 **vestigative costs**, to the Attorney General if the Attorney General prevails in an action under this
16 section **at trial and on appeal**. [*The court may award reasonable attorney fees, expert witness fees*
17 *and costs of investigation to a defendant who prevails in an action under this section if the court de-*
18 *termines that the Attorney General had no objectively reasonable basis for asserting the claim or no*
19 *reasonable basis for appealing an adverse decision of the trial court.*]

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

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

28 **SECTION 2.** ORS 646.770 is amended to read:

29 646.770. [(1)] Any person, including the state or any municipal corporation or political subdivi-
30 sion, threatened with injury [*in its*] **to the business or property of the person, state, municipal**
31 **corporation or political subdivision** by a violation of ORS 646.725 or 646.730, may [*prosecute a*

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 *suit*] **bring an action** for equitable relief[, *and in addition to such relief*]. **Upon prevailing in the**
 2 **action at trial and on appeal, the person, state, municipal corporation or political subdivision**
 3 shall recover [*the costs of suit, including necessary reasonable investigative costs and reasonable*
 4 *experts' fees*] **reasonable attorney fees, expert witness fees and costs, including investigative**
 5 **costs.**

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

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

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

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

20 **SECTION 3.** ORS 646.775 is amended to read:

21 646.775. (1)(a) The Attorney General may bring a civil action in the name of the State of Oregon,
 22 on behalf of a political subdivision in this state or as *parens patriae* on behalf of a natural person,
 23 in any circuit court in which venue is proper under ORS 646.790, to secure equitable and monetary
 24 relief as provided in this section for injury sustained by the natural person or political subdivision
 25 to the natural person's or political subdivision's property by reason of a violation of ORS 646.725
 26 or 646.730. The Attorney General may bring the action authorized by this paragraph regardless of
 27 whether the natural person or political subdivision dealt directly or indirectly with the adverse
 28 party.

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

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

32 (B) That is properly allocable to natural persons who have excluded their claims pursuant to
 33 subsection (2)(b) of this section, or to any business entity.

34 (c)(A) Subject to paragraph (b) of this subsection, the court shall award the state as monetary
 35 relief three times the total damages sustained by natural persons and political subdivisions, **rea-**
 36 **sonable attorney fees** and the costs the state incurs in the action.

37 [(B) *The court may award reasonable attorney fees to the Attorney General if the Attorney General*
 38 *prevails in an action under this section.*]

39 [(C)] (B) The court may award reasonable attorney fees to a defendant who prevails in an action
 40 under this section if the court determines that the Attorney General [*had no objectively reasonable*
 41 *basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial*
 42 *court*] **acted in bad faith, vexatiously, wantonly or for oppressive reasons.**

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

45 (A) The Attorney General prevails solely on the basis of a judgment entered in a proceeding

1 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
2 as collateral estoppel against the defendant under ORS 646.805; or

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

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

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

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

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

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

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

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

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

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

44 **SECTION 4.** ORS 646.780 is amended to read:

45 646.780. (1)(a) A person, the state or any political subdivision in the state injured in *[its]* **the**

1 business or property **of the person, state or political subdivision** by a violation of ORS 646.725
 2 or 646.730 may sue for the injury and shall, **upon prevailing in the action at trial and on appeal**,
 3 recover three times the damages sustained **and reasonable attorney fees, expert witness fees and**
 4 **costs, including investigative costs**. An action authorized by this paragraph may be brought re-
 5 gardless of whether the plaintiff dealt directly or indirectly with the adverse party.

6 (b) Notwithstanding paragraph (a) of this subsection, **upon prevailing in the action at trial**
 7 **and on appeal**, the state may recover only the state's actual damages sustained and [any] attorney
 8 fees, expert witness fees [or] **and costs, including** investigative costs [*that the court may award*
 9 *under subsection (3) of this section*], if the state:

10 (A) Brings an action under ORS 646.760;

11 (B) Commences a prosecution under ORS 646.815 and 646.990 (2); or

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

14 (c) Notwithstanding paragraph (a) of this subsection, in any action under this section in which
 15 the plaintiff prevails **at trial and on appeal** solely on the basis of a judgment or decree entered in
 16 a proceeding under 15 U.S.C. 1 to 45 or in another action by the state under ORS 646.760, 646.770
 17 or this section, used as collateral estoppel against a defendant pursuant to ORS 646.805, plaintiff's
 18 recovery shall be limited to the actual damages sustained and [any] attorney fees, expert witness
 19 fees [or] **and costs, including** investigative costs [*that may be awarded under subsection (3) of this*
 20 *section*].

21 (2) Unless there is a subsequent judgment that the court lacks jurisdiction, the taking of any
 22 testimony at the commencement of trial on a civil complaint for damages filed under the antitrust
 23 laws of the United States shall constitute an absolute bar and waiver of any right of a plaintiff in
 24 such action to recover damages from the same defendant under this section for the same or sub-
 25 stantially the same acts of plaintiff.

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

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

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

34 [(B) *The court may award reasonable attorney fees, expert witness fees and investigative costs to*
 35 *a defendant who prevails in an action under this section if the court determines that the state or poli-*
 36 *tical subdivision had no objectively reasonable basis for asserting the claim or no reasonable basis for*
 37 *appealing an adverse decision of the trial court.*]

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

41 [(5)(a)] **(3)(a)** When the Attorney General files an action *parens patriae* under ORS 646.775
 42 within 30 days of the date that a natural person files an action as a class action under this section
 43 and both the Attorney General and the natural person seek to represent the same class of natural
 44 persons, the action brought by the Attorney General must be deemed superior to the natural
 45 person's action for the purposes of determining whether the natural person's action under this sec-

1 tion may not be maintained as a class action under ORCP 32.

2 (b) Upon commencement of an action as a class action under this section by a natural person,
 3 the natural person shall mail a copy of the complaint to the Attorney General. Failure to mail a
 4 copy of the complaint is not a jurisdictional defect.

5 (c) The Attorney General's action shall be deemed superior to the natural person's action
 6 brought as a class action as described in paragraph (a) of this subsection until the earlier of:

7 (A) Thirty days after the natural person mails a copy of the complaint to the Attorney General
 8 as provided in paragraph (b) of this subsection; or

9 (B) The date that a court finds that the natural person's action is to be maintained as a class
 10 action.

11 (d) Nothing in this subsection shall prohibit a natural person from filing an action as a class
 12 action if:

13 (A) The Attorney General's parens patriae action is dismissed prior to adjudication of the issues
 14 without damages paid to any natural person; or

15 (B) A sufficient number of natural persons opt out of the parens patriae action to sustain a
 16 separate class action.

17 **SECTION 5.** ORS 653.055 is amended to read:

18 653.055. (1) Any employer who pays an employee less than the wages to which the employee is
 19 entitled under ORS 653.010 to 653.261 is liable to the employee affected:

20 (a) For the full amount of the wages, less any amount actually paid to the employee by the
 21 employer;

22 **(b) For reasonable attorney fees and costs at trial and on appeal; and**

23 *[(b)] (c) For civil penalties provided in ORS 652.150.*

24 (2) Any agreement between an employee and an employer to work at less than the wage rate
 25 required by ORS 653.010 to 653.261 is no defense to an action under subsection (1) of this section.

26 (3) The Commissioner of the Bureau of Labor and Industries has the same powers and duties in
 27 connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS
 28 652.310 to 652.445 and in addition the commissioner may, without the necessity of assignments of
 29 wage claims from employees, initiate suits against employers to enjoin future failures to pay re-
 30 quired minimum wages or overtime pay and to require the payment of minimum wages and overtime
 31 pay due employees but not paid as of the time of the filing of suit. The commissioner may join in a
 32 single proceeding and in one cause of suit any number of wage claims against the same employer.
 33 If the commissioner does not prevail in such action, the commissioner shall pay all costs and dis-
 34 bursements from the Bureau of Labor and Industries Account.

35 *[(4) The court may award reasonable attorney fees to the prevailing party in any action brought*
 36 *by an employee under this section.]*

37 **SECTION 6. The amendments to ORS 646.760, 646.770, 646.775, 646.780 and 653.055 by**
 38 **sections 1 to 5 of this 2011 Act apply to legal proceedings commenced on or after the effective**
 39 **date of this 2011 Act.**