**COMMISSION APPROVED**

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

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| JOHN E. SNIDER d/b/a HOMINY REXALL DRUG; ROBERT SLAMANS d/b/a/ CORNER HEALTH MART; WILBUR CAVE d/b/a/ FAIRFAX DRUG; LEO BERKENBILE d/b/a B & B REXALL DRUG; and JIM WEIGANT d/b/a/ WEIGANT'S HEALTH MART,<br><br>Plaintiffs,<br><br>v.<br><br>WAL-MART STORES, INC., a Delaware corporation, d/b/a WAL-MART PHARMACY, Pawhuska,<br><br>Defendant. | No. 84-C-436-E |

BRIEF OF THE FEDERAL TRADE COMMISSION
AS AMICUS CURIAE
IN SUPPORT OF WAL-MART STORES, INC.'S MOTION TO DISMISS


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BRIEF OF THE FEDERAL TRADE COMMISSION
AS *AMICUS CURIAE*
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The Federal Trade Commission files this brief to provide the Court with its views regarding conflicts between the Oklahoma Unfair Sales Act, 15 Okla. St. Ann. §§598.1-598.11 (1981) ("the Oklahoma Act" or "the Act"), and the federal antitrust laws. The Federal Trade Commission is one of two agencies charged by Congress with enforcement of the federal antitrust laws. The Commission has a long history of concern with promoting competition in interstate commerce and has developed substantial expertise in analyzing impediments to competition.

The Federal Trade Commission supports Wal-Mart Stores, Inc.'s motion to dismiss on the grounds that the Oklahoma Act is unconstitutional because it impermissibly conflicts with federal antitrust law. The Sherman Antitrust Act, 15 U.S.C. §1, _et seq._, prohibits agreements that restrain fully competitive pricing whereas the Oklahoma Act limits the ability of retailers and wholesalers to engage in such competitive pricing. Among other things, the Oklahoma Act, with specified exceptions, makes it prima facie illegal for a retailer to price below cost, with cost defined to include a six percent markup. The doctrine of federal legislative preemption under the Supremacy Clause of Article VI of the United States Constitution authorizes federal courts to invalidate any state or local law that conflicts with the federal antitrust laws. Because of its irreconcilable conflict with the federal antitrust laws, the Oklahoma Act is unconstitutional and unenforceable.

## I. THE OKLAHOMA ACT IS INVALID IF IT IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT BY PRECLUDING COMPETITORS FROM ENGAGING IN FULLY COMPETITIVE PRICING

### A. The Oklahoma Act Is Invalid if It Prevents the Accomplishment of the Full Purposes of the Sherman Act

Congress and the Supreme Court have emphasized the primacy of the federal antitrust policy of free competition. As Justice Black noted: "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." _Northern Pac. Ry. v. United States_, 356 U.S. 1, 4 (1958).

Under the Supremacy Clause of Article VI of the United States Constitution, a state law that conflicts with federal law is preempted:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

As early as 1819, the Supreme Court interpreted the Supremacy Clause to deprive the states of all power "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 436 (1819). Whenever a clear conflict between state regulation and federal policy arises, the Supreme Court has consistently emphasized the primacy of federal policy.[1] In Hines v. Davidowitz, 312 U.S. 52, 67 (1941), the Supreme Court stated that the test was whether a state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." This same language appears in more recent Supreme Court opinions. For example, in Ray v. Atlantic Richfield Corp., 435 U.S. 151, 158 (1978), the Court stated:

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1 For example, in early cases such as Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) and Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859), the Supreme Court held that state laws "repugnant to and inconsistent with" federal legislation must be struck down.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal or state regulations is a physical impossibility" . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

The federal antitrust laws[2] are nonexclusive and do not preclude most kinds of state economic regulation.[3] Indeed, state regulation is normally consistent with federal antitrust policy.[4] Although Congress' enactment of the Sherman Act has not foreclosed state economic regulation in most areas, a state statute is nevertheless unenforceable whenever it irreconcilably conflicts with the Sherman Act. In Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982), the Supreme Court expressly recognized the applicability of this standard to conflicts with the Sherman Act, declaring that a state statute is preempted whenever there is an irreconcilable conflict between the statute and the Sherman Act:

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2 Section 1 of the Clayton Act, 15 U.S.C. §12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. §44, define the federal "antitrust laws."

3 In other words, the Sherman Act does not "occupy the field." Thus, state statutes regulating commerce can coexist with the Sherman Act.

4 For example, two categories of state regulation that are consistent with the goals and policies of the federal antitrust laws or whose purpose and intent are to accommodate coequal or superior public policy goals with a minimum of competitive disruption are the regulation of natural monopolies and various laws and regulations designed to promote the public health and safety. As such, these regulations are not repugnant to the antitrust laws. See Section V., infra.

> In determining whether the Sherman Act pre-empts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes.

Rice contains an extensive discussion of the principles underlying federal antitrust law preemption of state statutes:

> A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect. . . .
>
> A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy. . . .
>
> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under §1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.

Rice, 458 U.S. at 659-661.

Thus, the Sherman Act preempts the Oklahoma Act if the two statutes stand in irreconcilable conflict such that the Oklahoma Act is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. at 67. Such a conflict occurs if the Oklahoma Act on its face mandates conduct inconsistent with the per se standards of the Sherman Act. Rice, 458 U.S. at 661.

B. Central to the Purposes of the Sherman Act Is Its Ban on Private Agreements that Restrain Fully Competitive Pricing

Section 1 of the Sherman Act prohibits agreements in restraint of trade. The central thrust of Section 1 of the Sherman Act is to prohibit cartelization.[5] Agreements among competitors whose only effect is to eliminate or reduce price competition among themselves are essentially cartel agreements and are treated as per se violations of the Sherman Act. Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958). The "protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws," United States v. General Motors Corp., 384 U.S. 127, 148 (1966), because any restriction on free and open price competition poses a "threat to the central nervous system of the economy." United States v. Socony-Vacuum Oil, 310 U.S. 150, 224-26 n.59 (1940). This sensitivity to open price competition has led the Supreme Court to declare per se unlawful a variety of agreements among competitors designed to raise, lower, or stabilize prices.

In United States v. Trenton Potteries Co., 273 U.S. 392 (1927) the Supreme Court first declared direct price-fixing agreements unlawful regardless of the "reasonableness" of the prices agreed upon:

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5 See, e.g., L. Sullivan, Antitrust §61 at 161 (1977). "To discuss Section 1 of the Sherman Act is to deal with the law's response to the cartel and to various modes of concerted conduct among competitors which, if not amounting to full blown cartels, nevertheless have the same effect."

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

273 U.S. at 397-398 (emphasis added).

To constitute per se unlawful price-fixing, an agreement need not fix the ultimate price. An agreement among competitors to fix any specific element of a sales transaction is also per se unlawful. For example, the Supreme Court has held that an agreement among competing wholesalers to eliminate credit terms offered to purchasers is as plainly anticompetitive as a direct agreement to raise prices. Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980). An agreement to set minimum fee schedules that established a rigid price floor was declared per se unlawful in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). Of direct relevance to the Oklahoma statute are cases expressly holding that agreements limiting discounts or establishing uniform costs and markups constitute per se unlawful price fixing. See e.g., Catalano, 446 U.S. at 648 (per curiam); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 185-188 (3d Cir. 1970), cert. denied, 401 U.S. 948

(1971); United States v. United Liquor Corp., 149 F. Supp. 609 (W.D. Tenn. 1956), aff'd per curiam, 352 U.S. 991 (1957).

### C. State Statutes that Preclude Competitors from Engaging in Fully Competitive Pricing Are Unconstitutional and Unenforceable

When the Supreme Court has found that a state statute precludes competitors from engaging in fully competitive pricing, it has struck the statute down because it conflicts with the federal antitrust laws.

In Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951), the Court was faced with a state liquor law that allowed resale price maintenance. Resale price maintenance was legal at that time under the Miller-Tydings Act.[6] However, the state law at issue not only authorized resale price maintenance between a manufacturer and those retailers who voluntarily agreed to be bound by the manufacturer-determined resale price, but also required other non-contracting retailers to abide by the same price. In effect, the state was mandating parallel pricing among all retailers of a particular product. Reversing an injunction against a non-signing retailer for selling at less than the official prices, the Supreme Court held that:

> [T]he Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price

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6 Ch. 690, 50 Stat. 693 (1937) (codified at 15 U.S.C. §1). The Miller-Tydings Act was repealed by the Consumer Goods Pricing Act of 1975, Pub. L. 94-145, §2, 89 Stat. 801.

> policy, it demands private conduct which the Sherman Act forbids. See Parker v. Brown, 317 U.S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual "vertical" agreements with all his retailers. But when retailers are forced to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing.

(footnote omitted) (emphasis in original). 341 U.S. at 389.

In California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980), the Supreme Court struck down a similar California statute that prohibited fully competitive pricing in the wholesale distribution of wine. California required wine producers and wholesalers either to sell wine under fair trade contracts or to post resale prices that would bind all of the wine merchants in the trade area. In striking down the statute, the Supreme Court noted that "such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" 445 U.S. at 103, quoting Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911). Because the State had prohibited full price competition, in clear conflict with the federal antitrust laws, the law could not be enforced.

The Court's holding in Midcal Aluminum was interpreted in Rice v. Norman Williams Co., 458 U.S. 654 (1982). Rice involved a Supremacy Clause challenge to a provision of California's alcoholic beverage laws that prohibited licensed California liquor importers from purchasing or accepting delivery of any brand of distilled spirits unless the brand owner or his authorized agent had designated the importer as an authorized importer of the particular brand. This so-called "designation" statute was apparently enacted in response to Oklahoma's "open wholesaling" statute, whereby a licensed California importer who was unable to obtain distilled spirits through the distiller's established distribution system could obtain them from Oklahoma wholesalers. A group of California importers who had been benefitting from the "Oklahoma Connection" sought to enjoin enforcement of the California statute as unconstitutional under the Supremacy Clause because of a claimed conflict with the Sherman Act.

In rejecting the importers' claim, the Supreme Court first noted that the California designation statute merely enforced the distiller's decision to restrain intrabrand competition by permitting the distiller to designate which wholesalers were to be allowed to import the distiller's products into California. The Court emphasized that the statute did not "require the distiller to impose vertical restraints of any kind." Id. at 662 (emphasis in original). Moreover, the Court observed that in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), it had held that an attempt by a manufacturer to use such nonprice vertical restraints to limit competition in its own products is not per se illegal under the Sherman Act but, instead, must be analyzed under the rule of reason. As such, the Court concluded that the California statute did not irreconcilably conflict with federal antitrust policy:

> Such condemnation will follow under §1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. at 661.

The Rice Court contrasted the lack of an irreconcilable conflict between federal antitrust policy and the designation statute before it and the conflict with the statute at issue in California Retail Liquor Dealers' Assn. v. Midcal Aluminum, Inc. The Court characterized the statute at issue in Midcal as having "required" wine producers to file fair trade contracts or price schedules with the State. Unlike the California designation statute, "the [Midcal] statute facially conflicted with the Sherman Act because it mandated . . . an activity that has long been regarded as a per se violation of the Sherman Act." 458 U.S. at 659-60 (emphasis in original).

The argument may be made, based on the language in Rice,[7]

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[7] The language in Rice that could lead to this argument is as follows:

> [A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under §1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.

458 U.S. at 659-661.

that a state statute cannot be preempted by the Sherman Act unless the statute mandates that private parties enter into an illegal private agreement. Courts have split on this issue. Compare, e.g., Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Bd., 186 Cal. Rptr. 552 (1982), cert. denied, 104 S. Ct. 193 (1983) and Rice v. Alcoholic Beverage Control Appeals Bd., 146 Cal. Rptr. 585 (1978) with Miller v. Hedlund, 579 F. Supp. 116 (D. Ore. 1984) and United States Brewers Ass'n, Inc. v. Healey, 532 F. Supp. 1312 (D. Conn.), rev'd on other grounds, 692 F.2d 275 (2d Cir. 1982), aff'd, 104 S. Ct. 265 (1983). The view that an illegal private agreement is necessary for preemption is inconsistent with the plain language of Rice and with the holdings of both Schwegmann and Midcal, the two cases in which the Supreme Court struck down state statutes because of a conflict with the federal antitrust laws.

In Rice the Court did not say that the statute must mandate an illegal agreement in order to be preempted. Rather, the Court spoke in terms of an "activity that has long been regarded as a violation of the Sherman Act," (discussing Midcal) 458 U.S. at 659 (emphasis added) and of "conduct contemplated by the statute [that] is in all cases a per se violation." 458 U.S. at 661. As Schwegmann and Midcal indicate, the "activity" or "conduct" in question must irreconcilably conflict with the Sherman Act, but need not constitute an illegal agreement by private parties:

when the statute itself prevents full price competition, no private agreement is required for the statute to be preempted.[8]

In Schwegmann, the conflict with the antitrust laws arose from the state imposed requirement that non-contracting retailers abide by "fair trade" prices. A manufacturer's use of a fair trade contract, which by operation of law triggered the non-signer requirement, was not itself illegal and did not conflict with the Sherman Act as amended by the Miller-Tydings Act. The Schwegmann statute was struck down because the statute itself, by imposing a restraint on non-signers, directly prohibited full price competition. Even in the absence of an illegal private agreement, the statute was invalidated.

Similarly, in Midcal, producers and wholesalers were required by state law either to sell under fair trade contracts or to post and follow a resale price schedule. No private agreement was involved whenever producers or wholesalers posted resale prices. In such cases, state compulsion prohibiting full price competition eliminated the need for a private agreement. As the Supreme Court noted, this vertical control over prices, including the control mandated by the statute, "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" 445 U.S. at 103, quoting Dr. Miles Medical Co. v. John D. Park & sons Co., 220 U.S. 373, 408 (1911).

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8 The leading antitrust treatise agrees that no illegal private agreement is necessary for a statute to be preempted. I P. Areeda & D. Turner, Antitrust Law, ¶209 at 62-64.

Schwegmann and Midcal thus indicate that a state statute presents an irreconcilable conflict with federal antitrust statutes when it mandates that private parties desist from engaging in fully competitive pricing.

## II. THE OKLAHOMA ACT IS INVALID BECAUSE IT IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT BY PRECLUDING COMPETITORS FROM ENGAGING IN FULLY COMPETITIVE PRICING

### A. The Minimum Markup Required by The Act Would Constitute *Per Se* Illegal Price Fixing if Agreed upon by Competitors

With certain specified exceptions, the Oklahoma Act makes it a misdemeanor for a wholesaler or retailer to sell, offer to sell, or advertise at prices below cost. The statute defines "cost" essentially as invoice or replacement cost, less trade discounts, plus freight and cartage charges, taxes, and a markup to cover the cost of doing business (which, for retailers, is set at six percent in the absence of proof of lower cost).

One portion of the Act might be read as requiring proof of anticompetitive intent and effect.[9] Technically, a sale, offer to sell, or advertisement to sell below cost is unlawful only when made "with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare . . . where the result of such advertising, offer or sale is to tend to deceive any

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9 The Oklahoma Act would not facially conflict with the Sherman Act if it actually required proof of anticompetitive effect for conduct to be illegal.

purchaser . . . or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce."[10] However, these requirements seem to be eliminated by the statute's presumption that "[e]vidence of advertisement, offering to sell, or sale of merchandise by any retailer or wholesaler at less than cost to him, shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition."[11] On its face, then, a retailer in Oklahoma commits a prima facie violation of the Act by, *inter alia*, merely placing an advertisement in a newspaper advertising a single product for sale at a price that is below the seller's cost (including a six percent markup).

The effect of the statute is to frustrate the benefits of free price competition: it inhibits vigorous price competition on all of the seller's merchandise. Accepting a lower profit margin is a classic and effective method of price competition. By declaring pricing with a markup of less than six percent to be prima facie criminal conduct, the act chills discount pricing.[12]

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10 15 Okla. St. Ann. §598.3 (emphasis added).

11 15 Okla. St. Ann. 15 §598.5 (emphasis added). We infer that the statutory presumption applies to the effect requirement since the "substantially lessen competition" language appears in the effects requirement but not the intent requirement.

12 Indeed, historically the purpose of sales below cost statutes has been to prevent the free operation of competitive markets. Note, "Sales Below Cost Prohibitions: Private Price Fixing Under State Law," 57 Yale L.J. 391, 392 (1948).

Systematic enforcement of the Oklahoma Act might well eliminate an entire class of retailers, i.e., discounters. The growth of discount retailers in recent years has had a substantial procompetitive effect on many retail industries, including clothing, food, and consumer electronics. Discounters compete squarely on prices, and they force full-service retailers to become more efficient and more cognizant of the service-price menu that they offer the consumer.[13] Typical reactions of full-service retailers to discount competition are to lower prices, increase quality, or provide some new combination of both. This sort of price competition from discount retailers benefits consumers, and is the kind of innovative, cost cutting activity the antitrust laws are designed to encourage and protect.

If retailers in Oklahoma agreed to have a minimum markup of six percent it would be a clear case of per se price fixing. The markup is as basic a component of the total price as is the cost of raw materials, the cost of advertising, or the cost of granting credit. An agreement to raise the retailer's minimum markup is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing." Catalano, 446 U.S. at 648. Nor could parties defend an agreement to maintain a minimum markup on the basis

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13 We are not saying that discounters are necessarily better than full-service retailers, but merely that consumers are better served when discounters are free to operate and consumers can choose the kinds of retailers they wish to patronize.

that a six percent markup is a "reasonable" margin that still permits "reasonable" competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market. Accordingly, federal law prohibits such an act. Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, 340 U.S. 211 (1951); United States v. Paramount Pictures Inc., 334 U.S. 131 (1948); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

### B. The Act's Requirement that No Product Be Sold Below Cost Would Constitute *Per Se* Illegal Price Fixing if Agreed upon by Competitors

In addition to discount operations that depend on a low margin/high volume method of operation, price competition can take many forms, including seasonal sales and introductory product sales. The federal antitrust laws encourage and protect all forms of non-predatory price competition. In contrast to the federal antitrust laws, the Oklahoma Act forecloses several types of retail price competition, as for example the so-called "loss leader."[14]

The use of "loss leaders" is a popular form of promotion whereby a seller takes a loss (or merely breaks even) on one or several items in order to induce customers to frequent his

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14 Neither introductory prices nor "loss leaders" are excluded from the Act's coverage. 15 Okla. St. Ann. 15 § 598.6 (1981).

store.[15] Advertising "loss leaders" of certain well-known products is a well-recognized method of attracting customers.[16] So long as promotional or other "loss leader" offers are temporary, demand-inducing, and non-deceptive, their use is pro-competitive.[17] "Loss leaders" may be particularly useful to new entrants in a market who must develop a clientele. By attracting first-time shoppers, a new entrant can build consumer loyalty and take business and market share away from established competitors, thus negating or reducing a traditional incumbent advantage and enhancing competition.

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15 The competitive rationale for "loss leaders" is that promotional outlays or reduced prices may, from the retailer's standpoint, represent a profitable investment in good-will that will increase future patronage. For example, when visiting a store to take advantage of a loss leader, the customer comes to know about the particular store, the goods it carries, and the availability of some bargain prices. Loss leader advertising and other forms of selective discounting are effective, pro-competitive selling devices that benefit both buyers and sellers. Advertising of prices stimulates price comparison by buyers. Once sellers evaluate the results of their initial efforts (or their competitors'), they may be motivated to engage in additional price and service competition. Over time, a variety of selected items may be used as loss-leaders as the seller tries to induce different kinds of buyers with varying tastes into the store.

16 Lormar, Inc. v. Kroger Co., 1979-1 Trade Cas. (CCH) ¶62,498 (S.D. Ohio 1979).

17 See generally III P. Areeda & D. Turner, Antitrust Law ¶716 at 176-77, Supplement ¶716' at 157-58. As a general rule, below cost pricing of one product "would not be likely to drive out or exclude rivals from sales of the product line as a whole, in the absence of predatory pricing in other [products]." Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978).

Like any other agreement to restrain price competition, an agreement by competitors not to sell any goods below cost would be a form of horizontal price fixing and would be a per se violation of the Sherman Act.[18]

C. Because It Precludes Competitors from Engaging in Fully Competitive Pricing, the Oklahoma Act Is Unconstitutional and Unenforceable

Since the Oklahoma Act precludes competitors from engaging in fully competitive pricing, it stands in irreconcilable conflict with the Sherman Act. Under controlling Supreme Court precedents, the Oklahoma Act is unenforceable.

In Schwegmann the statute was invalid because the "state compel[ed] retailers to follow a parallel price policy . . . [and thereby] demand[ed] private conduct which the Sherman Act forbids." 341 U.S. at 389. The Oklahoma Act conflicts with the Sherman Act in the same manner as did the statute in Schwegmann. It forces retailers and wholesalers to follow a parallel price policy. It requires all retailers to price with a markup of at least 6 percent or stand prepared to rebut the presumption that its properly apportioned overhead costs are 6

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18 See authorities cited in Section I.B., supra. Moreover, the Oklahoma Act impedes competition and harms consumers in other ways. It inhibits pricing near cost, because the seller may fear technical violation of the complex statutory scheme. Moreover, the accounting complexities that attend compliance make it difficult for a national chain that faces similar statutes in a number of states to price other than under the most restrictive statutes. See the affidavit attached as Appendix A to Wal-Mart's Motion to Dismiss. Finally, compliance raises the cost of doing business, ultimately raising prices for consumers.

percent or more. Further, with specified exceptions, no retailer may price any product below cost, even when such pricing is temporary, demand-inducing and pro-competitive.

In _Midcal_, the Supreme Court struck down a statute that prohibited wine merchants from selling wine at a discount below the producer's or wholesaler's posted resale price. That statute prohibited full price competition and destroyed "horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" 445 U.S. at 103. The Oklahoma Act prohibits full price competition among retailers and has the same effect as if all retailers agreed not to sell products with a markup of less than 6 percent.

As the Court stated in _Schwegmann_, "it [the Act] demands private conduct which the Sherman Act forbids." 341 U.S. at 389. The Oklahoma Act demands that retailers refrain from full price competition. Accordingly, the Oklahoma Act "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," _Hines v. Davidowitz_, 312 U.S. 52, 67 (1941), and is unenforceable.

## III. "STATE ACTION" IMMUNITY DOES NOT PRECLUDE PREEMPTION WHEN A STATE STATUTE IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT

The "state action" immunity doctrine does not preclude a preemption attack on the Oklahoma Act. Immunity focuses on liability to suit under the antitrust laws. Preemption focuses on conflict with federal policy and the enforceability of the state law itself.

Under the "state action" doctrine, the Supreme Court has held that official state policy makers, acting on behalf of the state in making policy for the state, are immune from suit under the federal antitrust laws. Hoover v. Ronwin, 104 S. Ct. 1989, 1998 (1984). State and local officials acting in accordance with official state policy are also immune from antitrust suit. Community Communications Co. v. Boulder, 455 U.S. 40, 54 (1982); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109-111 (1978). Similarly, private parties are immune from antitrust liability when acting pursuant to state compulsion. Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975).

Thus, because of "state action" immunity, Oklahoma state legislators are clearly not subject to suit under the federal antitrust laws merely because they have enacted a statute (the Oklahoma Unfair Sales Act) that conflicts with the Sherman Act. Nor are retailers or wholesalers doing business in Oklahoma subject to antitrust liability merely because they complied with the Oklahoma Act.

However, merely because "state action" immunity precludes antitrust suits against Oklahoma officials based solely on their passage of the Oklahoma Act or against wholesalers or retailers based solely upon their individual compliance with the Oklahoma Act, it in no way follows that the statute itself is not subject to preemption on the basis of its irreconcilable conflict with the federal antitrust laws.[19]

Some may argue, based on a footnote in Mr. Justice Rehnquist's opinion in Rice,[20] that the state action doctrine saves a statute that is otherwise preempted.[21] Such an assertion ignores Mr. Justice Rehnquist's fuller explication of the relationship between preemption and state action immunity in his

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19 There has been considerable confusion in the "state action" cases caused by the failure to distinguish between exemption or immunity and preemption. Boulder, 455 U.S. at 61-62 (Rehnquist, J., dissenting); Handler, "Antitrust - 1978," 78 Colum. L. Rev. 1363, 1374, 1378 (1978); Page, "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum," 61 B.U.L. Rev. 1099, 1101 (1981). For example, the Supreme Court has used the language of antitrust immunity even while striking down a state statute that was preempted by the Sherman Act. Midcal, 445 U.S. at 105-106. It was not until Rice that the Supreme Court expressly recognized that preemption was the proper basis for its ruling in Midcal. Rice, 458 U.S. at 659. Similarly, the Supreme Court has used "state action" immunity language when it actually held that there was no irreconcilable conflict between the statute in question and the federal antitrust laws. Orrin Fox, 439 U.S. at 109-111. Subsequent to Rice, we can expect much of this confusion to be clarified. In Rice, for the first time, the Supreme Court majority explicitly recognized and stated that a state statute is preempted when it conflicts irreconcilably with the Sherman Act.

20 Footnote 9 of the Rice decision states:

> Because of our resolution of the pre-emption issue, it is not necessary for us to consider whether the statute may be saved from invalidation under the doctrine of Parker v. Brown, 317 U.S. 341 (1943), or under the Twenty-first Amendment. Rice, 458 U.S. at 662-63 n.9.

21 For a discussion of the arguments on both sides of this issue see Battipaglia v. New York State Liquor Authority, No. 84-7168, slip op. at 6432, 6437 (2d Cir., September 21, 1984).

dissenting opinion[22] in Community Communications Co. v. Boulder, 455 U.S. 40 (1982), decided the same year as Rice. In Boulder, Mr. Justice Rehnquist spelled out the necessary consequence of preemption:

> Where pre-emption is found, the state enactment must fall without any effort to accommodate the State's purpose or interests.

455 U.S. at 61 (1982). Distinguishing between immunity and preemption, Mr. Justice Rehnquist observed:

> There was no suggestion that a State *violates* the Sherman Act when it enacts legislation not saved by the Parker doctrine from invalidation under the Sherman Act. Instead, the statute is simply unenforceable because it has been pre-empted by the Sherman Act.

Id. at 64 (emphasis in original).

In Rice, a party seeking to avoid application of the statute challenged its constitutional validity on preemption grounds. The Court concluded that the statute was valid on its face but the Court did not have to reach the question whether a party sued for violating the antitrust laws because of conduct consistent with the state statute at issue in Rice could properly raise the state action defense. Because no one was being sued for an antitrust violation in Rice, the Court did not have to address the liability issue.

In summary, immunity and preemption are separate doctrines. Even if parties are immune from suit because of compliance with a state statute, that statute is nevertheless

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22 Mr. Justice Rehnquist's reasons for dissenting in Boulder were not related to the question of the relationship between preemption and state action immunity.

unconstitutional and unenforceable if it irreconcilably conflicts with the federal antitrust laws.

## IV. THE OKLAHOMA ACT CANNOT BE JUSTIFIED AS NECESSARY TO PROTECT CONSUMERS AGAINST SUCH MARKET BEHAVIOR AS DECEPTIVE OR PREDATORY ACTS

Proponents of the Oklahoma Act may argue that it effectively limits the ability of retailers to engage in deceptive advertising and predatory pricing, two matters of concern under the Federal Trade Commission Act, the Sherman Act, and the Clayton Act (as amended by the Robinson-Patman Act). Such assertions would be totally unfounded.

First, the Oklahoma Act is not necessary to impede bait-and-switch selling techniques. In bait-and-switch, the seller's offer to sell an item it advertises is deceptive because it lacks sufficient inventory to meet anticipated demand or it misrepresents the quality of the advertised product. Having enticed a buyer into its store, the seller will try to induce buyers to purchase substitutes, frequently at a higher price, through a variety of deceptive sales techniques. Federal law enforced by the Federal Trade Commission prohibits this form of advertising. Oklahoma could also directly prohibit such deceptive sales techniques if it so desires.

Second, proponents may argue that the Oklahoma Act is necessary to protect against predatory pricing. Predatory pricing essentially is a form of below cost pricing engaged in by sellers who hope to drive their rivals out of business; present losses are recouped during the subsequent period of monopolistic pricing. But since genuine predatory pricing is a violation of §2 of the Sherman Act and §2 of the Clayton Act (as amended by the Robinson Patman Act), any Oklahoma wholesaler or retailer already has an adequate remedy if it believes it has been a victim of such pricing. On the other hand, the Oklahoma Act establishes a presumption that may make criminal conduct that is not predatory under any acceptable antitrust standard, and, as such, would impermissibly chill procompetitive pricing behavior.[23] Oklahoma could, of course, ban predatory pricing where the effect is in fact anticompetitive.

Quite clearly, the Oklahoma Act conflicts with the federal standards for distinguishing between forms of discounting that are procompetitive (the vast majority) and those few instances in which discounting may have the intent and effect of driving out competitors. As the Second Circuit observed in Northeastern Telephone Co. v. American Telephone & Telegraph Co.:

> Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote.

651 F.2d 76, 88 (2d Cir. 1981) (emphasis added).

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23 The antitrust standard to show predatory pricing in the 10th Circuit necessitates proof of specific intent to harm competition, some element of anticompetitive conduct, and a dangerous probability of success. See Perington Wholesale, Inc. v. Burger King. Corp., 631 F.2d 1369, 1376 (10th Cir. 1979); Pacific Engineering & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 795-97 (10th Cir.), cert. denied, 434 U.S. 879 (1977); Telex Corp. v. IBM, 510 F.2d 894, 927-28 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975).

The Oklahoma Act prohibits discount pricing, "loss leader" promotions and other forms of price cutting that have no discernible anticompetitive effects (and are, indeed, procompetitive and beneficial to consumers). The statute thus compels Oklahoma wholesalers and retailers to refrain from engaging in even modest forms of price competition and, as such, is in irreconcilable conflict with federal antitrust policy.

## V. PREEMPTION OF STATE STATUTES THAT IRRECONCILABLY CONFLICT WITH THE SHERMAN ACT DOES NOT PRECLUDE STATE REGULATION THAT IS CONSISTENT WITH THE PUBLIC INTEREST

Under the Tenth Amendment, powers not delegated to the federal government are reserved to the states. These powers have generally been referred to as police powers. Berman v. Parker, 348 U.S. 26, 31-32 (1954). The police powers include the power to regulate in order to protect health and safety, the power to regulate business entities, like natural monopolies, that have substantial intrastate market power, and the power to correct other market defects.

The Sherman Act does not preempt state laws and regulations properly designed to regulate natural monopolies, to deal with health and safety problems or to correct other market defects even if those rules appear anticompetitive in that they restrict business conduct or limit entry. State statutes legitimately designed to regulate natural monopolies, to protect health and safety or to correct other market defects do not pose a genuine conflict with the Sherman Act. Such legislation is designed to correct situations in which consumers are not receiving the benefits that normally flow from a freely competitive market. See, e.g., Cantor v. Detroit Edison Co., 428 U.S. 579, 595-596 (1976).

Competitive markets are highly valued because the "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." Northern Pac. R. Co. v. United States, 356 U.S. 1, 4. So-called market defects, such as externalities and monopoly market power, reduce consumer welfare and misallocate our economic resources.[24] Accordingly, state regulatory schemes properly designed to provide public goods or correct for market defects are, like the antitrust laws, intended to increase consumer welfare. These

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24 See, e.g., E. Mansfield, Microeconomics 456-458 (3d ed. 1979). A market defect occurs when normal competitive forces are either suspended or insufficient to guarantee an efficient allocation of society's resources. In the case of an externality, a producer is able to impose some of its production costs on others (e.g., the victims of pollution). Because the producer is able to shift some of its production costs to others, it can charge an artificially low price. In the case of monopoly, a firm is able to increase profits by holding output below the competitive level while raising prices. This obviously impairs consumer welfare. A natural monopoly occurs when the cost structure of a particular market is such that its entire output is most efficiently produced by a single firm. If left unconstrained, the natural monopolist (like any monopolist) will seek to exploit its monopoly power by raising prices and reducing output. To avoid this result, natural monopolies are often regulated in an effort to approximate the price and output that would result if competition were feasible.

statutes do not conflict with the goals of the federal antitrust laws. By contrast, state statutes such as this one, designed solely to eliminate an otherwise competitive market, stand in irreconcilable conflict with the goals of the federal antitrust laws.

The Oklahoma Act does not have any plausible justification in terms of curing any real market defect. Retailing is traditionally a highly competitive industry that is not characterized by any natural monopoly market power. The Act's pricing schemes have no effect on the healthfulness or safety of the products sold. Health and safety regulations are covered under other Oklahoma statutes. See, e.g., 63 Okla. St. Ann. 63, § 1-1101 et seq.; id. § 1-1401 et seq. Nor does the Act affect any externalities of production; indeed, none can be identified.

The purpose and effect of the Oklahoma Act are to restrain competitive pricing. If the restrictions of the Oklahoma Act had resulted from a private agreement among competitors, the conduct would be per se illegal price fixing. No plausible competitive justification exists for the Oklahoma Act. If such a justification existed, the Act would need to be evaluated under the rule of reason and would not facially conflict with the Sherman Act. But since the Oklahoma Act on its face "stands as an obstacle to the accomplishment and excution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. at 67, it irreconcilably conflicts with the Sherman Act and is unenforceable.

## CONCLUSION

For the reasons given above, the Oklahoma Act conflicts irreconcilably with the Sherman Act and is unenforceable.

Date: November 6, 1984

Respectfully submitted,

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## CERTIFICATE OF MAILING

I hereby certify that on this ____ day of November, 1984, I mailed a true and correct copy of the above and foregoing documents, postage fully prepaid, to:

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______________________________

DISSENTING STATEMENT OF COMMISSIONER PATRICIA P. BAILEY
TO FILING AN AMICUS BRIEF IN
SNIDER v. WAL-MART STORES, INC., NO. 84-C-436-E
(U.S. DISTRICT COURT, NORTHERN DISTRICT OF OKLAHOMA)

November 7, 1984

I have voted against the motion to file this <u>amicus</u> brief for one principal reason: the Commission does not now have sufficient information upon which to base preemption arguments and to advance them at this stage is premature.

I have no objection to the procompetitive substance of the brief. In particular, I agree heartily with the discussion of the benefits to consumers and competition of vigorous price competition and the corresponding perniciousness of conduct which impedes discounters' freedom to set their own prices--indeed, I would welcome such discussion more often at the Commission. Unfortunately, in the last few years, when interference with discounters has stemmed from private parties, rather than the state, the Commission has generally sided with those imposing the "vertical restraints" and <u>against</u> discounters.*/

Thus, I do not disagree with this <u>amicus</u> brief insofar as it reiterates the familiar national policy favoring competition. However, that is not its real purpose. Instead, its purpose is to assert preemption--the federal government's authority

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*/ For example, in <u>Lenox Corporation</u>, Docket 8718, <u>Bulova Watch Company</u>, Docket C-1887, and <u>Magnavox Co.</u>, Docket 8822, a Commission majority voted to allow suppliers to impose transshipping bans on their dealers: that is, suppliers were given permission to order their dealers not to sell to discounters. I dissented from these orders, finding that the suppliers had not advanced any plausible rationale for such price-inhibiting conduct.

to override and declare unenforceable a state statute. That is an extremely serious assertion which requires careful attention to the law and the delicacy of federalism issues. In a recent Supreme Court opinion, Justice Powell cautioned that "competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case'." California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980.*/ Yet the Commission chooses to make this first major statement on Sherman Act preemption in the context of a motion to dismiss in a private action**/ and, apparently, absent

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*/ The state interest in Midcal, which dealt with a California wine pricing plan, was particularly strong as it rested on the Twenty-First Amendment to the Constitution. This, of course, set up a direct constitutional conflict with the Sherman Act, which is rooted in the Commerce Clause. However, the careful weighing of competing state and federal interests is mandated also by general principles of federalism, as discussed in most preemption cases. See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941); Hirsch, Towards a New View of Federal Preemption, 1972 U. Ill. L. Rev. 515. The need for informed, careful weighing of federal against state interests is also routinely emphasized in "state action" cases. See, e.g., Parker v. Brown, 317 U.S. 341, 351 (1943): "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

**/ It is extremely rare for either the Commission or the Department of Justice to make an antitrust challenge to a state statute by the backhanded route of intervention in a private litigation. My files show such interventions by the FTC in only two cases, Gonzales v. Dept. of Alcoholic Bev. Control, 3 Civ. No. 22956 (Cal. Ct. App., 3d Dist) and Harris v. N. Carolina Bd. of Certified Public Accountant Examiners, Inc., 81 CVS 9349 (N. Car. Sup. Ct. Div., Wake County). In both cases the Commission discussed whether state statutes, variously interpreted, could violate federal antitrust laws, particularly the FTC Act. Neither intervention raised the issue of preemption.

consultation with the Department of Justice, which has concurrent jurisdiction over Sherman Act enforcement. The Commission has had no hand in developing the facts in this case which, in any event, at this procedural stage are limited to barebones allegations of the pleadings that must be taken as true. The *amicus* brief does not discuss these allegations and their relevance to the legal theory; nor does it present any information on the actual workings of the statute. We do not know what, if any, state interests support the Oklahoma Unfair Sales Act, and thus cannot even begin the crucial balancing process prescribed by *Midcal*.*/

Thus, *if* there is a preemption issue here, the Commission has concluded that a federal victory is proper even though at least half of the story remains to be told. That is not only unwise; it is in direct conflict with a long line of cautious preemption cases and is seriously troubling as a matter of federalism policy.

But is there a preemption issue here? The brief is embarrassingly short on facts to support its theories. The controlling and very recent Supreme Court decision on preemption, *Rice* v. *Norman Williams Co.*, 102 S. Ct. 3294 (1982) holds that a state statute is unenforceable only when it sets up an "irreconcilable conflict" with federal law. 102 S. Ct. 3299. More specifically,

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*/ In *Midcal* both the State Attorney General and the agency administering the wine pricing system had opportunity to describe state interests advanced by the scheme, although neither showed much enthusiasm in the task. 445 U.S. 111, N.12.

in the same antitrust context as we have here, the court said: "[s]uch condemnation will follow under §1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation". 102 S. Ct. 3300.

The amicus brief repeatedly offers the conclusory assertion that the Oklahoma Unfair Sales Act is in irreconcilable conflict with the Sherman Act, but it nowhere sets forth the offending statute in full or describes how the statute operates in all cases to place "irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." Rice, supra, 102 S. Ct. 3300. Even a cursory glance at the Oklahoma statute reveals that it does not command or authorize agreements concerning price between wholesalers and retailers, either horizontally or vertically. Where such agreements exist the Supreme Court has found a state-mandated pricing scheme to be in irreconcilable conflict with the federal antitrus laws. Midcal, supra,; Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The Oklahoma statute, however, simply mandates a retail price floor measured by a statutorily defined cost standard that must be obeyed by individual firms. Where a state law merely authorizes unilateral conduct no preemption issue is raised, even though the conduct clearly retards maximum price competition in the market. Rice, supra.*/ Accord, Battipaglia

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*/ The state statute which was not preempted in Rice allowed a wholesaler to import liquor into the state only if it had been designated as an importer by the brand owner. In other words, the statute mandated a non-price (but very likely price-affecting) vertical restraint on distribution. The effects of this statute could be anticompetitive, but that determination was to be reached by "Sherman Act analysis under the Rule of Reason." 102 S. Ct. 3301.

v. New York State Liquor Authority, No. 84-7168, 1984 Trade Cases Par. 66, 206 (2d Cir., Sept. 21, 1984). The state must mandate a per se antitrust violation, not merely conduct which could have the same effect, in order to be caught in the narrow preemption trap.*/ In addition, a premise underlying this amicus brief is problematic: that is, that there is a clear federal standard on predation. There is not; this area of the law is in flux. There is no one rule of law for Oklahoma's version to be measured against. An irreconcilable conflict cannot exist when one of the combatants is a will-o'-the- wisp.

A second glance at the Oklahoma Unfair Sales Act will show that it sets up a series of defenses, including meeting competition, for the retailer accused of selling below cost. By definition, where defenses exist, the violation is not per se. Consequently, the Rice test that an irreconcilable federal/state conflict be apparent on the face of the statute is not met.

In sum, the Oklahoma statute may well be a deplorable block on competition. However, we do not in my view have enough

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*/ "The existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." Rice, supra, 102 S. Ct. 3299.

information now to support that conclusion, much less assert that it is preempted by federal law. The answers necessary for me to reach that conclusion may well develop at trial, and an amicus brief on the preemption issue may become appropriate at some appellate stage. But for now, the Commission majority is rushing in where angels fear to tread, saying too much, too soon.

## SALES BELOW COST

### Unfair Sales Act

[¶ 33,985]

(Oklahoma Statutes, 1971, Title 15, Chapter 14, Sections 598.1-598.11.)

[¶ 33,985.01] Short Title

Section 598.1. This Act[1] shall be known and designated, and may be cited as the "Unfair Sales Act."

[1] Sections 598.1-598.11 of this title.



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[¶ 33,985.02] Definitions

Sec. 598.2. (a) When used in this Act,[1] 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 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 (¾) 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 taxes, (3) all State and Federal taxes not heretofore added to the cost as such, and (4) 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 (6%) per cent of the cost of [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 invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, 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 wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (¾) 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 taxes, and (3) all State and Federal taxes not heretofore added to the cost as such.

(c) When used in this Act the term "replacement costs" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought by the 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 seller if bought in the same quantity or quantities as the seller's last purchase of said merchandise.

(d) When 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 purposes 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 paragraphs (a) or (b) of Section 2, respectively.[1]

(e) 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.

(f) The terms "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 purposes 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.

(g) 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 the case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business.

[1] This section. [2] Sections 598.1-598.11 of this title.

(h) 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 the 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 be applied only to the wholesale portion of such business.

**[¶ 33,985.03] Sales Below Cost Prohibited in Certain Cases**

Sec. 598.3. 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 and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act,[1] 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.

[¶ 33,985.04] Punishment for Sales Below Cost

Sec. 598.4. Any retailer who shall, in contravention of the policy of this Act,[1] advertise, offer to sell or sell at retail any item of merchandise at less than cost to the retailer as defined in this Act; 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 at less than cost to the wholesaler as defined in this Act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars ($500.00).

[¶ 33,985.05] Injunctive Relief—Damages—Prima Facie Evidence

Sec. 598.5. (a) In addition to the penalties provided in this Act, any person injured by any violation, or who shall suffer injury from any threatened violation of this Act,[1] may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such violation or threatened violation. If in such action a violation or threatened violation of this Act shall be established, the court shall enjoin and restrain or otherwise prohibit, such violation or threatened violation and, in addition thereto, shall assess in favor of the plaintiff and against the defendant the cost of suit. In such action if damages are alleged and proved, the plaintiff in said action, in addition to such injunctive relief and costs of suit, shall be entitled to recover from the defendant the actual damages sustained by him.

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

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

[¶ 33,985.06] Exempted Sales

Sec. 598.6 The provisions of this Act[1] shall not appy to sales at retail or sales at wholesale.

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

[1] Sections 598.1-598.11 of this title.

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

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

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

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

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

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

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

[¶ 33,985.07] Meeting Competitor's Prices

Sec. 598.7. Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer. The price of merchandise advertised, offered for sale or sold under the exemptions specified in Section 6,[1] shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost, nor shall the price established at a bankrupt sale be considered the price of a competitor within the purview of the first sentence of this Section.

[¶ 33,985.08] Determination of Cost in Case of Sale Outside Ordinary Channels of Trade

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

[¶ 33,985.09] Witnesses—Production of Books, Records, Etc.

Sec. 598.9. Any defendant, or any witnesses, in any civil action brought under the provisions of this Act[2] may be required to testify, and any defendant, or any witness, may, upon proper process, be compelled to produce his books, records, invoices and all other documents of any such defendant or witness into court and the same may be introduced as evidence, but no defendant, or any witness in such civil action shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may thus be required to testify or produce evidence, documentary or otherwise, and no testimony thus given or produced shall be received against him upon any criminal proceeding or investigation.

[¶ 33,985.10] Trade Association May Sue

Sec. 598.10. Any duly organized and existing trade association, whether incorporated or not, is hereby authorized to institute and prosecute a suit or suits for injunctive relief and costs, provided for under the terms of this Act,[2] as the real party in interest for and on behalf of one or more of said association's members, when violation of this Act directly or indirectly affects or threatens to affect or injure such member or members, or where violation of this Act threatens to impair fair competition or otherwise affects such member as herein provided.

[¶ 33,985.11] Partial Invalidity

Sec. 598.11. If any subsection, sentence, clause, word, phrase or provision of this Act[2] shall for any reason be held invalid or unconstitutional, the validity

[1] Section 598.6 of this title.

[2] Sections 598.1-598.11 of this title.

of the remaining parts hereof shall not be affected thereby and to that end the provisions of this Act are declared to be severable.

**Source.**—1941 Session Laws, House Bill No. 14, approved February 24, 1941. Codified in 1941 Statutes, Title 15, Chapter 14, Sections 591-597.

**1949 Amendment.**—1949 Session Laws, House Bill No. 488, approved May 18, 1949, amended the Act to meet constitutional objections which declared that the legislature had violated the due process clause of the state and federal constitutions by declaring that intent to injure was not an essential ingredient of the offense of selling below cost.

**1951 Codification.**—1951 Statutes, as Sections 598.1-598.11, approved and effective May 18, 1951.

## Cigarettes, Tobacco Products, Dairy Products

[¶ 33,986]

[Sales of cigarettes and tobacco products below cost are prohibited in Oklahoma Statutes, Title 68, Sections 326 through 342. Sales of milk and dairy products below cost are prohibited by Oklahoma Statutes, 1971, Title 2, Chapter 6A, Section 419.3.]

[The next page is 39,001.]



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