

WEST VIRGINIA LEGISLATURE

2016 REGULAR SESSION

Enrolled

Committee Substitute

for

Committee Substitute

for

Senate Bill 259

BY SENATORS BLAIR, KARNES AND SNYDER,

original sponsors

[Passed March 11, 2016; in effect 90 days from passage]

1 AN ACT 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; providing
9 for exemptions to cost calculations relating to federal and state motor fuel taxes;
10 exempting certain sales, offers to sell or advertisements to sell from the provisions of the
11 article; providing that an injured person or entity may maintain an action to enjoin
12 continuance of any violation of the article; providing that an injured person or entity may
13 maintain an action for damages; providing that actual damages, if alleged and proven, be
14 assessed; providing for an absolute defense to an action to enjoin or for damages filed
15 under the article; providing jurisdiction to the circuit courts; and providing purposes of the
16 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2 amended, be repealed; and that §47-11A-1, §47-11A-2, §47-11A-5, §47-11A-6, §47-11A-8, §47-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 (a) The Legislature hereby finds that the sale of goods at prices below the cost thereof
2 can result in economic maladjustments and tend toward the creation of monopolies, thereby
3 destroying fair and healthy competition; therefore, the below-cost sale of goods with the intent to
4 destroy or the effect of destroying competition is deemed an unlawful unfair trade practice.

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

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

1 Except as otherwise provided herein, it shall be unlawful for any person, partnership, firm,
2 corporation or other entity engaged in business as a retailer or wholesaler within this state to sell,
3 offer for sale, or advertise for sale any product or item of merchandise at a price less than the
4 cost thereof with the intent to destroy or the effect of destroying competition. Each violation shall
5 constitute a misdemeanor and, upon conviction thereof, any person, partnership, firm, corporation
6 or other entity violating this section shall be subject to the penalty set forth in section eleven of
7 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 or other entity engaged in the business of making sales at retail within this state: *Provided,*
3 *however,* That in the case of a person, partnership, firm, corporation, or other entity engaged in
4 the business of making sales both at retail and at wholesale, such term shall be applied only to
5 the retail portion of such business.

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

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

17 (d) The provisions of this article shall be applicable to all sales at wholesale, and shall be
18 applicable to any transfer for a valuable consideration made in the ordinary course of trade or in
19 the usual prosecution of the wholesaler's business, of title to tangible personal property to the
20 purchaser for purposes of resale or further proceedings or manufacturing, and shall be applicable
21 also to any such transfer of property where title is retained by the seller as security for the payment
22 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 product or item of merchandise to the retailer or the
3 replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale or
4 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:

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 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 trade in any such stock or commodity;

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

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

10 (d) By an officer acting under the orders of any court;

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

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

15 (g) For charitable purposes or to relief agencies;

16 (h) Where merchandise is sold on contract to departments of the government or
17 governmental institutions; and

18 (i) During and for fifteen days after a business grand opening as determined by the
19 completion date.

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

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

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

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

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

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

§47-11A-14. Purposes of article.

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

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

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2016.

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Governor