WEST VIRGINIA CODE CHAPTER 47 ARTICLE 11A

WV Legislature

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

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

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

WV Legislature

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

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

WV Legislature

§47-11A-3. When rebates and special privileges prohibited; penalty.

The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, partnership, firm, corporation, joint-stock company, or other association resorting to such trade practice shall be deemed guilty of a misdemeanor and, on conviction thereof shall be subject to the penalties set out in section eleven of this article.

WV Legislature

§47-11A-4. Personal responsibility of directors, officers or agents.

Any person who, either as director, officer or agent of any firm or corporation or as agent of any person violating the provisions of this article, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or for which he acts.

WV Legislature

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

(a) The term "retailer" shall mean and include every person, partnership, firm, corporation, or other entity engaged in the business of making sales at retail within this state: Provided, however, That in the case of a person, partnership, firm, corporation, or other entity engaged in the business of making sales both at retail and at wholesale, such term shall be applied only to the retail portion of such business.

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

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

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

WV Legislature

§47-11A-6. How cost determined.

(a) The term “cost” when applicable to the business of retailer shall mean bona fide cost andshall mean: (i) The invoice cost of each separate or distinct product or item of merchandise to the retailer to include applicable taxes, or the replacement cost thereof to the retailer within 30 days prior to the date of sale, offer for sale, or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be deducted all trade discounts, except customary discounts for cash; and (ii) to either of which there shall be added

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

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

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

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

WV Legislature

§47-11A-7. When invoice cost of goods purchased at forced, etc., sale may be used.

In establishing the "cost" of a given article, product or item of merchandise to the vendor, the invoice cost of any article, product or item of merchandise purchased at a forced, bankrupt, close-out 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 as of the date of said sale of said article, product or item of merchandise replaced through the ordinary channels of trade, unless said article, product or merchandise is kept separate from goods purchased in the ordinary channels of trade and unless said article, product or item of merchandise is advertised and sold as merchandise purchased at a forced, bankrupt, close-out sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased, and the quantity of such merchandise to be sold or offered for sale.

WV Legislature

§47-11A-8. Sales exempt.

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

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing trade in any such stock or commodity;

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

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

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

(e) To meet the price of a competitor;

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

(g) For charitable purposes or to relief agencies;

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

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

WV Legislature

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

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

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

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

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

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

WV Legislature

§47-11A-10

Repealed.

Acts, 2016 Reg. Sess., Ch. 217

WV Legislature

§47-11A-11. Penalties for violations.

Any person, firm, partnership, corporation, joint-stock company or other association, whether as principal, agent, officer or director, for or itself, or for another person, or for any person, firm, partnership, corporation, joint- stock company or other association, who or which shall violate any of the provisions of this article, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment not exceeding ninety days or by both said fine and imprisonment, in the discretion of the court.

WV Legislature

§47-11A-12

Repealed.

Acts, 2016 Reg. Sess., Ch. 217

WV Legislature

§47-11A-12a. Unsolicited goods.

No person, firm, partnership, association or corporation, or agent or employee thereof, shall, in any manner, or by any means, offer for sale goods, wares or merchandise, where the offer includes the voluntary and unsolicited sending of goods, wares or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such unsolicited goods, wares or merchandise shall for all purposes be deemed an unconditional gift to the recipient who may use or dispose of the same in any manner he sees fit without any obligation on his part to the sender.

WV Legislature

§47-11A-13

Repealed.

Acts, 2016 Reg. Sess., Ch. 217

WV Legislature

§47-11A-14. Purposes of article.

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

WV Legislature