

# **WEST VIRGINIA LEGISLATURE**

**2016 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 259**

BY SENATORS BLAIR, KARNES AND SNYDER

[Originating in the Committee on Government

Organization; reported on January 27, 2016.]

1 A BILL to repeal §47-11A-7, §47-11A-10 and §47-11A-13 of the Code of West Virginia, 1931, as  
2 amended; and to amend and reenact §47-11A-1, §47-11A-2, §47-11A-5, §47-11A-6, §47-  
3 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 to sell products below cost with specific intent, where the effect may  
6 substantially lessen competition or tend to create a monopoly, and there is a dangerous  
7 probability of recoupment of losses through future profits; providing that a violation of the  
8 act constitutes a misdemeanor offense; exempting wholesalers from the provisions of the  
9 act; providing for how cost is to be determined; exempting sales of perishable  
10 merchandise or seasonal goods to avert loss to the retailer from the provisions of the act;  
11 exempting sales made in a good faith attempt to match the price of a competitor from the  
12 provisions of the act; exempting sales involving an earned discount or earned rebate  
13 through the use of a bonus or rewards program from the provisions of the act; providing  
14 that an injured party may maintain an action to enjoin continuance of any violation;  
15 providing actual damages, if alleged and proven, be assessed; providing that a claim  
16 arising under the act may be sufficiently rebutted by evidence that a competitor in the  
17 same market area is selling a substantially similar product for an equal to or greater than  
18 price as the defendant; defining market area; requiring a court to dismiss an action upon  
19 motion for summary judgment if the action is sufficiently rebutted; vesting jurisdiction in  
20 the circuit courts to carry into effect the provisions of the act; providing for the purposes of  
21 the act; and providing for construction of the act.

*Be it enacted by the Legislature of West Virginia:*

1 That §47-11A-7, §47-11A-10 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2 amended, be repealed; and that §47-11A-1, §47-11A-2, §47-11A-5, §47-11A-6, §47-11A-8, §47-  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 below the cost thereof benefits  
12 consumers so long as it does not rise to a predatory nature which causes harm to market  
13 competition. Consumers are harmed by below-cost sales only if, as a result of predatory below-  
14 cost sales, a dominant competitor is able to create a monopoly and later raise prices to a  
15 supracompetitive level. Cutting prices in order to increase business is often the very essence of  
16 competition. However, the below-cost sale of goods by a retailer with the intent to control prices  
17 or destroy competition is deemed an unlawful unfair trade practice when the below-cost sales  
18 substantially lessen competition or tend to create a monopoly and there is a dangerous probability  
19 of such retailer recouping its losses through future profits.

20           (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.**

21           ~~It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or~~  
22 ~~other association engaged in business as a retailer or wholesaler within this state, to sell, offer for~~  
23 ~~sale or advertise for sale any article, product or item of merchandise at less than the cost thereof~~  
24 ~~to the vendor, or give, offer to give or advertise the intent to give away any article, product or item~~

25 ~~of merchandise for the purposes of unfairly diverting trade from or otherwise injuring one or more~~  
26 ~~competitors, and destroying competition. Each violation shall constitute a misdemeanor and, upon~~  
27 ~~conviction thereof, any person, partnership, firm, corporation, joint-stock company, or other~~  
28 ~~association violating this section shall be subject to the penalty set out in section eleven hereof.~~

29 It shall be unlawful for any person, partnership, firm, corporation or other association  
30 engaged in business as a retailer within this state to sell, offer for sale, or advertise for sale any  
31 product or item of merchandise at a price less than the cost to the retailer with the specific intent  
32 to control prices or destroy competition, where the effect of such practice may substantially lessen  
33 competition or tend to create a monopoly in any line of commerce, and there is a dangerous  
34 probability of such retailer being able to recoup its losses through future monopoly profits. Each  
35 violation shall constitute a misdemeanor and, upon conviction thereof, any person, partnership,  
36 firm, corporation, joint-stock company, or other association violating this section shall be subject  
37 to the penalties set forth in section eleven of 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 engaged in the business of making sales at retail within  
3 this state: *Provided, however,* That in the case of a person, partnership, firm, corporation, joint-  
4 stock company or other association engaged in the business of making sales both at retail and at  
5 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 engaged in the business of making sales  
8 at wholesale within this state: *Provided,* That in the case of a person, partnership, firm,  
9 corporation, joint-stock company, or other association engaged in the business of making sales  
10 both at retail and wholesale, such term shall be applied only to the wholesale portion of such  
11 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 not be applicable to all sales at wholesale, and shall  
19 not be applicable to any transfer for a valuable consideration made in the ordinary course of trade  
20 or in the usual prosecution of the wholesaler's business, of title to tangible personal property to  
21 the purchaser for purposes of resale or further proceedings or manufacturing, and shall not be  
22 applicable also to any such transfer of property where title is retained by the seller as security for  
23 the payment 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 or  
3 the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale  
4 or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower,  
5 from either of which there shall be deducted all trade discounts, except customary discounts for  
6 cash, and (ii) ~~to either of which there shall be added the following items of expense: a markup to~~  
7 cover, in part, the cost of doing business, which markup, in the absence of proof of a lesser cost,  
8 shall be seven percent of the aggregate of invoice cost or replacement cost (whichever is used),  
9 exclusive of federal and state taxes, less trade discounts as aforesaid.

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

13 ~~(2) A markup to cover, in part, the cost of doing business, which markup, in the absence~~  
14 ~~of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement~~

15 ~~cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.~~

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

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

26 ~~(2) A markup to cover, in part, the cost of doing business, which markup in the absence~~  
27 ~~of proof of a lesser cost, shall be four percent of the aggregate of invoice cost or replacement cost~~  
28 ~~(whichever is used), less trade discounts as aforesaid, and plus said freight charges.~~

**§47-11A-8. Sales exempt.**

1 The provisions of this article shall not apply to any sale made:

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

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

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

11 ~~(c)(d)~~ (d) By an officer acting under the orders of any court;

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

14 (e) In a good faith attempt to match the price of a competitor, based on evidence in the  
15 form of an advertisement, proof of sale, receipted purchase or other business record obtained in  
16 the ordinary course of trade or the usual conduct of business;

17 (f) Involving an earned discount or earned rebate through the use of a bonus or rewards  
18 program;

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

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

**§47-11A-9. Injunctions and damage suits.**

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, firm, partnership, corporation, joint-stock company, or trade association  
11 injured by a violation of the provisions of this article may maintain an action to enjoin a continuance  
12 of any such violation in the circuit court of the county wherein said violation is alleged to have  
13 occurred. If a violation is established in such an action, the court shall enjoin, restrain or otherwise  
14 prohibit such violation. In such action, if damages are alleged and proven, the plaintiff in the action,  
15 in addition to injunctive relief, shall be entitled to recover from the defendant the actual damages

16 sustained.

17 (b) In the event no injunctive relief is sought or required, any person, firm, partnership,  
18 corporation, joint-stock company, or trade association injured by a violation of the provisions of  
19 this article may maintain an action for damages alone in the circuit court of the county wherein  
20 said violation is alleged to have occurred. If a violation is established in such an action, the court  
21 shall assess in favor of the plaintiff and against the defendant the actual damages sustained as a  
22 result of the violation.

23 (c) Any action filed pursuant to subsection (a) or (b) of this section shall be sufficiently  
24 rebutted by clear and convincing evidence that the cost of any product or item of merchandise  
25 alleged to be in violation of this article is equal to or greater than the price of a substantially similar  
26 product or item being sold by a competitor of the defendant in the same market area wherein the  
27 violation is alleged to have occurred.

28 (1) For the purposes of this subsection, "market area" shall mean a fifty-mile radius  
29 surrounding the location wherein the violation is alleged to have occurred, or, if applicable, any  
30 internet-based retail website.

31 (d) A court shall dismiss any action filed pursuant to subsection (a) or (b) of this section  
32 upon a motion for summary judgment if it finds pursuant to rule 56 of the rules of civil procedure  
33 that provisions of subsection (c) have been satisfied.

34 (c) Jurisdiction is hereby vested in the circuit courts of this state to carry into effect the  
35 provisions of this section.

**§47-11A-14. 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 (a) The Legislature declares that the purposes of this article are to: (1) safeguard



6 consumers from the creation of monopolies by prohibiting predatory pricing that actually harms  
7 market competition; (2) foster market efficiency; and (3) protect market competition.

8 (b) Whereas sales below-cost prohibitions such as those contained herein may, if enforced  
9 too strictly, injure consumers by stifling legitimate procompetitive business conduct, this article  
10 shall be construed so that its beneficial purposes may be subserved, and any efficiency concerns  
11 shall be weighed over equity concerns.

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NOTE: The purpose of this bill is to amend the Unfair Practices Act to bring the state's standards and procedures regarding below-cost sales prohibitions more in line with federal anti-trust laws.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.