

1 ENGROSSED HOUSE AMENDMENT
TO
2 ENGROSSED SENATE BILL NO. 550 By: Holt of the Senate
3 and
4 Newell of the House
5
6
7 [Unfair Sales Act - advertising and selling
8 merchandise below cost and penalties - changing name
9 of act - modifying language - limiting unfair sales
10 provisions to gasoline, diesel fuel, and legend drug
11 products - effective date]
12
13 AUTHORS: Add the following House Coauthors: Hall and Walker
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15
16 AMENDMENT NO. 1. Strike the stricken title, enacting clause and
17 entire bill and insert
18
19 "An Act relating to contracts; amending 15 O.S. 2011,
20 Sections 598.1, 598.2, 598.3, 598.4, 598.5, 598.6,
21 598.7 and 598.8, which relate to the Unfair Sales
22 Act; modifying language; defining terms; limiting
23 unfair sales provisions to covered merchandise;
24 providing punishment and fine for violation;
permitting civil relief for violation; exempting
certain sales; permitting sale of covered
merchandise at certain price; modifying term; and
providing an effective date.

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

1 SECTION 1. AMENDATORY 15 O.S. 2011, Section 598.1, is
2 amended to read as follows:

3 Section 598.1 This act shall be known and ~~designated, and~~ may
4 be cited as the "Unfair Sales Act".

5 SECTION 2. AMENDATORY 15 O.S. 2011, Section 598.2, is
6 amended to read as follows:

7 Section 598.2 For the purposes of the Unfair Sales Act:

8 (a) ~~When used in this act, the~~ The term "cost to the retailer"
9 ~~shall mean~~ means the invoice cost of the merchandise to the retailer
10 or the replacement cost of the merchandise to the retailer,
11 whichever is the lower; less all trade discounts except customary
12 discounts for cash; to which shall be added (1) freight charges not
13 otherwise included in the invoice cost or the replacement cost of
14 the merchandise as herein set forth, and (2) cartage to the retail
15 outlet if done or paid for the retailer, which cartage cost, in the
16 absence of proof of a lesser cost, shall be deemed to be three-
17 fourths of one percent ($\frac{3}{4}$ of 1%) of the cost to the retailer as
18 herein defined after adding thereto freight charges but before
19 adding thereto cartage, and taxes, (3) all state and federal taxes
20 not heretofore added to the cost as such, and (4) a markup to cover
21 a proportionate part of the cost of doing business, which markup, in
22 the absence of proof of a lesser cost, shall be six percent (6%) of
23 the cost of the retailer as herein set forth after adding thereto
24 freight charges and cartage but before adding thereto a markup-;

1 (b) ~~When used in this act, the~~ The term "cost to the
2 wholesaler" ~~shall mean~~ means the invoice cost of the merchandise to
3 the wholesaler, or the replacement cost of the merchandise to the
4 wholesaler, whichever is the lower; less all trade discounts except
5 customary discounts for cash; to which shall be added, (1) freight
6 charges, not otherwise included in the invoice cost or the
7 replacement cost of the merchandise as herein set forth, and (2)
8 cartage to the retail outlet if done or paid for by the wholesaler,
9 which cartage cost, in the absence of proof of a lesser cost, shall
10 be deemed to be three-fourths of one percent ($3/4$ of 1%) of the cost
11 to the wholesaler as herein set forth after adding thereto freight
12 charges but before adding thereto cartage, and taxes, and (3) all
13 state and federal taxes not heretofore added to the cost as such-;

14 (c) ~~When used in this act the~~ The term "replacement costs"
15 ~~shall mean~~ means the cost per unit at which the merchandise sold or
16 offered for sale could have been bought by the seller at any time
17 within thirty (30) days prior to the date of sale or the date upon
18 which it is offered for sale by the seller if bought in the same
19 quantity or quantities as the seller's last purchase of said
20 merchandise-;

21 (d) When one or more items ~~are~~ advertised, offered for sale, or
22 sold with one or more other items at a combined price, or ~~are~~
23 advertised, offered as a gift, or given with the sale of one or more
24 other items, each and all of ~~said~~ the items shall ~~for the purposes~~

1 ~~of this act~~ be deemed to be advertised, offered for sale, or sold,
2 and the price of each item named shall be governed by the provisions
3 of paragraphs (a) or (b) of ~~Section 2~~ this section, respectively;
4

5 (e) The terms "sell at retail", "sales at retail", and "retail
6 sale" ~~shall mean~~ mean and ~~include~~ include any transfer for a
7 valuable consideration made in the ordinary course of trade or in
8 the usual prosecution of the seller's business of title to tangible
9 personal property to the purchaser for consumption or use other than
10 resale or further processing or manufacturing. The above terms
11 shall include any transfer of such property where title is retained
12 by the seller as security for the payment of the purchase price;
13

14 (f) The terms "sell at wholesale", "sales at wholesale", and
15 "wholesale sales" ~~shall mean~~ mean and ~~include~~ include any transfer
16 for a valuable consideration made in the ordinary course of trade or
17 the usual conduct of the seller's business, of title to tangible
18 personal property to the purchaser for purposes of resale or further
19 processing or manufacturing. The above terms shall include any
20 transfer of such property where title is retained by the seller as
21 security for the payment of the purchase price;
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23 (g) The term "retailer" ~~shall mean~~ means and ~~include~~ includes
24 every person, partnership, corporation or association engaged in the
business of making sales at retail of covered merchandise within
this state; provided that, in the case of a person, partnership,
corporation or association engaged in the business of making both

1 sales at retail and sales at wholesale, such term shall be applied
2 only to the retail portion of such business-;

3 (h) The term "wholesaler" ~~shall mean~~ means and ~~include~~ includes
4 every person, partnership, corporation, or association engaged in
5 the business of making sales at wholesale of covered merchandise
6 within this state; provided that, in the case of a person,
7 partnership, corporation or association engaged in the business of
8 making both sales at wholesale and sales at retail, such term shall
9 be applied only to the wholesale portion of such business; and

10 (i) The term "covered merchandise" means any gasoline and
11 diesel fuel; legend drug products; food and nonalcoholic beverages
12 sold for off-premise use or consumption; household soaps and
13 detergents; health and beauty aids; over-the-counter medicines,
14 vitamins, and health products excluding exercise equipment and
15 durable medical products; pet food and pet supplies; paper and
16 plastic goods; household cleaning agents and cleaning supplies; baby
17 supplies directly related to nutrition and food preservation,
18 consumption and disposal, including disposable diapers; and low-
19 point beer, as defined in paragraph 1 of Section 163.2 of Title 37
20 of the Oklahoma Statutes, sold for off-premise use or consumption.

21 SECTION 3. AMENDATORY 15 O.S. 2011, Section 598.3, is
22 amended to read as follows:

23 Section 598.3 It is hereby declared that any advertising,
24 offer to sell, or sale of any covered merchandise, either by

1 retailers or wholesalers, at less than cost as defined in ~~this act~~
2 the Unfair Sales Act with the intent and purpose of inducing the
3 purchase of other covered merchandise or of unfairly diverting trade
4 from a competitor or otherwise injuring a competitor, impair and
5 prevent fair competition, injure public welfare, are unfair
6 competition and contrary to public policy and the policy of ~~this act~~
7 the Unfair Sales Act, where the result of such advertising, offer or
8 sale is ~~to tend to deceive any purchaser or prospective purchaser,~~
9 ~~or~~ to substantially lessen competition, or to unreasonably restrain
10 trade, or to tend to create a monopoly in any line of commerce.

11 SECTION 4. AMENDATORY 15 O.S. 2011, Section 598.4, is
12 amended to read as follows:

13 Section 598.4 Any retailer who shall, in contravention of the
14 policy of ~~this act~~ the Unfair Sales Act, advertise, offer to sell or
15 sell at retail any ~~item of~~ covered merchandise at less than cost to
16 the retailer as defined in this act; or any wholesaler who shall in
17 contravention of the policy of ~~this act~~ the Unfair Sales Act,
18 advertise, offer to sell, or sell at wholesale any ~~item of~~ covered
19 merchandise at less than cost to the wholesaler as defined in this
20 act, shall be guilty of a misdemeanor and upon conviction ~~thereof,~~
21 shall be punished by a fine of not more than Five Hundred Dollars
22 (\$500.00).

23 SECTION 5. AMENDATORY 15 O.S. 2011, Section 598.5, is
24 amended to read as follows:

1 Section 598.5 (a) In addition to the penalties provided in
2 ~~this act~~ the Unfair Sales Act, any person injured by any violation,
3 or who shall suffer injury from any threatened violation of ~~this act~~
4 the Unfair Sales Act, may maintain an action in any court of
5 equitable jurisdiction to prevent, restrain or enjoin such violation
6 or threatened violation. If in such action a violation or
7 threatened violation of ~~this act~~ the Unfair Sales Act shall be
8 established, the court shall enjoin and restrain or otherwise
9 prohibit, such violation or threatened violation and, in addition
10 thereto, shall assess in favor of the plaintiff and against the
11 defendant the cost of suit. In such action if damages are alleged
12 and proved, the plaintiff in ~~said~~ the action, in addition to such
13 injunctive relief and costs of suit, shall be entitled to recover
14 from the defendant the actual damages sustained by him or her.

15 (b) In the event no injunctive relief is sought or required,
16 any person injured by a violation of ~~this act~~ the Unfair Sales Act
17 may maintain an action for damages alone in any court of general
18 jurisdiction, and the measure of damages in such action shall be the
19 same as prescribed in subsection (a) of this section. Provided ~~this~~
20 ~~act~~ the Unfair Sales Act shall not authorize suits or actions
21 against newspapers, radio broadcasters, or other advertising
22 agencies through which such advertisements are published, broadcast
23 or otherwise made.

24 (c) Evidence of advertisement, offering to sell, or sale of

1 covered merchandise by any retailer or wholesaler at less than cost
2 to ~~him~~ such retailer or wholesaler, shall be prima facie evidence of
3 intent to injure competitors and to destroy or substantially lessen
4 competition.

5 SECTION 6. AMENDATORY 15 O.S. 2011, Section 598.6, is
6 amended to read as follows:

7 Section 598.6 The provisions of ~~this act~~ the Unfair Sales Act
8 shall not apply to the following sales at retail or sales at
9 wholesale:

10 (a) where seasonable merchandise is sold in bona fide clearance
11 sales, if advertised, marked, and sold as such;

12 (b) where perishable merchandise must be sold promptly in order
13 to forestall loss;

14 (c) where merchandise is imperfect or damaged or is being
15 discontinued and is advertised, marked and sold as such;

16 (d) where merchandise is sold upon the final liquidation of any
17 business;

18 (e) where merchandise is sold for charitable purposes or to
19 relief agencies;

20 (f) where merchandise is sold on contract to departments of the
21 government or governmental institutions;

22 (g) where merchandise is sold by any officer acting under the
23 order or direction of any court;

24 (h) where merchandise is sold at any bona fide auction sale;

1 and

2 (i) where a particular item of merchandise corresponding to a
3 unique identifier is sold at below cost for fifteen (15) or fewer
4 sequential days and where such sale does not occur more than ten
5 times in any twelve-month period. This exemption shall not apply to
6 the following types of merchandise: gasoline and diesel fuel; legend
7 drug products; food and nonalcoholic beverages sold for off-premise
8 use or consumption; household soaps and detergents; health and
9 beauty aids; over-the-counter medicines, vitamins, and health
10 products excluding exercise equipment and durable medical products;
11 pet food and pet supplies; paper and plastic goods; household
12 cleaning agents and cleaning supplies; baby supplies directly
13 related to nutrition and food preservation, consumption and
14 disposal, including disposable diapers; and low-point beer, as
15 defined in paragraph 1 of Section 163.2 of Title 37 of the Oklahoma
16 Statutes, sold for off-premise use or consumption.

17 SECTION 7. AMENDATORY 15 O.S. 2011, Section 598.7, is
18 amended to read as follows:

19 Section 598.7 Any retailer or wholesaler may advertise, offer
20 to sell, or sell covered merchandise at a price made in good faith
21 to meet the price of a competitor who is selling the same ~~article~~
22 products or such products of comparable quality at cost to ~~him as a~~
23 such wholesaler or retailer. The price of covered merchandise
24 advertised, offered for sale or sold under the exemptions specified

1 in Section ~~6~~ 598.6 of this title, shall not be considered the price
2 of a competitor and shall not be used as a basis for establishing
3 prices below cost, nor shall the price established at a bankrupt
4 sale be considered the price of a competitor within the purview of
5 the first sentence of this section.

6 SECTION 8. AMENDATORY 15 O.S. 2011, Section 598.8, is
7 amended to read as follows:

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

16 SECTION 9. This act shall become effective November 1, 2013."
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1 Passed the House of Representatives the 17th day of April, 2013.

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4 Presiding Officer of the House of
Representatives
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6 Passed the Senate the ____ day of _____, 2013.

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9 Presiding Officer of the Senate
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