

# House Bill 2775

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**.

Changes standard of conduct under which person may be liable for unlawful practice under Unlawful Trade Practices Act from willful conduct to knowing conduct.

## A BILL FOR AN ACT

1  
2 Relating to unlawful practices; creating new provisions; and amending ORS 30.138, 646.605, 646.638  
3 and 646.641.

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

5 **SECTION 1.** ORS 30.138 is amended to read:

6 30.138. (1) In addition to any other remedy payable to a servicemember for the enforcement of  
7 a right under 50 U.S.C. App. 501 et seq., a court shall award a servicemember reasonable attorney  
8 fees and the amounts specified in subsection (2) of this section if the court finds that written demand  
9 as described in subsection (3) of this section was mailed to the opposing party demanding relief un-  
10 der 50 U.S.C. App. 501 et seq., and the opposing party failed to remedy the violation of 50 U.S.C.  
11 App. 501 et seq. within 30 days after the mailing of the demand.

12 (2) If a court finds that notice was mailed as required by this section, and the opposing party  
13 failed to remedy the violation of 50 U.S.C. App. 501 et seq. within the time allowed, the court shall  
14 award the servicemember:

15 (a) The greater of \$1,000 or actual damages, including damages for emotional distress; or

16 (b) If the court finds that the opposing [*party's conduct was willful, as described in ORS*  
17 *646.605,*] **party knew or should have known that the party's conduct was a violation**, the court  
18 shall award the servicemember the greater of \$5,000, or three times the amount of actual damages,  
19 including damages for emotional distress.

20 (3) A written demand under subsection (1) of this section must be sent by certified mail, return  
21 receipt requested. The demand must include the servicemember's name and address, the date on  
22 which the servicemember went on active duty and a description of the alleged violation of 50 U.S.C.  
23 App. 501 et seq.

24 **SECTION 2.** ORS 646.605 is amended to read:

25 646.605. As used in ORS 646.605 to 646.652:

26 (1) "Appropriate court" means the circuit court of a county:

27 (a) Where one or more of the defendants reside;

28 (b) Where one or more of the defendants maintain a principal place of business;

29 (c) Where one or more of the defendants are alleged to have committed an act prohibited by  
30 ORS 646.605 to 646.652; or

31 (d) With the defendant's consent, where the prosecuting attorney maintains an office.

**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 (2) "Documentary material" means the original or a copy of any book, record, report, memo-  
 2 randum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or  
 3 other tangible document or recording, wherever [*situate*] **located**.

4 (3) "Examination" [*of documentary material shall include inspection, study*] **means inspecting,**  
 5 **studying** or copying [*of any such*] **documentary** material[,] and taking testimony under oath or ac-  
 6 knowledgment [*in respect of any such documentary material or copy thereof*] **about the documentary**  
 7 **material or a copy of the documentary material.**

8 (4) "Person" means a natural [*persons, corporations, trusts, partnerships,*] **person, a corporation,**  
 9 **a trust, a partnership, an** incorporated or unincorporated [*associations*] **association** and any other  
 10 legal entity except bodies or officers acting under **the** statutory authority of this state or the United  
 11 States.

12 (5) "Prosecuting attorney" means the Attorney General or the district attorney of any county  
 13 in which a violation of ORS 646.605 to 646.652 is alleged to have occurred.

14 (6)(a) "Real estate, goods or services" means [*those*] **real estate, goods or services** that are or  
 15 may be obtained primarily for personal, family or household purposes, or that are or may be ob-  
 16 tained for any purposes as a result of a telephone solicitation, and includes loans and extensions  
 17 of credit, and franchises, distributorships and other similar business opportunities, but does not in-  
 18 clude insurance.

19 (b) Notwithstanding paragraph (a) of this subsection:

20 (A) "Real estate" does not [*cover*] **mean** conduct [*covered by*] **that is regulated under** ORS  
 21 chapter 90 [*except as provided in section 2, chapter 658, Oregon Laws 2003*].

22 (B) "Loans and extensions of credit" does not [*include*] **mean** transactions [*involving*] **that in-**  
 23 **volve** a pawnbroker, as defined in ORS 726.010, that is required to be licensed under ORS chapter  
 24 726.

25 (7) "Telephone solicitation" means a solicitation [*where*] **in which** a person, in the course of the  
 26 person's business, vocation or occupation, uses a telephone or an automatic dialing-announcing de-  
 27 vice to initiate telephonic contact with a potential customer and the person is not one of the fol-  
 28 lowing:

29 (a) [*A person who is*] A broker-dealer or salesperson licensed under ORS 59.175, or a mortgage  
 30 banker or mortgage broker licensed under ORS 86A.106, [*when*] **if** the solicitation is for a security  
 31 qualified for sale [*pursuant to*] **under** ORS 59.055.

32 (b) A real estate licensee or a person who is otherwise authorized to engage in professional real  
 33 estate activity [*pursuant to*] **under** ORS chapter 696, [*when*] **if** the solicitation involves professional  
 34 real estate activity.

35 (c) A person licensed or exempt from licensure as a builder pursuant to ORS chapter 701,  
 36 [*when*] **if** the solicitation involves [*the construction, alteration, repair, improvement or demolition of*]  
 37 **constructing, altering, repairing, improving or demolishing** a structure.

38 (d) A person licensed or otherwise authorized to sell insurance as an insurance producer pur-  
 39 suant to ORS chapter 744, [*when*] **if** the solicitation involves insurance.

40 (e) A person [*soliciting*] **that solicits** the sale of a newspaper of general circulation, a magazine  
 41 or membership in a book or record club who complies with ORS 646.611, [*when*] **if** the solicitation  
 42 involves newspapers, magazines or membership in a book or record club.

43 (f) A person [*soliciting*] **that solicits** without the intent to complete and who does not complete  
 44 [*the*] **a** sales presentation during the telephone solicitation and who only completes the sales pres-  
 45 entation at a later face-to-face meeting between the [*solicitor*] **person** and the prospective purchaser.

1 (g) A supervised financial institution or parent, subsidiary or affiliate *[thereof]* **of a supervised**  
 2 **financial institution.** As used in this paragraph, “supervised financial institution” means any fi-  
 3 nancial institution or trust company, as those terms are defined in ORS 706.008, or any personal  
 4 property broker, consumer finance lender, commercial finance lender or insurer that is subject to  
 5 regulation by an official or agency of this state or of the United States.

6 (h) A person who is authorized to conduct prearrangement or preconstruction funeral or ceme-  
 7 tery sales, *pursuant to* **under** ORS chapter 692, *[when]* **if** the solicitation involves prearrangement  
 8 or preconstruction funeral or cemetery plans.

9 (i) A person who solicits the services *[provided by]* **that** a cable television system licensed or  
 10 franchised *[pursuant to]* **under** state, local or federal law **provides,** *[when]* **if** the solicitation in-  
 11 volves cable television services.

12 (j) A person or affiliate of a person whose business is regulated by the Public Utility Commission  
 13 of Oregon.

14 (k) A person *[who]* **that** sells farm products as defined by ORS 576.006, if the solicitation *[neither*  
 15 *intends to nor actually results]* **is not intended to result in or does not actually result** in a sale  
 16 that costs the purchaser *[in excess of]* **more than** \$100.

17 (L) An issuer or subsidiary of an issuer that has a class of securities that is subject to section  
 18 12 of the Securities Exchange Act of 1934 and that is either registered or exempt from registration  
 19 under paragraph (A), (B), (C), (E), (F), (G) or (H) or subsection (g) of that section.

20 (m) A person *[soliciting exclusively]* **that solicits only** the sale of telephone answering services  
 21 *[to be provided by]* that **the** person or *[that]* **the** person’s employer **will provide, if** *[when]* the so-  
 22 licitation involves answering services.

23 (n) A telecommunications utility with access lines of 15,000 or less or a cooperative telephone  
 24 association, **if** *[when]* the solicitation involves regulated goods or services.

25 (8) “Trade” and “commerce” mean advertising, offering or distributing, whether by sale, rental  
 26 or otherwise, any real estate, goods or services, and include any trade or commerce directly or in-  
 27 directly affecting the people of this state.

28 (9) “Unconscionable tactics” *[include, but are]* **includes, but is** not limited to, actions by which  
 29 a person:

30 (a) Knowingly takes advantage of a customer’s physical infirmity, ignorance, illiteracy or ina-  
 31 bility to understand the language of the agreement;

32 (b) Knowingly permits a customer to enter into a transaction from which the customer will  
 33 derive no material benefit;

34 (c) Permits a customer to enter into a transaction with knowledge that *[there is no]* **the cus-**  
 35 **tomer does not have a** reasonable probability of *[payment of]* **paying** the attendant financial obli-  
 36 gation in full *[by the customer]* when due; or

37 (d) Knowingly takes advantage of a customer who is a disabled veteran, a disabled  
 38 servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled  
 39 servicemember or servicemember in active service. For purposes of this paragraph:

40 (A) “Disabled veteran” has the meaning given that term in ORS 408.225.

41 (B) “Disabled servicemember” means a servicemember, as defined in 50 U.S.C. App. 511 as in  
 42 effect on January 1, 2010, who may be entitled to disability compensation under laws administered  
 43 by the United States Department of Veterans Affairs.

44 (C) “Servicemember in active service” means:

45 (i) A servicemember called into active service under Title 10 or Title 32 of the United States

1 Code as in effect on January 1, 2010; or

2 (ii) A servicemember on active state duty, as defined in ORS 398.002.

3 [(10) *A willful violation occurs when the person committing the violation knew or should have*  
4 *known that the conduct of the person was a violation.*]

5 [(11)] (10) A loan is made “in close connection with the sale of a manufactured dwelling” if:

6 (a) The lender directly or indirectly controls, is controlled by or is under common control with  
7 the seller, unless the relationship is remote and is not a factor in the transaction;

8 (b) The lender gives a commission, rebate or credit in any form to a seller who refers the bor-  
9 rower to the lender, other than payment of the proceeds of the loan jointly to the seller and the  
10 borrower;

11 (c) The lender is related to the seller by blood or marriage;

12 (d) The seller directly and materially assists the borrower in obtaining the loan;

13 (e) The seller prepares documents that are given to the lender and used in connection with the  
14 loan; or

15 (f) The lender supplies documents to the seller [*used by*] **that** the borrower **uses** in obtaining  
16 the loan.

17 **SECTION 3.** ORS 646.605, as amended by section 12, chapter 658, Oregon Laws 2003, section  
18 199, chapter 71, Oregon Laws 2007, section 32, chapter 319, Oregon Laws 2007, section 2, chapter  
19 215, Oregon Laws 2009, and section 2, chapter 94, Oregon Laws 2010, is amended to read:

20 646.605. As used in ORS 646.605 to 646.652:

21 (1) “Appropriate court” means the circuit court of a county:

22 (a) Where one or more of the defendants reside;

23 (b) Where one or more of the defendants maintain a principal place of business;

24 (c) Where one or more of the defendants are alleged to have committed an act prohibited by  
25 ORS 646.605 to 646.652; or

26 (d) With the defendant’s consent, where the prosecuting attorney maintains an office.

27 (2) “Documentary material” means the original or a copy of any book, record, report, memo-  
28 randum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or  
29 other tangible document or recording, wherever [*situate*] **located**.

30 (3) “Examination” [*of documentary material shall include inspection, study*] **means inspecting,**  
31 **studying** or copying [*of any such*] **documentary** material[,] and taking testimony under oath or ac-  
32 knowledgment [*in respect of any such documentary material or copy thereof*] **about the documentary**  
33 **material or a copy of the documentary material**.

34 (4) “Person” means **a** natural [*persons, corporations, trusts, partnerships,*] **person, a corporation,**  
35 **a trust, a partnership, an** incorporated or unincorporated [*associations*] **association** and any other  
36 legal entity except bodies or officers acting under **the** statutory authority of this state or the United  
37 States.

38 (5) “Prosecuting attorney” means the Attorney General or the district attorney of any county  
39 in which a violation of ORS 646.605 to 646.652 is alleged to have occurred.

40 (6)(a) “Real estate, goods or services” means [*those*] **real estate, goods or services** that are or  
41 may be obtained primarily for personal, family or household purposes, or that are or may be ob-  
42 tained for any purposes as a result of a telephone solicitation, and includes loans and extensions  
43 of credit, and franchises, distributorships and other similar business opportunities, but does not in-  
44 clude insurance.

45 (b) Notwithstanding paragraph (a) of this subsection:

1 (A) “Real estate” does not *[cover]* **mean** conduct *[covered by]* **that is regulated under** ORS  
2 chapter 90.

3 (B) “Loans and extensions of credit” does not *[include]* **mean** transactions *[involving]* **that in-**  
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13 (b) A real estate licensee or a person who is otherwise authorized to engage in professional real  
14 estate activity *[pursuant to]* **under** ORS chapter 696, *[when]* **if** the solicitation involves professional  
15 real estate activity.

16 (c) A person licensed or exempt from licensure as a builder pursuant to ORS chapter 701,  
17 *[when]* **if** the solicitation involves *[the construction, alteration, repair, improvement or demolition of]*  
18 **constructing, altering, repairing, improving or demolishing** a structure.

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20 suant to ORS chapter 744, *[when]* **if** the solicitation involves insurance.

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22 or membership in a book or record club who complies with ORS 646.611, *[when]* **if** the solicitation  
23 involves newspapers, magazines or membership in a book or record club.

24 (f) A person *[soliciting]* **that solicits** without the intent to complete and who does not complete  
25 *[the]* a sales presentation during the telephone solicitation and who only completes the sales pres-  
26 entation at a later face-to-face meeting between the *[solicitor]* **person** and the prospective purchaser.

27 (g) A supervised financial institution or parent, subsidiary or affiliate *[thereof]* **of a supervised**  
28 **financial institution**. As used in this paragraph, “supervised financial institution” means any fi-  
29 nancial institution or trust company, as those terms are defined in ORS 706.008, or any personal  
30 property broker, consumer finance lender, commercial finance lender or insurer that is subject to  
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39 of Oregon.

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41 *intends to nor actually results]* **is not intended to result in or does not actually result** in a sale  
42 that costs the purchaser *[in excess of]* **more than** \$100.

43 (L) An issuer or subsidiary of an issuer that has a class of securities that is subject to section  
44 12 of the Securities Exchange Act of 1934 and that is either registered or exempt from registration  
45 under paragraph (A), (B), (C), (E), (F), (G) or (H) or subsection (g) of that section.

1 (m) A person [*soliciting exclusively*] **that solicits only** the sale of telephone answering services  
 2 [*to be provided by*] that **the** person or [*that*] **the** person's employer **will provide, if** [*when*] the so-  
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4 (n) A telecommunications utility with access lines of 15,000 or less or a cooperative telephone  
 5 association, **if** [*when*] the solicitation involves regulated goods or services.

6 (8) "Trade" and "commerce" mean advertising, offering or distributing, whether by sale, rental  
 7 or otherwise, any real estate, goods or services, and include any trade or commerce directly or in-  
 8 directly affecting the people of this state.

9 (9) "Unconscionable tactics" [*include, but are*] **includes, but is** not limited to, actions by which  
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11 (a) Knowingly takes advantage of a customer's physical infirmity, ignorance, illiteracy or ina-  
 12 bility to understand the language of the agreement;

13 (b) Knowingly permits a customer to enter into a transaction from which the customer will  
 14 derive no material benefit;

15 (c) Permits a customer to enter into a transaction with knowledge that [*there is no*] **the cus-**  
 16 **tomer does not have a** reasonable probability of [*payment of*] **paying** the attendant financial obli-  
 17 gation in full [*by the customer*] when due; or

18 (d) Knowingly takes advantage of a customer who is a disabled veteran, a disabled  
 19 servicemember or a servicemember in active service, or the spouse of a disabled veteran, disabled  
 20 servicemember or servicemember in active service. For purposes of this paragraph:

21 (A) "Disabled veteran" has the meaning given that term in ORS 408.225.

22 (B) "Disabled servicemember" means a servicemember, as defined in 50 U.S.C. App. 511 as in  
 23 effect on January 1, 2010, who may be entitled to disability compensation under laws administered  
 24 by the United States Department of Veterans Affairs.

25 (C) "Servicemember in active service" means:

26 (i) A servicemember called into active service under Title 10 or Title 32 of the United States  
 27 Code as in effect on January 1, 2010; or

28 (ii) A servicemember on active state duty, as defined in ORS 398.002.

29 [*(10) A willful violation occurs when the person committing the violation knew or should have*  
 30 *known that the conduct of the person was a violation.*]

31 [*(11)*] **(10)** A loan is made "in close connection with the sale of a manufactured dwelling" if:

32 (a) The lender directly or indirectly controls, is controlled by or is under common control with  
 33 the seller, unless the relationship is remote and is not a factor in the transaction;

34 (b) The lender gives a commission, rebate or credit in any form to a seller who refers the bor-  
 35 rower to the lender, other than payment of the proceeds of the loan jointly to the seller and the  
 36 borrower;

37 (c) The lender is related to the seller by blood or marriage;

38 (d) The seller directly and materially assists the borrower in obtaining the loan;

39 (e) The seller prepares documents that are given to the lender and used in connection with the  
 40 loan; or

41 (f) The lender supplies documents to the seller [*used by*] **that** the borrower **uses** in obtaining  
 42 the loan.

43 **SECTION 4.** ORS 646.638 is amended to read:

44 646.638. (1) Except as provided in subsections (8) and (9) of this section, [*any*] **a** person who  
 45 suffers any ascertainable loss of money or property, real or personal, as a result of [*willful use or*

1 *employment by another person of]* **another person's knowingly employing** a method, act or practice  
 2 *[declared unlawful by]* **that is unlawful under** ORS 646.608, may bring an individual action in an  
 3 appropriate court to recover actual damages or statutory damages of \$200, whichever is greater.  
 4 The court or the jury[, *as the case may be,*] may award punitive damages and the court may provide  
 5 *[the]* equitable relief the court considers necessary or proper.

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

13 (3) The court may award reasonable attorney fees and costs at trial and on appeal to a pre-  
 14 vailing plaintiff in an action under this section. The court may award reasonable attorney fees and  
 15 costs at trial and on appeal to a prevailing defendant only if the court finds *[there was no]* **that an**  
 16 objectively reasonable basis for bringing the action or asserting the ground for appeal **did not**  
 17 **exist**.

18 (4) The court may not award attorney fees to a prevailing defendant under the provisions of  
 19 subsection (3) of this section if the action under this section is maintained as a class action *[pur-*  
 20 *suant to]* **in accordance with** ORCP 32.

21 (5) Any permanent injunction or final judgment or order of the court made under ORS 646.632  
 22 or 646.636 is prima facie evidence in an action brought under this section that the respondent used  
 23 or employed a method, act or practice *[declared unlawful by]* **that is unlawful under** ORS 646.608,  
 24 but an assurance of voluntary compliance, whether or not approved by the court, *[shall not be]* **is**  
 25 **not** evidence of the violation.

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

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

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

38 (a) Statutory damages under subsection (1) of this section may be recovered on behalf of class  
 39 members only if the plaintiffs in the action establish that the members have sustained an  
 40 ascertainable loss of money or property as a result of a *[reckless or]* **defendant's** knowing use or  
 41 employment *[by the defendant]* of a method, act or practice *[declared unlawful by]* **that is unlawful**  
 42 **under** ORS 646.608;

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

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

45 (9) This section does not apply to any method, act or practice described in ORS 646.608 (1)(aa).

1 Actions for violation of laws relating to odometers are provided under ORS 815.410 and 815.415.

2 **SECTION 5.** ORS 646.641 is amended to read:

3 646.641. (1) Any person injured as a result of [*willful use or employment by another person of*]  
4 **another person's knowingly using or employing** an unlawful collection practice may bring an  
5 action in an appropriate court to enjoin the practice or to recover actual damages or \$200, which-  
6 ever is greater. The court or the jury may award punitive damages, and the court may provide  
7 [*such*] equitable relief [*as it*] **the court** deems necessary or proper.

8 (2) In any action [*brought by*] a person **brings** under this section, the court may award reason-  
9 able attorney fees to the prevailing party.

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

12 **SECTION 6. The amendments to ORS 30.138, 646.605, 646.638 and 646.641 by sections 1 to**  
13 **5 of this 2013 Act apply to actions brought on or after the effective date of this 2013 Act.**

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