

TITLE 48
MONOPOLIES AND TRADE PRACTICES
CHAPTER 4
UNFAIR SALES ACT

48-401. TITLE OF ACT. This act shall be known and designated, and may be cited, as the "Unfair Sales Act."

48-402. DECLARATION OF POLICY AND PURPOSE. The practice of selling certain items of merchandise below cost in order to attract patronage is a deceptive form of advertising and an unfair method of competition. Such practice misleads the consumer, works back against the farmer, obstructs commerce and diverts business from dealers who maintain a fair price policy, with the result of unemployment, underpayment of employees, excessive working hours, nonpayment of taxes and an inevitable train of undesirable consequences including economic depression. This act is designed to make illegal such practice and to promote the general welfare of the state of Idaho.

48-403. DEFINITIONS OF TERMS.

(a) When used in this act, the term "cost to the retailer" shall mean the actual cost of the merchandise to the retailer, or the replacement cost of the merchandise to the retailer at the lowest prices then prevailing in his trade area, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (3/4) of one per cent (1%) of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and

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(3) a markup to cover a proportionate part of the cost of doing business, which markup in the absence of proof of a lesser cost, shall be six per cent (6%) of the cost to the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) When used in this act, the term "cost to the wholesaler" shall mean the actual cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (3/4) of one per cent (1%) of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be two per cent (2%) of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) (aa) When used in this act, the term "cost to the direct seller" shall mean the actual cost of the merchandise to the direct seller or the replacement cost of the merchandise to the direct seller at the lowest price then prevailing in his trade area, whichever is the lower; less all trade discounts except customary discounts for cash; to which shall be added

(1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and

(2) cartage to the retail outlet if done or paid for by the direct seller, which cartage cost, in the absence of proof of a lesser cost shall be deemed to be one and one-half [per cent] (1 1/2%) of the cost to the direct seller as

herein defined after adding thereto freight charges, but before adding thereto cartage and markup, and

(3) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost shall be eight per cent (8%) of the cost to the direct seller as herein set forth after adding thereto freight charges, but before adding thereto cartage and markup.

(c) When used in this act the term "replacement cost" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought at the nearest source of supply by the retailer, wholesaler or direct seller at any time within thirty (30) days prior to the date of sale or the date upon which it is offered for sale by the retailer, wholesaler or direct seller if bought in the same quantity or quantities as the retailer's, wholesaler's or direct seller's last purchase of the said merchandise.

(d) Where one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purpose of this act be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of subsections (a), (b) and (b-aa) of section 48-403 (this section) respectively.

(e) The terms "cost to the retailer" "cost to the wholesaler" and "cost to the direct seller" as defined in subsections (a), (b) and (b-aa) of this section shall mean bona fide costs; and purchases made by retailers, wholesalers and direct sellers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer, cost to the wholesaler and cost to the direct seller. Any manufacturer's published list price, less published discounts, in effect in this state at the time any such manufacturer's merchandise is purchased by a wholesaler, retailer or direct seller is deemed to be competent evidence of the cost of such

manufacturer's merchandise, in the absence of proof of a lesser cost.

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

(g) The term "sell at wholesale," "sales at wholesale" and "wholesale sales" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purpose of resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(h) The term "retailer" shall mean and include every person, partnership, corporation or association engaged in the business of making sales at retail within this state; provided, that in case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sale at wholesale, such terms shall be applied only to the retail portion of such business.

(i) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this state; provided that in case of a person, partnership, corporation or association engaged in the business of making both sales at wholesale and sales at retail, such term shall apply only to the wholesale portion of such business.

(j) The term "freight charges" when used in this act shall mean minimum rates or charges contained in the lawfully filed tariff of any carriers holding authority from the Idaho Public Utilities Commission of Idaho or the Interstate Commerce Commission which tariff is on file with the said

Idaho Public Utilities Commission or the Interstate Commerce Commission.

(k) The term "direct seller" when used in this act shall mean and include every retailer as herein defined who buys processed merchandise direct from the processor for the purpose of selling such processed merchandise at retail, but a retailer shall be a direct seller only as to the processed merchandise so purchased.

(l) The term "store or outlet" as used in this act, means any place at which goods, wares or merchandise are sold or offered for sale to the public; provided, however, that the term "store or outlet" shall not be construed to include any place at which the gross sales of goods, wares or merchandise in the last preceding calendar year do not exceed \$5,000.00.

(m) The term "person" shall mean any individual, firm, partnership, corporation or association.

48-404. ADVERTISING OR SALES AT LESS THAN COST CONTRARY TO PUBLIC POLICY. It is hereby declared that any advertising, offer to sell or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

48-405. PENALTY FOR ADVERTISING OR SELLING MERCHANDISE AT LESS THAN COST. Any retailer or direct seller who shall, in contravention of the policy of this act, advertise, offer to sell or sell at retail any item of merchandise, which is subject to this act, at less than cost to the retailer or direct seller as defined in this act, or knowingly buys any

item of merchandise, which is subject to this act, from any wholesaler at less than cost to the wholesaler as herein defined, or any wholesaler who shall, in contravention of the policy of this act, advertise, offer to sell or sell at wholesale any item of merchandise, which is subject to this act, at less than cost to the wholesaler as defined in this act, shall be guilty of a misdemeanor for each single offense, and upon conviction thereof shall be punished by a fine or not more than \$500.00 or by imprisonment not to exceed six months or by both said fine and imprisonment, in the discretion of the court. Proof of any such advertising, offer to sell or sale by any retailer, direct seller or wholesaler in contravention of the policy of this act, shall be prima facie evidence of a violation of this act.

48-406. INJUNCTIONS.

(1) Parties Authorized to Bring. Any person, municipal or other public corporation, or the state of Idaho, may maintain an action to enjoin a continuance of any act or acts in violation of this act.

(2) Authority to Issue. If it appears to the court upon any application for a temporary injunction, or upon the hearing for any order to show cause why a temporary injunction should not be issued, or, if the court shall find, in any such action, that any defendant therein is violating, or has violated, this act, then the court shall enjoin the defendant from doing all acts which are prohibited in said act.

(3) Restraints Which May Be Included. The court may, in its discretion, include in any injunction against a violation of this act such other restraints as it may deem expedient in order to deter the defendant therefrom, and ensure against his committing a future violation of this act.

(4) Article or Products Covered. Any injunction against a violation of this act, whether temporary or final, shall cover every article or product handled or sold by the defendant and not merely the particular article or product involved in the pending action.

(5) Undertaking or Bond. As a condition to the granting of a temporary injunction under this act, the court may require of the plaintiff, excepting when a municipal or public corporation or the state of Idaho is the plaintiff, a written undertaking in such sum as the court deems reasonable and proper in the premises, with sufficient sureties to the effect that the plaintiff will pay to the person enjoined such costs and damages, not exceeding an amount specified in said undertaking, as such person enjoined may incur or sustain by reason of the issuance of a temporary injunction, if it shall be finally decided that plaintiff was not entitled thereto.

Within five (5) days after the service of the temporary injunction, the defendant may except to the sufficiency of the sureties. If the defendant fails to do so he is deemed to have waived all objections to them.

When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two (2) nor more than five (5) days, must justify before the judge, in the same manner as upon bail or arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed the order granting an injunction shall be dissolved.

(6) Injury and Damages. In any action under this act, it is not necessary to allege or prove actual damages or threat thereof, or actual injury or threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action is entitled to recover the amount of the actual damages, if any, sustained by the plaintiff, as well as the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this act.

History:

48-407. EXEMPTED SALES. The provisions of this act shall not apply to sales at retail or sales at wholesale.

(a) where perishable merchandise must be sold promptly in order to forestall loss;

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

(c) where merchandise is sold upon the final liquidation of any business;

(d) Where an endeavor is made in good faith to meet the prices of a competitor as herein defined selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade.

(e) where merchandise is sold on contract to departments of the government or governmental agencies;

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

(g) where in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product if advertised, marked and sold as such. Provided, however, that any retailer or wholesaler claiming the benefits of any of the exceptions hereinabove provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of such exceptions.

48-408. SUPERVISION AND ADMINISTRATION OF ACT BY GOVERNOR.

(1) The governor of the state of Idaho shall have the responsibility for the supervision and administration of this act and he shall have the authority to designate any department of the state government to supervise and administer this act under his direction.

(2) The governor or the department designated by him to supervise and administer this act shall employ such employees as may be required to supervise and administer this act, whose duties shall be:

(a) To inspect and investigate the sales practices of all persons subject to this act;

(b) To investigate and ascertain violations of this act;

(c) To prosecute all violations of this act, either by injunction proceedings, criminal proceedings or both.

(d) To aid and assist the attorney general of the state of Idaho and the prosecuting attorneys of the various counties in the enforcement of this act.

(e) To collect such taxes as called for in this act.

(f) To perform such other duties in connection with this act as may be designated by the governor.

48-409. WITNESSES - EXEMPTION FROM PROSECUTION BASED UPON TESTIMONY. Any party of record to any civil action or proceeding instituted or brought pursuant to the provisions of this act may be required to testify in such proceeding and to produce books, papers, invoices, contracts, agreements and all material documents before the court in such proceedings, providing, however, that no person compelled under the provisions of this section to testify or produce evidence tending to incriminate him or expose him to public ignominy shall be prosecuted for any crime which such testimony or evidence tends to prove or to which the same relates. This section shall not exempt any person from prosecution for perjury.

48-411. SEPARABILITY. If any section, sentence, clause or provision of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions.

48-412. DECEPTIVE ADVERTISING AS UNFAIR COMPETITION. It is hereby declared to be unlawful, unfair competition and an act or acts within the purview of section 48-406, Idaho Code, for any manufacturer, wholesaler or retailer to advertise for sale, offer for sale or sell any goods, wares or merchandise where the advertisement contains any assertion, representation or statement which is untrue, deceptive or misleading or falsely represents the kind, classification, grade of quality of the goods, wares or merchandise so advertised.

48-413. REBATES UNLAWFUL. The inhibition of this chapter against selling merchandise at less than cost and

unfair competition contrary to public policy shall embrace any scheme of special rebates, collateral contracts or any device of any nature by and among wholesalers, retailers and direct sellers whereby such rebates or agreements are, in substance or fact, effected in violation of the spirit and intent of this chapter. It is hereby declared to be unlawful, unfair competition, and an act or acts within the purview of section 48-406, Idaho Code, for any wholesaler, retailer or direct seller to give or receive special rebates or be a party to any such agreements or devices.

