

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 2478

BY DELEGATES STEELE, PACK, LOVEJOY, MANDT AND

ROHRBACH

[Passed March 7, 2020; in effect ninety days from
passage.]

1 AN ACT to amend and reenact §47-11A-2, §47-11A-6, and §47-11A-9 of the Code of West
2 Virginia, 1931, as amended, all relating to unfair trade practices; generally providing for
3 invoice cost of each separate or distinct product or item of merchandise to retailer in
4 calculation of cost to business of retailer; including applicable taxes in invoice cost in
5 calculation of cost to business of retailer; clarifying application of misdemeanor offenses
6 under the act; eliminating markup in calculation of cost to business of retailer; authorizing
7 court to award treble damages, court costs, litigation costs, and attorney fees for violation;
8 and making technical changes.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11A. UNFAIR TRADE PRACTICES.

§47-11A-2. When selling below cost prohibited; penalty.

1 Except as otherwise provided in this article, it shall be unlawful for any person, partnership,
2 firm, corporation, or other entity engaged in business as a retailer or wholesaler within this state
3 to sell, offer for sale, or advertise for sale any product or item of merchandise at a price less than
4 the cost thereof with the intent to destroy or the effect of destroying competition. Each violation
5 shall constitute a misdemeanor and, upon conviction thereof, any person, partnership, firm,
6 corporation, or other entity violating this section shall be subject to the penalty set forth in §47-
7 11A-11 of this code.

§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 each separate or distinct product or item of merchandise
3 to the retailer to include applicable taxes, or the replacement cost thereof to the retailer within 30
4 days prior to the date of sale, offer for sale, or advertisement for sale, as the case may be, in the
5 quantity last purchased, whichever is lower, from either of which there shall be deducted all trade
6 discounts, except customary discounts for cash; and (ii) to either of which there shall be added

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

10 (b) The term "cost" when applicable to the business of a wholesaler shall mean bona fide
11 cost and shall mean: (i) The invoice cost of the merchandise to the wholesaler to include
12 applicable taxes, or the replacement cost of the merchandise to the wholesaler within 30 days
13 prior to the date of sale, offer for sale, or advertisement for sale, as the case may be, in the
14 quantity last purchased, whichever is lower, from either of which there shall be deducted all trade
15 discounts except customary discounts for cash; and (ii) to either of which there shall be added
16 the following items of expense:

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

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

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

1 (a) Any person, partnership, firm, corporation, or other entity injured by a violation of §47-
2 11A-2 or §47-11A-3 of this code may maintain an action to enjoin a continuance of any such
3 violation in the circuit court of the county wherein said violation is alleged to have occurred. If a
4 violation is established in such an action, the court shall enjoin, restrain, or otherwise prohibit such
5 violation. In such action, if damages are alleged and proven, the plaintiff in the action, in addition
6 to injunctive relief, shall recover from the defendant the actual damages sustained and proven to

7 be a result of the violation, and the court may award the plaintiff treble damages, court costs,
8 litigation costs, and attorneys' fees.

9 (b) In the event no injunctive relief is sought or required, any person, partnership, firm,
10 corporation, or other entity injured by a violation of the provisions of this article may maintain an
11 action for damages alone in the circuit court of the county wherein said violation is alleged to have
12 occurred. If a violation is established in such an action and proven, a plaintiff shall recover from
13 the defendant the actual damages sustained and proven to be a result of the violation, and the
14 court may award the plaintiff treble damages, court costs, litigation costs, and attorneys' fees.

15 (c) In any action under subsections (a) and (b) of this section it shall be an absolute
16 defense that the sale price of any product or item of merchandise alleged to be in violation of this
17 article is equal to or greater than the sales price of the same product or item being sold by a
18 competitor of the defendant.

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman, House Committee

.....
Chairman, Senate Committee

Originating in the House.

In effect ninety days from passage.

.....
Clerk of the House of Delegates

.....
Clerk of the Senate

.....
Speaker of the House of Delegates

.....
President of the Senate

The within this the.....
day of, 2020.

.....
Governor