

1 **SENATE FLOOR VERSION**

2 February 14, 2013

3 SENATE BILL NO. 550

By: Holt of the Senate

4 and

5 Newell of the House

6
7
8 An Act relating to the Unfair Sales Act; amending 15
9 O.S. 2011, Sections 598.1, 598.2, 598.3, 598.4,
10 598.5, 598.6, 598.7 and 598.8, which relate to
11 advertising and selling merchandise below cost and
12 penalties; changing name of act; modifying language;
13 limiting unfair sales provisions to gasoline, diesel
14 fuel, and legend drug products; providing for
15 noncodification; and providing an effective date.

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

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

19 Section 598.1. This act shall be known and ~~designated,~~ and may
20 be cited as the "Unfair Fuel and Legend Drug Products Sales Act".

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

23 Section 598.2. For the purposes of the Unfair Fuel and Legend
24 Drug Products Sales Act:

(a) ~~When used in this act,~~ the term "cost to the retailer" shall
mean means the invoice cost of the merchandise to the retailer or

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

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

1 be deemed to be three-fourths of one percent (3/4 of 1%) of the cost
2 to the wholesaler as herein set forth after adding thereto freight
3 charges but before adding thereto cartage, and taxes, and (3) all
4 state and federal taxes not heretofore added to the cost as such-;

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

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

19 (e) The terms "sell at retail", "sales at retail", and "retail
20 sale" ~~shall mean~~ means and ~~include~~ includes any transfer for a
21 valuable consideration made in the ordinary course of trade or in
22 the usual prosecution of the seller's business of title to tangible
23 personal property to the purchaser for consumption or use other than
24 resale or further processing or manufacturing. The above terms shall

1 include any transfer of such property where title is retained by the
2 seller as security for the payment of the purchase price-;

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

11 (g) The term "retailer" ~~shall mean~~ means and ~~include~~ includes
12 every person, partnership, corporation or association engaged in the
13 business of making sales at retail of gasoline, diesel fuel or
14 legend drug products within this state; provided that, in the case
15 of a person, partnership, corporation or association engaged in the
16 business of making both sales at retail and sales at wholesale, such
17 term shall be applied only to the retail portion of such business-;
18 and

19 (h) The term "wholesaler" ~~shall mean~~ means and ~~include~~ includes
20 every person, partnership, corporation, or association engaged in
21 the business of making sales at wholesale of gasoline, diesel fuel
22 or legend drug products within this state; provided that, in the
23 case of a person, partnership, corporation or association engaged in
24 the business of making both sales at wholesale and sales at retail,

1 such term shall be applied only to the wholesale portion of such
2 business.

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

5 Section 598.3. It is hereby declared that any advertising,
6 offer to sell, or sale of any ~~merchandise~~ gasoline, diesel fuel or
7 legend drug products, either by retailers or wholesalers, at less
8 than cost as defined in ~~this act~~ the Unfair Fuel and Legend Drug
9 Products Sales Act with the intent and purpose of inducing the
10 purchase of other ~~merchandise~~ gasoline, diesel fuel or legend drug
11 products or of unfairly diverting trade from a competitor or
12 otherwise injuring a competitor, impair and prevent fair
13 competition, injure public welfare, are unfair competition and
14 contrary to public policy and the policy of ~~this act~~ the Unfair Fuel
15 and Legend Drug Products Sales Act, where the result of such
16 advertising, offer or sale is ~~to tend to deceive any purchaser or~~
17 ~~prospective purchaser, or~~ to substantially lessen competition, or to
18 unreasonably restrain trade, or to tend to create a monopoly in any
19 line of commerce.

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

22 Section 598.4. Any retailer who shall, in contravention of the
23 policy of ~~this act~~ the Unfair Fuel and Legend Drug Products Sales
24 Act, advertise, offer to sell or sell at retail any ~~item of~~

1 ~~merchandise~~ gasoline, diesel fuel or legend drug products at less
2 than cost to the retailer as defined in this act; or any wholesaler
3 who shall in contravention of the policy of ~~this act~~ the Unfair Fuel
4 and Legend Drug Products Sales Act, advertise, offer to sell, or
5 sell at wholesale any ~~item of merchandise~~ gasoline, diesel fuel or
6 legend drug products at less than cost to the wholesaler as defined
7 in this act, shall be guilty of a misdemeanor ~~and~~, upon conviction,
8 ~~thereof~~ and shall be punished by a fine of not more than Five
9 Hundred Dollars (\$500.00).

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

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

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

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

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

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

21 Section 598.6. The provisions of ~~this act~~ the Unfair Fuel and
22 Legend Drug Products Sales Act shall not apply to sales at retail or
23 sales at wholesale. as follows:

24 (a) where seasonable merchandise is sold in bona fide clearance

1 sales, if advertised marked, and sold as such;

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

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

6 (d) where merchandise is sold upon the final liquidation of any
7 business;

8 (e) where merchandise is sold for charitable purposes or to
9 relief agencies;

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

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

14 (h) where merchandise is sold at any bona fide auction sale.

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

17 Section 598.7. Any retailer or wholesaler may advertise, offer
18 to sell, or sell ~~merchandise~~ gasoline, diesel fuel or legend drug
19 products at a price made in good faith to meet the price of a
20 competitor who is selling the same ~~article~~ gasoline, diesel fuel or
21 legend drug products or such products of comparable quality at cost
22 to ~~him as a~~ such wholesaler or retailer. The price of ~~merchandise~~
23 gasoline, diesel fuel, or legend drug products advertised, offered
24 for sale or sold under the exemptions specified in Section ~~6~~ 598.6

1 of this title, shall not be considered the price of a competitor and
2 shall not be used as a basis for establishing prices below cost, nor
3 shall the price established at a bankrupt sale be considered the
4 price of a competitor within the purview of the first sentence of
5 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 merchandise to the
9 retailer or wholesaler, the invoice cost of such ~~merchandise~~
10 gasoline, diesel fuel, or legend drug products purchased at a
11 forced, bankrupt, closeout sale, or other sale outside of the
12 ordinary channels of trade, may not be used as a basis for
13 justifying a price lower than one based upon the replacement cost of
14 the merchandise to the retailer or wholesaler, within thirty (30)
15 days prior to the date of sale, in the quantity last purchased
16 through the ordinary channels of trade.

17 SECTION 9. This act shall become effective November 1, 2013.

18 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS AND COMMERCE
19 February 14, 2013 - DO PASS
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