

House Bill 2777

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**.

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 646.632, 646.638 and
3 646.641.

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 who has probable
7 cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful
8 trade practice may bring suit in the name of the State of Oregon in [*the*] **an** appropriate court to
9 restrain [*such*] **the** person from engaging in the alleged unlawful trade practice.

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

16 (2) Except as provided in subsections (5) and (6) of this section, before filing a suit under sub-
17 section (1) of this section, the prosecuting attorney shall in writing notify the person charged of the
18 alleged unlawful trade practice and the relief to be sought. [*Such*] **The** notice [*shall*] **must** be served
19 in the manner set forth in ORS 646.622 for [*the service of*] **servicing** investigative demands. The person
20 [*charged thereupon shall have*] **has** 10 days within which to execute and deliver to the prosecuting
21 attorney an assurance of voluntary compliance. [*Such*] **The** assurance **of voluntary compliance**
22 shall set forth what actions, if any, the person charged intends to take with respect to the alleged
23 unlawful trade practice. The assurance of voluntary compliance [*shall not be considered*] **is not** an
24 admission of a violation for any purpose. If the prosecuting attorney is satisfied with the assurance
25 of voluntary compliance, [*it*] **the prosecuting attorney or the person** may [*be submitted*] **submit**
26 **the assurance** to an appropriate court for approval and if [*approved shall thereafter*] **the court**
27 **approves shall file the assurance** [*be filed*] with the clerk of the court. If an approved assurance
28 of voluntary compliance provides for [*the payment of*] **paying** an amount of money, as restitution or
29 otherwise, and if the **person does not pay the** amount [*is not paid*] within 90 days [*of*] **after** the
30 date the court approves the assurance, or, if the assurance [*of voluntary compliance*] requires peri-

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 odic payments and if **the person does not pay a** *[any]* periodic payment *[is not paid]* within 30 days
 2 *[of]* **after** the date specified in the assurance *[of voluntary compliance for any]* **for the** periodic
 3 payment, *[then]* the prosecuting attorney may submit *[that]* **to the court the** portion of the assur-
 4 ance *[of voluntary compliance which]* **that** provides for *[the payment of]* **paying** money *[to the court]*
 5 with a certificate stating the unpaid balance in a form *[which]* **that** fully complies with the re-
 6 quirements of ORS 18.038 and 18.042. Upon submission of an assurance of voluntary compliance
 7 under this subsection, the court shall sign the assurance *[of voluntary compliance and it shall be*
 8 *entered]* **and enter the assurance** in the register of the court, and the clerk of the court shall note
 9 in the register that *[it]* **the assurance** creates a lien. **Once entered into the register,** the assur-
 10 ance of voluntary compliance *[shall thereupon constitute]* **constitutes** a judgment in favor of the
 11 State of Oregon and may be enforced as provided in ORS chapter 18. The notice of the prosecuting
 12 attorney under this subsection *[shall not be deemed]* **is not** a public record until *[the expiration of]*
 13 10 days *[from]* **after** the service of the notice.

14 (3) The prosecuting attorney may reject as unsatisfactory any assurance **of voluntary compli-**
 15 **ance that does not contain:**

16 (a) *[Which does not contain]* A promise to make restitution in specific amounts or through arbi-
 17 tration *[for]* **to** persons who suffered any ascertainable loss of money or property as a result of the
 18 alleged unlawful trade practice; or

19 (b) *[Which does not contain any]* **A** provision, including but not limited to *[the]* keeping *[of]* re-
 20 cords, *[which]* **that** the prosecuting attorney reasonably believes *[to be]* **is** necessary to ensure the
 21 *[continued]* **permanent** cessation of the alleged unlawful trade practice, if *[such]* **the** provision was
 22 included in a proposed assurance attached to the notice served pursuant to this section.

23 (4) Violation of any of the terms of an assurance of voluntary compliance *[which has been ap-*
 24 *proved by and filed with]* **that** the court *[shall constitute]* **has approved and filed constitutes** a
 25 contempt of court.

26 (5) The prosecuting attorney need not serve notice *[pursuant to]* **under** subsection (2) of this
 27 section before filing a suit if, within two years *[of the filing of such]* **before filing the** suit, the
 28 person charged with the alleged unfair trade practice submitted to any prosecuting attorney an as-
 29 surance of voluntary compliance *[which was accepted by and filed with an appropriate court]* **that a**
 30 **court approved and filed.** The prosecuting attorney shall in such case serve notice on the defend-
 31 ant in the manner set forth in ORS 646.622 for *[the service of]* **servicing** investigative demands, on the
 32 10th or earlier day *[previous to the]* **before** filing *[of]* suit.

33 (6) If the prosecuting attorney alleges that the prosecuting attorney has reason to believe that
 34 *[the delay caused by]* complying with the provisions of subsection (2) or (5) of this section would
 35 cause **a delay that would cause** immediate harm to the public health, safety or welfare, the pros-
 36 ecuting attorney may immediately institute a suit under subsection (1) of this section.

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

45 (8) The court may award reasonable attorney fees to the prevailing party in an action under this

1 section. If the defendant prevails in *[such]* **the** suit and the court finds that the defendant had in
 2 good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance
 3 *[prior to]* **before the prosecuting attorney brought** *[the institution of the]* suit or that the prose-
 4 cuting attorney, in a suit brought under subsections (5) and (6) of this section, did not have rea-
 5 sonable grounds to proceed under those subsections, the court shall award reasonable attorney fees
 6 at trial and on appeal to the defendant.

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

8 646.638. (1)(a) Except as provided in subsections (8) and (9) of this section, *[any]* a person who
 9 suffers any ascertainable loss of money or property, real or personal, as a result of **another**
 10 **person's** willful use or employment *[by another person]* of a method, act or practice *[declared un-*
 11 *lawful by]* **that is unlawful under** ORS 646.608, may bring an individual action in an appropriate
 12 court to recover actual damages or statutory damages of \$200, whichever is greater. The court or
 13 the jury*[, as the case may be,]* may award punitive damages and the court may provide *[the]* equitable
 14 relief the court considers necessary or proper.

15 **(b) A defendant in an action brought under paragraph (a) of this subsection may respond**
 16 **to the action with an affirmative defense in which the defendant shows by a preponderance**
 17 **of the evidence that the defendant did not intend the violation and that the violation resulted**
 18 **from a bona fide error notwithstanding the defendant's maintenance of procedures reason-**
 19 **ably adapted to avoid the violation.**

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

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

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

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

40 (6) Actions brought under this section *[shall]* **must** be commenced within one year *[from]* **after**
 41 the discovery of the unlawful method, act or practice. However, whenever *[any complaint is filed*
 42 *by]* a prosecuting attorney **files a complaint** to prevent, restrain or punish violations of ORS
 43 646.608, *[running of]* the statute of limitations **does not run** with respect to every private right of
 44 action under this section *[and]* **that is** based in whole or in part on any matter complained of in
 45 *[said]* **the** proceeding *[shall be suspended during the pendency thereof]* **while the proceeding is**

1 **pending.**

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

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

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

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

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

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

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

17 646.641. (1)(a) Any person injured as a result of **another person's** willful use or employment
 18 [*by another person*] of an unlawful collection practice may bring an action in an appropriate court
 19 to enjoin the practice or to recover actual damages or \$200, whichever is greater. The court or the
 20 jury may award punitive damages[,] and the court may provide [*such*] equitable relief [*as it*] **the**
 21 **court** deems necessary or proper.

22 **(b) A defendant in an action brought under paragraph (a) of this subsection may respond**
 23 **to the action with an affirmative defense in which the defendant shows by a preponderance**
 24 **of the evidence that the defendant did not intend the violation and that the violation resulted**
 25 **from a bona fide error notwithstanding the defendant's maintenance of procedures reason-**
 26 **ably adapted to avoid the violation.**

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

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

31 **SECTION 4. The amendments to ORS 646.632, 646.638 and 646.641 by sections 1 to 3 of this**
 32 **2013 Act apply to actions brought on or after the effective date of this 2013 Act.**