

SENATE FLOOR VERSION

THE STATE SENATE

1 Monday, February 22, 2010  
2 Committee Substitute for  
3 Senate Bill No. 1860

4 CS for SB 1860

5 COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 1860 - By: Sykes of  
6 the Senate and Nelson of the House.

7 [~~Unfair Sales Act sales below cost effective date~~]

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

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

11 Section 598.2 (a) [~~When used in this act, the term "cost to~~  
12 ~~the retailer" shall mean the invoice cost of the merchandise to the~~  
13 ~~retailer or the replacement cost of the merchandise to the retailer,~~  
14 ~~whichever is the lower; less all trade discounts except customary~~  
15 ~~discounts for cash; to which shall be added (1) freight charges not~~  
16 ~~otherwise included in the invoice cost or the replacement cost of~~  
17 ~~the merchandise as herein set forth, and (2) cartage to the retail~~  
18 ~~outlet if done or paid for the retailer, which cartage cost, in the~~  
19 ~~absence of proof of a lesser cost, shall be deemed to be~~  
20 ~~three fourths of one percent (3/4 of 1%) of the cost to the retailer~~  
21 ~~as herein defined after adding thereto freight charges but before~~  
22 ~~adding thereto cartage, and taxes, (3) all State and Federal taxes~~  
23 ~~not heretofore added to the cost as such, and (4) a markup to cover~~  
24 ~~a proportionate part of the cost of doing business, which markup, in~~

1 ~~the absence of proof of a lesser cost, shall be six percent (6%) of~~  
2 ~~the cost of the retailer as herein set forth after adding thereto~~  
3 ~~freight charges and cartage but before adding thereto a markup.]~~

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

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

23 ~~[(d) When one or more items are advertised, offered for sale,~~  
24 ~~or sold with one or more other items at a combined price, or are~~  
25 ~~advertised, offered as a gift, or given with the sale of one or more~~  
26 ~~other items, each and all of said items shall for the purposes of~~  
27 ~~this act be deemed to be advertised, offered for sale, or sold, and~~

1 ~~the price of each item named shall be governed by the provisions of~~  
2 ~~paragraphs (a) or (b) of Section 2, respectively.]~~

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

11 [~~(f)~~] (b) The terms "sell at wholesale", "sales at  
12 wholesale", and "wholesale sales" shall mean and include any  
13 transfer for a valuable consideration made in the ordinary course of  
14 trade or the usual conduct of the seller's business, of title to  
15 tangible personal property to the purchaser for purposes of resale  
16 or further processing or manufacturing. The above terms shall  
17 include any transfer of such property where title is retained by the  
18 seller as security for the payment of the purchase price.

19 [~~(g)~~] (c) The term "retailer" shall mean and include every  
20 person, partnership, corporation or association engaged in the  
21 business of making sales at retail within this state; provided that,  
22 in the case of a person, partnership, corporation or association  
23 engaged in the business of making both sales at retail and sales at  
24 wholesale, such term shall be applied only to the retail portion of  
25 such business.

26 [~~(h)~~] (d) The term "wholesaler" shall mean and include  
27 every person, partnership, corporation, or association engaged in

1 the business of making sales at wholesale within this state;  
2 provided that, in the case of a person, partnership, corporation or  
3 association engaged in the business of making both sales at  
4 wholesale and sales at retail, such term shall be applied only to  
5 the wholesale portion of such business.

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

8 Section 598.3 ~~[It is hereby declared that any advertising,]~~

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

26 B. For the purposes of this act "cost" means an appropriate

27 determination of cost that is consistent with Federal Court

1 Interpretations of Cost in Federal Predatory Pricing Cases Under the  
2 Federal "Sherman Act", 15 U.S.C., Section 1 et seq.

3 C. Any person, partnership, firm, corporation, joint stock  
4 company or other association, whether as principal, agent, officer,  
5 or director, for himself, herself or itself, or for another person,  
6 engaged in business within this state, who violates the provisions  
7 of this section shall be guilty of a misdemeanor for each single  
8 violation and, upon conviction, shall be punished by a fine of not  
9 more than Five Hundred Dollars (\$500.00) or by imprisonment in the  
10 county jail of not more than one (1) year or by both such fine and  
11 imprisonment.

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

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

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

27 alleged and proved, the plaintiff in said action, in addition to

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

3 ~~[(b)]~~ B. In the event no injunctive relief is sought or  
4 required, any person injured by a violation of this act may maintain  
5 an action for damages alone in any court of general jurisdiction,  
6 and the measure of damages in such action shall be the same as  
7 prescribed in subsection ~~[(a)]~~ A of this section. Provided this  
8 act shall not authorize suits or actions against newspapers, radio  
9 broadcasters, or other advertising agencies through which such  
10 advertisements are 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 4. AMENDATORY 15 O.S. 2001, Section 598.7, is  
16 amended to read as follows:

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

26 a basis for establishing prices below cost, nor shall the price  
27 established at a bankrupt sale be considered the price of a

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1 competitor within the purview of the first sentence of this section.

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

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

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

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

15 COMMITTEE REPORT BY: COMMITTEE ON FINANCE, dated 2-16-10 - DO  
16 PASS, As Amended and Coauthored.

17 SB1860 SFLR1State Senate

18 (Bold face denotes Committee Amendments)