

Enrolled Senate Bill 609

Sponsored by COMMITTEE ON JUDICIARY

CHAPTER

AN ACT

Relating to liability under securities laws; creating new provisions; and amending ORS 59.115, 59.127, 59.255 and 59.335.

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

SECTION 1. ORS 59.115 is amended to read:

59.115. (1) A person who **offers or** sells a security is liable as provided in subsection (2) of this section to a purchaser of the security if the person:

(a) **Offers or** sells a security, other than a federal covered security, in violation of the Oregon Securities Law or of any condition, limitation or restriction imposed upon a registration or license under the Oregon Securities Law; [or]

(b) **Offers or** sells a security by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission; **or**

(c) **Offers or sells a security in violation of ORS 59.135 (1), (2) or (3).**

(2) The purchaser may recover:

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

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

(3) Every person who directly or indirectly controls a seller liable under subsection (1) of this section, every partner, limited liability company manager, including a member who is a manager, officer or director of such seller, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the sale is also liable jointly and severally with and to the same extent as the seller, unless the nonseller sustains the burden of proof that the nonseller did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based. Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with that person.

(4) Notwithstanding the provisions of subsection (3) of this section, a person whose sole function in connection with the sale of a security is to provide ministerial functions of escrow, custody or

deposit services in accordance with applicable law is liable only if the person participates or materially aids in the sale and the purchaser sustains the burden of proof that the person knew of the existence of facts on which liability is based or that the person's failure to know of the existence of such facts was the result of the person's recklessness or gross negligence.

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

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

(7) [No] **An** action may **not** be commenced under this section solely because an offer was made prior to registration of the securities.

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

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

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

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

(10) Except as provided in subsection (11) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

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

SECTION 2. ORS 59.127 is amended to read:

59.127. (1) A person who **offers to purchase or** purchases a security is liable as provided in subsection (2) of this section to the person selling the security, if the person:

(a) Purchases a security, other than a federal covered security, in violation of any condition, limitation or restriction imposed upon a registration under the Oregon Securities Law; [or]

(b) Purchases a security by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading (the seller not knowing of the untruth or omission), and if the person does not sustain the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the untruth or omission; **or**

(c) Purchases a security in violation of ORS 59.135 (1), (2) or (3).

(2) The seller may recover:

(a) Upon a tender of the consideration paid for the security, the security plus interest from the date of purchase equal to the greater of the rate of interest specified in ORS 82.010 for judgments and decrees for the payment of money, or the rate provided in the security if the security is an interest-bearing obligation;

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

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

(3) Every person who directly or indirectly controls a purchaser liable under subsection (1) of this section, every partner, limited liability company manager, including a member who is a manager, officer or director of such purchaser, every person occupying a similar status or performing similar functions, and every person who participates or materially aids in the purchase is also liable

jointly and severally with and to the same extent as the purchaser, unless the nonpurchaser sustains the burden of proof that the nonpurchaser did not know, and, in the exercise of reasonable care, could not have known, of the existence of facts on which the liability is based. Any person held liable under this section shall be entitled to contribution from those jointly and severally liable with the person.

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

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

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

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

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

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

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

(9) Except as provided in subsection (10) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

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

SECTION 3. Section 4 of this 2003 Act is added to and made a part of ORS 59.005 to 59.451.

SECTION 4. (1) Any person who violates or participates or materially aids in a violation of ORS 59.135 (1), (2) or (3) is liable to any purchaser or seller of the security for the actual damages sustained, including the amount of any commission, fee or other remuneration paid, together with interest at the rate specified in ORS 82.010 for judgments for the payment of money.

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

(3) Except as provided in subsection (4) of this section, the court may award reasonable attorney fees to the prevailing party in an action under this section.

(4) The court may not award attorney fees to a prevailing defendant under the provisions of subsection (3) of this section if the action under this section is maintained as a class action pursuant to ORCP 32.

(5) An action or suit may be commenced under this section within the later of:

(a) Three years after the date of the purchase or sale of a security to which the action or suit relates; or

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

(6) Failure to commence an action or suit under this section on a timely basis is an affirmative defense.

SECTION 5. ORS 59.255 is amended to read:

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

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

(3) The court may award reasonable attorney fees to the director if the director prevails in an action under this section. The court may award reasonable attorney fees to a defendant who prevails in an action under this section if the court determines that the director had no objectively reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial court.

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

(a) A claim for restitution or damages under ORS 59.115 or 59.127 **or section 4 of this 2003 Act**, on behalf of the persons injured by the act or practice constituting the subject matter of the action. The court shall have jurisdiction to award appropriate relief to such persons, if the court finds that enforcement of the rights of such persons by private civil action, whether by class action or otherwise, would be so burdensome or expensive as to be impractical; or

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

[(3)] (5) The provisions of this section [shall] **do not** apply to:

(a) A failure to file a notice and pay a fee pursuant to ORS 59.049 (1), (2) or (3) [, nor to];

(b) A failure to file a notice and pay a fee pursuant to ORS 59.165 (7) [, nor to];

(c) A failure to pay a fee pursuant to ORS 59.175 (8) [, nor to]; **or**

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

SECTION 6. ORS 59.335 is amended to read:

59.335. (1) ORS 59.055, 59.115, 59.125 [, 59.135] and 59.145 and 59.165 (1) apply to persons who sell or offer to sell when:

(a) An offer to sell is made in this state; or

(b) An offer to buy is made and accepted in this state.

(2) ORS [59.135,] 59.145 and 59.165 (1) apply to persons who buy or offer to buy when:

(a) An offer to buy is made in this state; or

(b) An offer to sell is made and accepted in this state.

(3) ORS 59.135, 59.145 and 59.165, insofar as federal covered investment advisers or state investment advisers are concerned, apply when an act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

SECTION 7. (1) Except as provided in subsection (2) of this section:

(a) The amendments to ORS 59.115 by section 1 of this 2003 Act apply to offers and sales of a security that occur prior to, on or after the effective date of this 2003 Act.

(b) The amendments to ORS 59.127 by section 2 of this 2003 Act apply to offers to purchase and purchases of a security that occur prior to, on or after the effective date of this 2003 Act.

(c) Section 4 of this 2003 Act applies to violations of ORS 59.135 that occur prior to, on or after the effective date of this 2003 Act.

(d) The amendments to ORS 59.255 by section 5 of this 2003 Act apply to suits brought on or after the effective date of this 2003 Act.

(e) The amendments to ORS 59.335 by section 6 of this 2003 Act apply to offers and sales of a security, and offers to purchase and purchases of a security, that occur prior to, on or after the effective date of this 2003 Act.

(2) Section 4 of this 2003 Act and the amendments to ORS 59.115, 59.127, 59.255 and 59.335 by sections 1, 2, 5 and 6 of this 2003 Act do not apply to any action in which a judgment has been entered in the register of a court before the effective date of this 2003 Act.

Passed by Senate May 8, 2003

Received by Governor:

Repassed by Senate July 22, 2003

.....M.,....., 2003

Approved:

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Secretary of Senate

.....M.,....., 2003

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President of Senate

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Governor

Passed by House July 16, 2003

Filed in Office of Secretary of State:

.....M.,....., 2003

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Speaker of House

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Secretary of State