

D R A F T

SUMMARY

Permits defendant in action under unlawful trade practices law or unlawful debt collections law to respond to action with affirmative defense in which defendant shows by preponderance of evidence that defendant did not intend violation and that violation resulted from bona fide error notwithstanding defendant's maintenance of procedures reasonably adapted to avoid violation.

A BILL FOR AN ACT

1
2 Relating to affirmative defenses; creating new provisions; and amending ORS
3 646.632, 646.638 and 646.641.

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

5 **SECTION 1.** ORS 646.632 is amended to read:

6 646.632. (1)(a) Except as provided in ORS 646.633, a prosecuting attorney
7 who has probable cause to believe that a person is engaging in, has engaged
8 in, or is about to engage in an unlawful trade practice may bring suit in the
9 name of the State of Oregon in [*the*] **an** appropriate court to restrain [*such*]
10 **the** person from engaging in the alleged unlawful trade practice.

11 **(b) The person may respond to the suit with an affirmative defense**
12 **in which the person shows by a preponderance of the evidence that the**
13 **person did not intend the violation and that the violation resulted**
14 **from a bona fide error despite the person's maintenance of procedures**
15 **reasonably adapted to avoid the violation. Notwithstanding the**
16 **person's response to the suit, the person may execute and deliver an**
17 **assurance of voluntary compliance in accordance with subsection (2)**
18 **of this section.**

1 (2) Except as provided in subsections (5) and (6) of this section, before
2 filing a suit under subsection (1) of this section, the prosecuting attorney
3 shall in writing notify the person charged of the alleged unlawful trade
4 practice and the relief to be sought. *[Such]* **The** notice *[shall]* **must** be
5 served in the manner set forth in ORS 646.622 for *[the service of]* **servicing**
6 investigative demands. The person *[charged thereupon shall have]* **has** 10 days
7 within which to execute and deliver to the prosecuting attorney an assurance
8 of voluntary compliance. *[Such]* **The assurance of voluntary compliance**
9 shall set forth what actions, if any, the person charged intends to take with
10 respect to the alleged unlawful trade practice. The assurance of voluntary
11 compliance *[shall not be considered]* **is not** an admission of a violation for
12 any purpose. If the prosecuting attorney is satisfied with the assurance of
13 voluntary compliance, *[it]* **the prosecuting attorney or the person** may
14 *[be submitted]* **submit the assurance** to an appropriate court for approval
15 and if *[approved shall thereafter]* **the court approves shall file the assur-**
16 **ance** *[be filed]* with the clerk of the court. If an approved assurance of vol-
17 untary compliance provides for *[the payment of]* **paying** an amount of money,
18 as restitution or otherwise, and if the **person does not pay the** amount *[is*
19 *not paid]* within 90 days *[of]* **after** the date the court approves the assurance,
20 or, if the assurance *[of voluntary compliance]* requires periodic payments and
21 if **the person does not pay a** *[any]* periodic payment *[is not paid]* within
22 30 days *[of]* **after** the date specified in the assurance *[of voluntary compliance*
23 *for any]* **for the** periodic payment, *[then]* the prosecuting attorney may sub-
24 mit *[that]* **to the court the** portion of the assurance *[of voluntary compliance*
25 *which]* **that** provides for *[the payment of]* **paying** money *[to the court]* with
26 a certificate stating the unpaid balance in a form *[which]* **that** fully complies
27 with the requirements of ORS 18.038 and 18.042. Upon submission of an as-
28 surance of voluntary compliance under this subsection, the court shall sign
29 the assurance *[of voluntary compliance and it shall be entered]* **and enter the**
30 **assurance** in the register of the court, and the clerk of the court shall note
31 in the register that *[it]* **the assurance** creates a lien. **Once entered into**

1 **the register**, the assurance of voluntary compliance [*shall thereupon consti-*
2 *tute*] **constitutes** a judgment in favor of the State of Oregon and may be
3 enforced as provided in ORS chapter 18. The notice of the prosecuting at-
4 torney under this subsection [*shall not be deemed*] **is not** a public record
5 until [*the expiration of*] 10 days [*from*] **after** the service of the notice.

6 (3) The prosecuting attorney may reject as unsatisfactory any assurance
7 **of voluntary compliance that does not contain:**

8 (a) [*Which does not contain*] A promise to make restitution in specific
9 amounts or through arbitration [*for*] **to** persons who suffered any
10 ascertainable loss of money or property as a result of the alleged unlawful
11 trade practice; or

12 (b) [*Which does not contain any*] **A** provision, including but not limited
13 to [*the*] keeping [*of*] records, [*which*] **that** the prosecuting attorney reason-
14 ably believes [*to be*] **is** necessary to ensure the [*continued*] **permanent** ces-
15 sation of the alleged unlawful trade practice, if [*such*] **the** provision was
16 included in a proposed assurance attached to the notice served pursuant to
17 this section.

18 (4) Violation of any of the terms of an assurance of voluntary compliance
19 [*which has been approved by and filed with*] **that** the court [*shall constitute*]
20 **has approved and filed constitutes** a contempt of court.

21 (5) The prosecuting attorney need not serve notice [*pursuant to*] **under**
22 subsection (2) of this section before filing a suit if, within two years [*of the*
23 *filing of such*] **before filing the** suit, the person charged with the alleged
24 unfair trade practice submitted to any prosecuting attorney an assurance of
25 voluntary compliance [*which was accepted by and filed with an appropriate*
26 *court*] **that a court approved and filed.** The prosecuting attorney shall in
27 such case serve notice on the defendant in the manner set forth in ORS
28 646.622 for [*the service of*] **servicing** investigative demands, on the 10th or
29 earlier day [*previous to the*] **before** filing [*of*] suit.

30 (6) If the prosecuting attorney alleges that the prosecuting attorney has
31 reason to believe that [*the delay caused by*] complying with the provisions

1 of subsection (2) or (5) of this section would cause **a delay that would**
 2 **cause** immediate harm to the public health, safety or welfare, the prosecut-
 3 ing attorney may immediately institute a suit under subsection (1) of this
 4 section.

5 (7) A **court may grant a** temporary restraining order [*may be granted*]
 6 without prior notice to the person if the court finds [*there is*] a threat **exists**
 7 of immediate harm to the public health, safety or welfare. [*Such a*] **The**
 8 **court shall fix a time that does not exceed 10 days after entry within**
 9 **which the** temporary restraining order [*shall expire by its terms within such*
 10 *time after entry, not to exceed 10 days, as the court fixes*] **expires**, unless
 11 within the time [*so fixed the order,*] **the court fixes the court**, for good
 12 cause shown, [*is extended*] **extends the order** for a like period or unless the
 13 person restrained consents that [*it*] **the court** may [*be extended*] **extend the**
 14 **order** for a longer period.

15 (8) The court may award reasonable attorney fees to the prevailing party
 16 in an action under this section. If the defendant prevails in [*such*] **the** suit
 17 and the court finds that the defendant had in good faith submitted to the
 18 prosecuting attorney a satisfactory assurance of voluntary compliance [*prior*
 19 *to*] **before the prosecuting attorney brought** [*the institution of the*] suit
 20 or that the prosecuting attorney, in a suit brought under subsections (5) and
 21 (6) of this section, did not have reasonable grounds to proceed under those
 22 subsections, the court shall award reasonable attorney fees at trial and on
 23 appeal to the defendant.

24 **SECTION 2.** ORS 646.638 is amended to read:

25 646.638. (1)(a) Except as provided in subsections (8) and (9) of this section,
 26 [*any*] **a** person who suffers any ascertainable loss of money or property, real
 27 or personal, as a result of **another person's** willful use or employment [*by*
 28 *another person*] of a method, act or practice [*declared unlawful by*] **that is**
 29 **unlawful under** ORS 646.608, may bring an individual action in an appro-
 30 priate court to recover actual damages or statutory damages of \$200, which-
 31 ever is greater. The court or the jury[, *as the case may be,*] may award

1 punitive damages and the court may provide *[the]* equitable relief the court
2 considers necessary or proper.

3 **(b) A defendant in an action brought under paragraph (a) of this**
4 **subsection may respond to the action with an affirmative defense in**
5 **which the defendant shows by a preponderance of the evidence that**
6 **the defendant did not intend the violation and that the violation re-**
7 **sulted from a bona fide error notwithstanding the defendant's main-**
8 **tenance of procedures reasonably adapted to avoid the violation.**

9 (2) *[Upon commencement of any action brought]* **After bringing an action**
10 under subsection (1) of this section, *[the party bringing the action]* **the**
11 **plaintiff in the action** shall mail a copy of the complaint or other initial
12 pleading to the Attorney General and, upon entry of any judgment in the
13 action, shall mail a copy of the judgment to the Attorney General.
14 *[Failure]* **Failing** to mail a copy of the complaint *[shall not be]* **is not** a ju-
15 risdictional defect, but a court may not enter judgment for the plaintiff until
16 proof of mailing is filed with the court. Proof of mailing may be by affidavit
17 or by return receipt of mailing.

18 (3) The court may award reasonable attorney fees and costs at trial and
19 on appeal to a prevailing plaintiff in an action under this section. The court
20 may award reasonable attorney fees and costs at trial and on appeal to a
21 prevailing defendant only if the court finds *[there was no]* **that an** objec-
22 tively reasonable basis for bringing the action or asserting the ground for
23 appeal **did not exist.**

24 (4) The court may not award attorney fees to a prevailing defendant under
25 the provisions of subsection (3) of this section if the action under this section
26 is maintained as a class action *[pursuant to]* **in accordance with** ORCP 32.

27 (5) Any permanent injunction or final judgment or order of the court
28 made under ORS 646.632 or 646.636 is prima facie evidence in an action
29 brought under this section that the respondent used or employed a method,
30 act or practice *[declared unlawful by]* **that is unlawful under** ORS 646.608,
31 but an assurance of voluntary compliance, whether or not approved by the

1 court, [*shall not be*] **is not** evidence of the violation.

2 (6) Actions brought under this section [*shall*] **must** be commenced within
3 one year [*from*] **after** the discovery of the unlawful method, act or practice.
4 However, whenever [*any complaint is filed by*] a prosecuting attorney **files**
5 **a complaint** to prevent, restrain or punish violations of ORS 646.608, [*run-*
6 *ning of*] the statute of limitations **does not run** with respect to every private
7 right of action under this section [*and*] **that is** based in whole or in part on
8 any matter complained of in [*said*] **the** proceeding [*shall be suspended during*
9 *the pendency thereof*] **while the proceeding is pending**.

10 (7) Notwithstanding subsection (6) of this section, in any action brought
11 by a seller or lessor against a purchaser or lessee of real estate, goods or
12 services, the purchaser or lessee may assert any counterclaim the purchaser
13 or lessee has [*arising*] **that arises** out of a violation of ORS 646.605 to
14 646.652.

15 (8) A class action may be maintained under this section. In any class
16 action under this section:

17 (a) Statutory damages under subsection (1) of this section may be recover-
18 ed on behalf of class members only if the plaintiffs in the action establish
19 that the members have sustained an ascertainable loss of money or property
20 as a result of [*a*] **the defendant's** reckless or knowing use or employment
21 [*by the defendant*] of a method, act or practice [*declared unlawful by*] **that**
22 **is unlawful under** ORS 646.608;

23 (b) The trier of fact may award punitive damages; and

24 (c) The court may award appropriate equitable relief.

25 (9) This section does not apply to any method, act or practice described
26 in ORS 646.608 (1)(aa). Actions for violation of laws relating to odometers
27 are provided under ORS 815.410 and 815.415.

28 **SECTION 3.** ORS 646.641 is amended to read:

29 646.641. (1)(a) Any person injured as a result of **another person's** willful
30 use or employment [*by another person*] of an unlawful collection practice may
31 bring an action in an appropriate court to enjoin the practice or to recover

1 actual damages or \$200, whichever is greater. The court or the jury may
2 award punitive damages[,] and the court may provide [*such*] equitable relief
3 [*as it*] **the court** deems necessary or proper.

4 **(b) A defendant in an action brought under paragraph (a) of this**
5 **subsection may respond to the action with an affirmative defense in**
6 **which the defendant shows by a preponderance of the evidence that**
7 **the defendant did not intend the violation and that the violation re-**
8 **sulted from a bona fide error notwithstanding the defendant's main-**
9 **tenance of procedures reasonably adapted to avoid the violation.**

10 (2) In any action [*brought by*] a person **brings** under this section, the
11 court may award reasonable attorney fees to the prevailing party.

12 (3) Actions brought under this section [*shall*] **must** be commenced within
13 one year [*from*] **after** the date of the injury.

14 **SECTION 4. The amendments to ORS 646.632, 646.638 and 646.641 by**
15 **sections 1 to 3 of this 2013 Act apply to actions brought on or after the**
16 **effective date of this 2013 Act.**

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