

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Committee Substitute

for

Committee Substitute

for

Senate Bill 259

BY SENATORS BLAIR, KARNES AND SNYDER

[Originating in the Committee on the Judiciary;

reported on February 17, 2016.]

1 A BILL to repeal §47-11A-10, §47-11A-12 and §47-11A-13 of the Code of West Virginia, 1931,
2 as amended; and to amend and reenact §47-11A-1, §47-11A-2, §47-11A-5, §47-11A-6,
3 §47-11A-8, §47-11A-9 and §47-11A-14 of said code, all relating to unfair trade practices;
4 providing legislative findings; designating article the Unfair Trade Practices Act; making it
5 unlawful for a retailer or wholesaler to sell, offer for sale, or advertise for sale any product
6 or item of merchandise at a price less than cost with the intent to destroy or the effect of
7 destroying competition; providing that a violation of the article constitutes a misdemeanor;
8 defining “retailer” and “wholesaler”; providing for how cost is to be determined; exempting
9 certain sales, offers to sell or advertisements to sell from the provisions of the article;
10 providing that an injured person or entity may maintain an action to enjoin continuance of
11 any violation of the article; providing that an injured person or entity may maintain an action
12 for damages; providing that actual damages, if alleged and proven, be assessed; providing
13 for an absolute defense to an action to enjoin or for damages filed under the article;
14 providing jurisdiction to the circuit courts; and providing purposes of the article.

Be it enacted by the Legislature of West Virginia:

1 That §47-11A-10, §47-11A-12 and §47-11A-13 of the Code of West Virginia, 1931, as
2 amended, be repealed; and that §47-11A-1, §47-11A-2, §47-11A-5, §47-11A-6, §47-11A-8, §47-
3 11A-9 and §47-11A-14 of said code be amended and reenacted, all to read as follows:

ARTICLE 11A. UNFAIR TRADE PRACTICES.

§47-11A-1. Legislative findings; designation of article.

1 ~~The sale of goods at less than the cost thereof results in economic maladjustments and~~
2 ~~tends toward the creation of monopolies, thereby destroying fair and healthy competition and~~
3 ~~tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore,~~
4 ~~an unfair trade practice. It is hereby declared that any advertisement, offer to sell, or sale of any~~
5 ~~merchandise, either by retailers or wholesalers, at less than cost, as defined in this article, or any~~
6 ~~advertisement of an intent to give, any offer to give, or gift of any merchandise, either by retailers~~
7 ~~or wholesalers, for the purposes of unfairly diverting trade from or otherwise injuring competitors~~

8 ~~and destroying competition, is an unfair method of competition contrary to public policy and in~~
9 ~~contravention of the policy of this article, which shall be known and designated as the "Unfair~~
10 ~~Practices Act"~~

11 (a) The Legislature hereby finds that the sale of goods at prices below the cost thereof
12 can result in economic maladjustments and tend toward the creation of monopolies, thereby
13 destroying fair and healthy competition; therefore, the below-cost sale of goods with the intent to
14 destroy or the effect of destroying competition is deemed an unlawful unfair trade practice.

15 (b) This article shall be known as and designated the Unfair Trade Practices Act.

§47-11A-2. When selling below cost or giving away of merchandise prohibited; penalty.

1 ~~It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or~~
2 ~~other association engaged in business as a retailer or wholesaler within this state, to sell, offer for~~
3 ~~sale or advertise for sale any article, product or item of merchandise at less than the cost thereof~~
4 ~~to the vendor, or give, offer to give or advertise the intent to give away any article, product or item~~
5 ~~of merchandise for the purposes of unfairly diverting trade from or otherwise injuring one or more~~
6 ~~competitors, and destroying competition. Each violation shall constitute a misdemeanor and, upon~~
7 ~~conviction thereof, any person, partnership, firm, corporation, joint-stock company, or other~~
8 ~~association violating this section shall be subject to the penalty set out in section eleven hereof.~~

9 Except as otherwise provided herein, it shall be unlawful for any person, partnership, firm,
10 corporation or other entity engaged in business as a retailer or wholesaler within this state to sell,
11 offer for sale, or advertise for sale any product or item of merchandise at a price less than the
12 cost thereof with the intent to destroy or the effect of destroying competition. Each violation shall
13 constitute a misdemeanor and, upon conviction thereof, any person, partnership, firm, corporation
14 or other entity violating this section shall be subject to the penalty set forth in section eleven of
15 this article.

§47-11A-5. "Retailer" and "wholesaler" defined; sales and transfers subject to article.

1 (a) The term "retailer" shall mean and include every person, partnership, firm, corporation,
2 ~~joint-stock company~~ or other ~~association~~ entity engaged in the business of making sales at retail

3 within this state: *Provided, however,* That in the case of a person, partnership, firm, corporation,
4 ~~joint-stock company~~ or other ~~association~~ entity engaged in the business of making sales both at
5 retail and at wholesale, such term shall be applied only to the retail portion of such business.

6 (b) The term “wholesaler” shall mean and include every person, partnership, firm,
7 corporation, ~~joint-stock company~~, or other ~~association~~ entity engaged in the business of making
8 sales at wholesale within this state: *Provided,* That in the case of a person, partnership, firm,
9 corporation, ~~joint-stock company~~ or other ~~association~~ entity engaged in the business of making
10 sales both at retail and wholesale, such term shall be applied only to the wholesale portion of
11 such business.

12 (c) The provisions of this article shall be applicable to all sales at retail made by a retailer
13 as herein defined, and shall be applicable to any transfer for a valuable consideration made in the
14 ordinary course of trade, or the usual prosecution of the retailer’s business, of title to tangible
15 personal property to the purchaser for consumption or use other than resale or further
16 proceedings or manufacturing, and shall be applicable also to any transfer of such property where
17 title is retained by the retailer as security for the payment of such purchase price.

18 (d) The provisions of this article shall be applicable to all sales at wholesale, and shall be
19 applicable to any transfer for a valuable consideration made in the ordinary course of trade or in
20 the usual prosecution of the wholesaler’s business, of title to tangible personal property to the
21 purchaser for purposes of resale or further proceedings or manufacturing, and shall be applicable
22 also to any such transfer of property where title is retained by the seller as security for the payment
23 of the purchase price.

§47-11A-6. How cost determined.

1 (a) The term “cost” when applicable to the business of retailer shall mean bona fide cost
2 and shall mean: (i) The invoice cost of the ~~article~~, product or item of merchandise to the retailer
3 or the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for
4 sale or advertisement for sale, as the case may be, in the quantity last purchased, whichever is

5 lower, from either of which there shall be deducted all trade discounts, except customary
6 discounts for cash; and (ii) to either of which there shall be added the following items of expense:

7 (1) Freight charges not otherwise included in the cost of the article, product or item of
8 merchandise, but which freight charges shall not be construed as including cartage to retail outlet
9 if done or paid for by the retailer;

10 (2) A markup to cover, in part, the cost of doing business, which markup, in the absence
11 of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement
12 cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges;
13 Provided, That such a markup to cover the cost of doing business as provided for in this
14 subdivision shall be exclusive of any federal and state motor fuel taxes.

15 (b) The term "cost" when applicable to the business of a wholesaler shall mean bona fide
16 cost and shall mean: (i) The invoice cost of the merchandise to the wholesaler plus to include
17 applicable taxes, or the replacement cost of the merchandise to the wholesaler within thirty days
18 prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity
19 last purchased, whichever is lower, from either of which there shall be deducted all trade discounts
20 except customary discounts for cash; and (ii) to either of which there shall be added the following
21 items of expense:

22 (1) Freight charges not otherwise included in the cost of the article, product or item of
23 merchandise, but which freight charges shall not be construed as including cartage to the retail
24 outlet if done or paid for by the wholesaler;

25 (2) A markup to cover, in part, the cost of doing business, which markup in the absence
26 of proof of a lesser cost, shall be four percent of the aggregate of invoice cost or replacement cost
27 (whichever is used), less trade discounts as aforesaid, and plus said freight charges: Provided,
28 That such a markup to cover the cost of doing business as provided for in this subdivision shall
29 be exclusive of any federal and state motor fuel taxes.

§47-11A-8. Sales exempt.

1 The provisions of this article shall not apply to any sale, offer for sale, or advertisement to
2 sell made:

3 (a) In closing out in good faith the owner's stock or any part thereof for the purpose of
4 discontinuing his trade in any such stock or commodity, ~~and in the case of the sale of seasonal~~
5 ~~goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or~~
6 ~~depreciation;~~

7 (b) When perishable merchandise must be sold promptly to avert loss to the retailer or
8 wholesaler by spoilage or depreciation;

9 ~~(b)(c)~~ (c) When the goods are damaged or deteriorated in quality or ~~where~~ when merchandise
10 is sold in bona fide clearance sales and, in each case, merchandise is advertised, marked and
11 sold as such;

12 ~~(e)(d)~~ (d) By an officer acting under the orders of any court;

13 ~~(d) In an endeavor in good faith to meet the legal prices of a competitor as herein defined~~
14 ~~selling the same article, product or item of merchandise, in the same locality or trade area;~~

15 (e) To meet the price of a competitor;

16 (f) Involving a discount or rebate earned by purchases through the use of a bonus, loyalty
17 or rewards program or involving the redemption of credits, discounts or rebates through a bonus,
18 loyalty or rewards program;

19 ~~(e)(g)~~ (g) For charitable purposes or to relief agencies; and

20 ~~(f)(h)~~ (h) Where merchandise is sold on contract to departments of the government or
21 governmental institutions.

§47-11A-9. Injunctions; and damage suits; and jurisdiction.

1 ~~Any person, firm, partnership, corporation, joint-stock company, or trade association may~~
2 ~~maintain a proceeding to enjoin a continuance of any act or acts in violation of the provisions of~~
3 ~~this article and, if injured thereby, for the recovery of damages in the circuit court of the county~~

4 ~~wherein said article is alleged to have been or is being violated. If, in such proceeding, the court~~
5 ~~shall find that the defendant is violating or has violated any of the provisions of this article, it shall~~
6 ~~enjoin such defendant from a continuance thereof. It shall not be necessary that actual damages~~
7 ~~to the plaintiff be alleged or proved. In addition to such injunctive relief, the plaintiff in said action~~
8 ~~shall be entitled to recover from the defendant three times the amount of the actual damages, if~~
9 ~~any, sustained.~~

10 (a) Any person, partnership, firm, corporation, or other entity injured by a violation of the
11 provisions of this article may maintain an action to enjoin a continuance of any such violation in
12 the circuit court of the county wherein said violation is alleged to have occurred. If a violation is
13 established in such an action, the court shall enjoin, restrain or otherwise prohibit such violation.
14 In such action, if damages are alleged and proven, the plaintiff in the action, in addition to
15 injunctive relief, shall recover from the defendant the actual damages sustained and proven to be
16 a result of the violation.

17 (b) In the event no injunctive relief is sought or required, any person, partnership, firm,
18 corporation, or other entity injured by a violation of the provisions of this article may maintain an
19 action for damages alone in the circuit court of the county wherein said violation is alleged to have
20 occurred. If a violation is established in such an action and proven, a plaintiff shall recover from
21 the defendant the actual damages sustained and proven to be a result of the violation.

22 (c) In any action under subsection (a) or (b) of this section it shall be an absolute defense
23 that the sale price of any product or item of merchandise alleged to be in violation of this article is
24 equal to or greater than the sales price of the same product or item being sold by a competitor of
25 the defendant.

26 (d) A court may dismiss any action under subsection (a) or (b) of this section upon a motion
27 for summary judgment if the court finds pursuant to Rule 56 of the West Virginia Rules of Civil
28 Procedure that the provisions of subsection (c) of this section have been satisfied.

29 (e) The circuit courts of this state shall have jurisdiction of actions under this section.

§47-11A-14. Purpose Purposes and construction of article.

1 ~~The Legislature declares that the purpose of this article is to safeguard the public against~~
2 ~~the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting~~
3 ~~unfair and discriminatory practices by which fair and honest competition is destroyed or~~
4 ~~prevented. This article shall be liberally construed that its beneficial purposes may be subserved.~~

5 The Legislature declares that the purposes of this article are: (1) To safeguard consumers
6 from the creation of monopolies by prohibiting predatory pricing; (2) to foster market efficiency;
7 and (3) to protect market competition.