

1 STATE OF OKLAHOMA

2 2nd Session of the 52nd Legislature (2010)

3 COMMITTEE SUBSTITUTE
4 FOR

5 SENATE BILL NO. 1860

6 By: Coffee

7 COMMITTEE SUBSTITUTE

8 An Act relating to the Unfair Sales Act; amending 15
9 O.S. 2001, Sections 598.2, 598.3, 598.5, 598.7 and
10 598.8, which relate to sales below cost; deleting
11 certain definitions; clarifying who is prohibited
12 from violating act; providing that certain offers of
13 sale, advertising, and sale of products and services
14 violate act; specifying the necessary intent in order
15 to violate act; deleting certain prohibited acts;
16 defining term; providing penalties; providing for
17 certain prima facie evidence; deleting certain
18 language concerning prima facie evidence; providing
19 certain exception for services; repealing 15 O.S.
20 2001, Section 598.4, which relates to definitions and
21 punishment for certain violations; and providing an
22 effective date.

23 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

24 SECTION 1. AMENDATORY 15 O.S. 2001, Section 598.2, is
amended to read as follows:

Section 598.2 (a) ~~When used in this act, the term "cost to the
retailer" shall mean the invoice cost of the merchandise to the
retailer or the replacement cost of the merchandise to the retailer,
whichever is the lower; less all trade discounts except customary~~

1 ~~discounts for cash; to which shall be added (1) freight charges not~~
2 ~~otherwise included in the invoice cost or the replacement cost of~~
3 ~~the merchandise as herein set forth, and (2) cartage to the retail~~
4 ~~outlet if done or paid for the retailer, which cartage cost, in the~~
5 ~~absence of proof of a lesser cost, shall be deemed to be~~
6 ~~three fourths of one percent (3/4 of 1%) of the cost to the retailer~~
7 ~~as herein defined after adding thereto freight charges but before~~
8 ~~adding thereto cartage, and taxes, (3) all State and Federal taxes~~
9 ~~not heretofore added to the cost as such, and (4) a markup to cover~~
10 ~~a proportionate part of the cost of doing business, which markup, in~~
11 ~~the absence of proof of a lesser cost, shall be six percent (6%) of~~
12 ~~the cost of the retailer as herein set forth after adding thereto~~
13 ~~freight charges and cartage but before adding thereto a markup.~~

14 ~~(b) When used in this act, the term "cost to the wholesaler"~~
15 ~~shall mean the invoice cost of the merchandise to the wholesaler, or~~
16 ~~the replacement cost of the merchandise to the wholesaler, whichever~~
17 ~~is the lower; less all trade discounts except customary discounts~~
18 ~~for cash; to which shall be added, (1) freight charges, not~~
19 ~~otherwise included in the invoice cost or the replacement cost of~~
20 ~~the merchandise as herein set forth, and (2) cartage to the retail~~
21 ~~outlet if done or paid for by the wholesaler, which cartage cost, in~~
22 ~~the absence of proof of a lesser cost, shall be deemed to be~~
23 ~~three fourths of one percent (3/4 of 1%) of the cost to the~~
24 ~~wholesaler as herein set forth after adding thereto freight charges~~

1 ~~but before adding thereto cartage, and taxes, and (3) all State and~~
2 ~~Federal taxes not heretofore added to the cost as such.~~

3 ~~(c) When used in this act the term "replacement costs" shall~~
4 ~~mean the cost per unit at which the merchandise sold or offered for~~
5 ~~sale could have been bought by the seller at any time within thirty~~
6 ~~(30) days prior to the date of sale or the date upon which it is~~
7 ~~offered for sale by the seller if bought in the same quantity or~~
8 ~~quantities as the seller's last purchase of said merchandise.~~

9 ~~(d) When one or more items are advertised, offered for sale, or~~
10 ~~sold with one or more other items at a combined price, or are~~
11 ~~advertised, offered as a gift, or given with the sale of one or more~~
12 ~~other items, each and all of said items shall for the purposes of~~
13 ~~this act be deemed to be advertised, offered for sale, or sold, and~~
14 ~~the price of each item named shall be governed by the provisions of~~
15 ~~paragraphs (a) or (b) of Section 2, respectively.~~

16 ~~(e) The terms "sell at retail", "sales at retail", and "retail~~
17 ~~sale" shall mean and include any transfer for a valuable~~
18 ~~consideration made in the ordinary course of trade or in the usual~~
19 ~~prosecution of the seller's business of title to tangible personal~~
20 ~~property to the purchaser for consumption or use other than resale~~
21 ~~or further processing or manufacturing. The above terms shall~~
22 ~~include any transfer of such property where title is retained by the~~
23 ~~seller as security for the payment of the purchase price.~~

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1 ~~(f)~~ (b) The terms "sell at wholesale", "sales at wholesale",
2 and "wholesale sales" shall mean and include any transfer for a
3 valuable consideration made in the ordinary course of trade or the
4 usual conduct of the seller's business, of title to tangible
5 personal property to the purchaser for purposes of resale or further
6 processing or manufacturing. The above terms shall include any
7 transfer of such property where title is retained by the seller as
8 security for the payment of the purchase price.

9 ~~(g)~~ (c) The term "retailer" shall mean and include every
10 person, partnership, corporation or association engaged in the
11 business of making sales at retail within this state; provided that,
12 in the case of a person, partnership, corporation or association
13 engaged in the business of making both sales at retail and sales at
14 wholesale, such term shall be applied only to the retail portion of
15 such business.

16 ~~(h)~~ (d) The term "wholesaler" shall mean and include every
17 person, partnership, corporation, or association engaged in the
18 business of making sales at wholesale within this state; provided
19 that, in the case of a person, partnership, corporation or
20 association engaged in the business of making both sales at
21 wholesale and sales at retail, such term shall be applied only to
22 the wholesale portion of such business.

23 SECTION 2. AMENDATORY 15 O.S. 2001, Section 598.3, is
24 amended to read as follows:

1 Section 598.3 ~~It is hereby declared that any advertising, A.~~
2 It is unlawful and considered unfair competition for any person,
3 partnership, firm, corporation, joint stock company or other
4 association engaged in business within this state to offer to sell
5 for sale, advertise, or sale of sell any merchandise, either by
6 retailers or wholesalers, product or service at less than the cost
7 as defined in this act of the product or service with the intent and
8 purpose of inducing the purchase of other merchandise or of unfairly
9 diverting trade from a competitor or otherwise injuring a
10 competitor, impair and prevent fair competition, injure public
11 welfare, are unfair competition and contrary to public policy and
12 the policy of this act, where the result of such advertising, offer
13 or sale is to tend to deceive any purchaser or prospective
14 purchaser, or to substantially lessen competition, or to
15 unreasonably restrain trade, or to tend to create a monopoly in any
16 line of commerce to both injure competitors and destroy competition
17 and where the likely result of such sale would be the acquisition or
18 maintenance of a monopoly.

19 B. For the purposes of this act "cost" means an appropriate
20 determination of cost that is consistent with Federal Court
21 Interpretations of Cost in Federal Predatory Pricing Cases Under the
22 Federal "Sherman Act", 15 U.S.C., Section 1 et seq.

23 C. Any person, partnership, firm, corporation, joint stock
24 company or other association, whether as principal, agent, officer,

1 or director, for himself, herself or itself, or for another person,
2 engaged in business within this state, who violates the provisions
3 of this section shall be guilty of a misdemeanor for each single
4 violation and, upon conviction, shall be punished by a fine of not
5 more than Five Hundred Dollars (\$500.00) or by imprisonment in the
6 county jail of not more than one (1) year or by both such fine and
7 imprisonment.

8 D. Evidence of a violation of a prohibited act under subsection
9 A of this section, shall be prima facie evidence of an intent to
10 injure competitors and destroy competition.

11 SECTION 3. AMENDATORY 15 O.S. 2001, Section 598.5, is
12 amended to read as follows:

13 Section 598.5 ~~(a)~~ A. In addition to the penalties provided in
14 this act, any person injured by any violation, or who shall suffer
15 injury from any threatened violation of this act, may maintain an
16 action in any court of equitable jurisdiction to prevent, restrain
17 or enjoin such violation or threatened violation. If in such action
18 a violation or threatened violation of this act shall be
19 established, the court shall enjoin and restrain or otherwise
20 prohibit, such violation or threatened violation and, in addition
21 thereto, shall assess in favor of the plaintiff and against the
22 defendant the cost of suit. In such action if damages are alleged
23 and proved, the plaintiff in said action, in addition to such

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1 injunctive relief and costs of suit, shall be entitled to recover
2 from the defendant the actual damages sustained by him.

3 ~~(b)~~ B. In the event no injunctive relief is sought or required,
4 any person injured by a violation of this act may maintain an action
5 for damages alone in any court of general jurisdiction, and the
6 measure of damages in such action shall be the same as prescribed in
7 subsection ~~(a)~~ A of this section. Provided this act shall not
8 authorize suits or actions against newspapers, radio broadcasters,
9 or other advertising agencies through which such advertisements are
10 published, broadcast or otherwise made.

11 ~~(c) Evidence of advertisement, offering to sell, or sale of~~
12 ~~merchandise by any retailer or wholesaler at less than cost to him,~~
13 ~~shall be prima facie evidence of intent to injure competitors and to~~
14 ~~destroy or substantially lessen competition.~~

15 SECTION 3. AMENDATORY 15 O.S. 2001, Section 598.7, is
16 amended to read as follows:

17 Section 598.7 Any ~~retailer or wholesaler~~ person, partnership,
18 firm, corporations, joint stock company or other association, may
19 advertise, offer to sell, or sell merchandise or services at a price
20 made in good faith to meet the price of a competitor who is selling
21 the same article, services or products of comparable quality at cost
22 ~~to him as a wholesaler or retailer.~~ The price of merchandise
23 advertised, offered for sale or sold under the exemptions specified
24 in Section ~~6~~ 598.6 of this title, shall not be considered the price

1 of a competitor and shall not be used as a basis for establishing
2 prices below cost, nor shall the price established at a bankrupt
3 sale be considered the price of a competitor within the purview of
4 the first sentence of this section.

5 SECTION 5. AMENDATORY 15 O.S. 2001, Section 598.8, is
6 amended to read as follows:

7 Section 598.8 In establishing the cost of merchandise to ~~the~~ a
8 retailer or wholesaler, the invoice cost of such merchandise
9 purchased at a forced, bankrupt, closeout sale, or other sale
10 outside of the ordinary channels of trade, may not be used as a
11 basis for justifying a price lower than one based upon the
12 replacement cost of the merchandise to the retailer or wholesaler,
13 within thirty (30) days prior to the date of sale, in the quantity
14 last purchased through the ordinary channels of trade.

15 SECTION 6. REPEALER 15 O.S. 2001, Section 598.4, is
16 hereby repealed.

17 SECTION 7. This act shall become effective November 1, 2010.

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