WEST VIRGINIA CODE CHAPTER 47 ARTICLE 11B

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§47-11B-1. Legislative findings.

The Legislature hereby finds and declares that certain sales of goods, defined in this article as "closing-out sales,""sales of goods damaged by fire, smoke or water" or "defunct business sales" have heretofore often been advertised and conducted in such manner as to mislead and defraud the public or otherwise harm the public and that such sales should be licensed and regulated to prevent misrepresentation and fraud and to protect and promote the public welfare.

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§47-11B-2. Definitions.

Unless the context in which used clearly requires a different meaning, as used in this article:

(a) The term "closing-out sale" shall include but not be limited to all sales advertised, represented or held forth under the designation of "quitting business,""going out of business," "discontinuance of business,""selling out,""liquidation,""lost our lease,""must vacate,""forced out,""removal,""branch store discontinuance sale,""building coming down,""end,""final days,""last days,""lease expires,""we give up sale,""we quit sale,""warehouse closing sale,""reorganization sale" and any other advertising or designation by any other expression or characterization similar to any of the foregoing and giving notice to the public that the sale will precede the abandonment of a business location.

(b) The term "sale of goods damaged by fire, smoke or water" shall include but not be limited to all sales advertised, represented or held forth under the designation of "fire sale," "smoke damage sale,""water damage sale,""flood damage sale," "insurance sale" and any other advertising or designation by any other expression or characterization similar to any of the foregoing and giving notice to the public that the goods, wares or merchandise offered for sale have been damaged.

(c) The term "defunct business sale" shall include but not be limited to all sales advertised, represented or held forth under the designation of "adjuster's sale,""administrator's sale,""assignee's sale,""bankrupt sale,""bankrupt stock sale," "benefit of administrator's sale,""benefit of creditor's sale," "benefit of trustee's sale,""creditor's committee sale," "creditor's sale,""executor's sale,""insolvent sale,""mortgage sale,""receiver's sale,""trustee's sale" and any other advertising or designation by any other expression or characterization similar to any of the foregoing and conveying the same meaning or giving notice to the public of a sale resulting from death, business failure, or other adversity.

(d) "Unusual purchase or addition" shall mean any purchase of goods, wares or merchandise during the ninety days preceding the application for a license the total value of which is at least twenty-five percent greater than purchases made by the applicant for a like ninety-day period during any one of three years next immediately preceding the year in which the application is made or his peak purchases for any ninety-day period if he has been in business for less than three years.

(e) "Commissioner" shall mean the state commissioner of labor.

(f) "Person" shall mean any individual, partnership, association, firm or corporation or the plural thereof.

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§47-11B-3. License required; exceptions.

It shall be unlawful for any person in this state to advertise or conduct any sale of any goods, wares or merchandise which is a "closing-out sale,""a sale of goods damaged by fire, smoke or water," or a "defunct business sale" unless a license is first obtained to conduct such a sale from the commissioner as provided in this article.

This article shall, however, not be construed to apply to or affect the following persons:

(1) Persons acting pursuant to an order or process of a court of competent jurisdiction.

(2) Persons who are required to file an accounting with a court of competent jurisdiction.

(3) Persons acting in accordance with their powers and duties as public officers such as sheriffs, constables and marshals.

(4) Any publisher or employee of a newspaper, magazine or any operator or employee of a radio or television broadcasting station who publishes or broadcasts any such advertisement in good faith without knowledge of its false, deceptive and misleading character or without knowledge that the provisions of this article are not being complied with.

(5) Persons conducting sales by and on behalf of licensed insurers.

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§47-11B-4. License application requirements.

Any person desiring to conduct a sale regulated by this article shall make a written application under oath to the commissioner. Said application shall be accompanied by the approved bond specified in section nine of this article. If the application is for a "closing-out sale" or a "defunct business sale," it shall be filed at least ten days prior to the date on which such sale is to commence. If the application is for a "sale of goods damaged by fire, smoke or water," it may be made at any time prior to the date on which such sale is to commence.

All applications for a licensed sale regulated by this article shall set forth and contain the following information:

(1) The name and address of the applicant who must be the true owner of the goods, wares or merchandise to be sold, and if the applicant be a partnership, the names and addresses of all partners, or if the applicant be a corporation or association, the date and place of incorporation or organization, the address of the principal office within the state and the names and addresses of all the officers of the applicant.

(2) The name and address of the person or persons who will be in charge and responsible for the conduct of such sale.

(3) The exact address of the place at which the proposed sale is to be conducted and the length of time the applicant has been engaged in business at such location.

(4) The date on which it is proposed to begin the sale.

(5) The nature of the occupancy where such sale is to be held whether by lease or otherwise and the effective date of termination of such occupancy.

(6) The reason for the urgent and expeditious disposal of the goods, wares or merchandise to be offered at such sale.

(7) A statement of the descriptive name of the sale and the reasons why the name is truthfully descriptive of the sale.

(8) A statement that the business is to be terminated permanently or reopened at another location, the location of the premises at which the business is to be moved, if the applicant intends to resume the operation of the business upon the termination of the sale, and the name or designation under which such business is to be resumed.

(9) A full, complete, detailed and itemized inventory of the goods, wares and merchandise to be offered at such sale as disclosed by applicant's records which inventory shall:

(i) Itemize the goods to be offered for sale and contain sufficient information concerning each item including quantity, make, brand name, model and manufacturer's number, if any, to clearly identify it.

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(ii) List separately any goods to be offered for sale which were purchased and received during a ninety-day period immediately prior to the date of making application for the license.

(iii) The total retail value of the inventory of goods, wares and merchandise to be offered at such sale based on the inventory used for applicant's most recent federal income tax return adjusted for sales and purchases.

(iv) If the application is for a license to conduct a "sale of goods damaged by fire, smoke or water" and the applicant was not the owner at the time when the goods, wares and merchandise to be offered at the contemplated sale were damaged, he shall attach to the said application certified copies of the bill of sale and all other documents connected with such transfer obtained by him from the previous owner of such goods, wares and merchandise.

(v) If the application is for a license to conduct a "defunct business sale" and the applicant was not the owner of the goods, wares and merchandise to be offered at the contemplated sale at the time of occurrence of the circumstances warranting the termination of such business, he shall attach to the application certified copies of the bill of sale and the official appraisal made by the trustee, receiver, assignee for benefit of creditor, referee in bankruptcy or the personal representative of a decedent.

(10) A statement that no goods will be added to the inventory after the application is made.

(11) A statement that all goods included in such inventory have been purchased by the applicant for resale on bona fide orders without cancellation privileges and that said inventory comprises no goods purchased on consignment.

(12) A statement that no merchandise listed in the inventory has been the subject of a licensed sale conducted within one year prior to the date of the application unless such merchandise was damaged by fire, smoke or water while in the possession of the applicant.

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§47-11B-5. Investigation of application; grounds for denial.

Upon receipt of the application, the commissioner may in his discretion make or cause to be made an examination or order an investigation of the applicant and all the facts contained in the application and inventory in relation to the proposed sale. A license shall be denied or refused if any one or more of the following facts or circumstances are found by him to exist:

(1) That the applicant has not been the owner of the business advertised or described in the application for a license hereunder for a period of at least three months prior to the date of the application or, if the applicant be a partnership, corporation or association, controlling interest in the corporation or association was transferred within six months prior to the date of the application for a license hereunder except:

(i) Where the application is for a license for a "sale of goods damaged by fire, smoke or water" or a "defunct business sale" and the inventory listed in the application contains only those goods, wares or merchandise which were on the premises at the time of the occurrence of the circumstances warranting the granting of a license hereunder.

(ii) Upon the death of a person doing business in this state, his heirs, distributees, devisees, legatees or their successors and assigns shall have the right to apply at any time for a license hereunder.

(iii) Where a business is required or compelled to be discontinued because the premises whereupon it is being conducted has been condemned, taken for purposes of urban renewal or development, or because the premises must be vacated because of legal or judicial proceedings.

(2) That in the case of a "closing-out sale" the applicant either as owner, partner, member of an association, or principal stockholder of a corporation was granted a prior license hereunder within one year preceding the date of the filing of the application.

(3) That the inventory contains goods, wares or merchandise not purchased by the applicant for resale on bona fide orders without cancellation privileges.

(4) That the inventory contains goods, wares or merchandise purchased by the applicant on consignment except if the consigned goods, wares or merchandise have been damaged while in the consignee's possession.

(5) That the applicant except in the case of an application for a license to conduct a "sale of goods damaged by fire, smoke or water" or a "defunct business sale" either as owner, partner, officer of an association, or principal stockholder of a corporation was granted a prior license hereunder within one year preceding the date of the filing of the application at the particular location for which the license is sought or within one year prior to the date of filing of the application has conducted a sale in connection with which he advertised or represented that the entire business conducted at the particular location for which the

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license is sought was to be closed out or terminated.

(6) That the applicant has within one year, prior to the filing of the application, been convicted of a violation of this article.

(7) That the goods, wares or merchandise as described in the inventory were transferred or assigned to the applicant prior to the date of the filing of the application and that said transfer or assignment was not made for a valuable and adequate consideration.

(8) That the inventory contains goods, wares or merchandise purchased by the applicant or added to his stock in contemplation of such sale and for the purpose of selling the same at such sale. For this purpose any unusual purchase or addition to the stock of such goods, wares and merchandise made within ninety days prior to the date of the filing of such application shall be presumptive evidence that such purchase or additions were made in contemplation of such sale and for the purpose of selling the same at such sale.

(9) That any representation made in the application is false.

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§47-11B-6. Duration of sale; license fee.

A license to conduct a sale issued pursuant to this article shall be good for no more than a period of thirty consecutive calendar days and may be renewed for one consecutive period not exceeding thirty consecutive calendar days upon the affidavit of the applicant that the goods listed in the inventory have not been disposed of and that no new goods have been or will be added to the inventory previously filed pursuant to this article by purchase, acquisition on consignment, or otherwise. The application for renewal shall be made not more than ten days prior to the time of the expiration of the license and shall contain a new inventory of the goods remaining on hand at the time the application for renewal is made which new inventory shall be prepared and furnished in the same manner and form as the original inventory. The commissioner shall receive from the applicant for such license, upon the granting thereof, a fee of $50 and upon the renewal thereof a fee of $100. The applicant shall not be entitled to a refund of the fee paid if said application is refused, denied or revoked.

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§47-11B-7. Revocation of license; grounds.

The commissioner may, on his own initiative, or shall, upon the written and verified complaint of any resident of this state, investigate any person licensed by him under the provisions of this article to determine if such person is violating or has violated this article. The commissioner shall immediately revoke such person's license if, after such investigation, he shall determine that:

(1) Any sale by the applicant is conducted in violation of any provision of this article,

(2) The applicant has made any material misstatement in his application for said license,

(3) The applicant has failed to include in the inventory required by the provisions of this article the goods, wares or merchandise required to be contained in such inventory,

(4) The applicant has added or permitted to be added to said sale or offered or permitted to be offered at said sale any goods, wares or merchandise not described in the original application and inventory, or

(5) The applicant made or permitted to be made any false, misleading or deceptive statements in advertising said sale, whether written or oral, or in displaying, ticketing or pricing goods, wares or merchandise offered for sale.

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§47-11B-8. Notice of denial, refusal or revocation of license; judicial review thereof.

Whenever the commissioner shall deny or refuse to issue a license or shall revoke any license, he shall make and enter an order to that effect and shall cause a copy of such order to be served in person or by certified mail, return receipt requested, on the applicant or person licensed by him as the case may be. Such order shall be accompanied by findings of fact and conclusions of law upon which such order was made and entered. Any person adversely affected by an order made and entered by the board is entitled to judicial review thereof. Such judicial review shall be in the circuit court for the county in which the sale is to be or is being conducted. The judgment of the circuit court shall be final unless reversed, vacated or modified on appeal to the Supreme Court of Appeals of West Virginia. Legal counsel and services for the commissioner in appeal proceedings in any circuit court and the Supreme Court of Appeals shall be provided by the Attorney General or his assistants, and in appeal proceedings in any circuit court by the prosecuting attorney of the county as well, all without additional compensation. The commissioner, with the written approval of the Attorney General, may employ special counsel to represent the commissioner in a particular proceeding.

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§47-11B-9. Bond required.

No license shall be issued unless the applicant files with the commissioner a bond with corporate surety payable to the State of West Virginia conditioned upon the faithful observance of all the provisions of this article, the payment to any municipality or the state of all taxes due and owing or which may become due and the indemnifying of any purchaser at such sale who suffers any loss by reason of misrepresentation made in connection with such sale: Provided, That the aggregate liability of the surety for all breaches of the conditions of the bond shall in no event exceed the amount of said bond. The amount of said bond shall be determined as follows: Five percent of the first $100,000 of the retail value of all the goods, wares and merchandise to be offered at such sale, two percent of the next $400,000 and one percent of the balance. Said bond shall be approved as to form and sufficiency by the prosecuting attorney or his assistant of the county in which such sale is to be conducted.

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§47-11B-10. Branch stores and warehouses.

If the applicant owns, conducts or operates more than one store or warehouse in connection with such store or warehouse specified in the application, the license issued will apply only to the one store or warehouse for which it was issued and no other store or warehouse may advertise or represent in any way that it is cooperating with or participating in any way in the licensed sale, nor shall the licensed store or warehouse or any person advertise or represent that any other person, store or warehouse is cooperating with or participating in the licensed sale. The licensed sale conducted by any store or warehouse of a chain or group of stores or warehouses shall be conducted solely at the location of the store or warehouse for which the license was obtained and no goods, wares or merchandise shall be brought from any other store or warehouse and placed on sale at the store or warehouse licensed to conduct a sale hereunder.

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§47-11B-11. Substitution, addition and commingling of goods voids license; change of time or place of sale; certain purchases prohibited.

(a) Any substitution for or addition to goods described in an inventory filed pursuant to this article or any change in the time or place for a sale conducted pursuant to this article shall be unlawful and shall void any license issued to conduct a sale pursuant to this article and such license shall be revoked.

(b) In the case of a sale licensed under this article conducted by any person licensed under this article in addition to conducting a business or selling other goods, wares or merchandise not included in the inventory accompanying the application, the goods to be sold at such sale shall be clearly and distinctly segregated, marked or identified and advertised, if at all, so that both on display and in advertising such goods may be readily distinguished from other stocks and their identity readily ascertained. Any commingling of such goods with other stocks of such person in such a manner as to cause the goods to lose their separate identity either on display or in advertising shall be unlawful.

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§47-11B-12. Copy of application, inventory and license to be posted; license to be referred to in advertisements.

A copy of the application for a license to conduct a sale under this article, including a copy of the inventory filed therewith, shall be posted in a conspicuous place in the sales room or place where the inventoried goods are to be sold so that the public may be informed of the facts relating to the goods before purchasing same. Any advertisement or announcement published in connection with the sale shall conspicuously show on its face the number of the license, the date of its expiration, and if applicable, the location where the business is to be resumed.

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§47-11B-13. Opening of a similar business within one year of sale prohibited.

Opening of a business similar to the one for which the sale licensed pursuant to this article was conducted except the licensed "sale of goods damaged by fire, smoke or water" by the person, partner of a partnership, officer of an association, or principal stockholder of a corporation who or which conducted the sale upon the same premises within one year of the termination of the sale shall constitute a violation of this article. Every day in which business is conducted within the prohibited period of one year shall constitute a separate violation of this article.

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§47-11B-14. Records.

(a) Suitable books and records concerning said sale shall be kept by the licensee for the duration of the licensed sale and one year thereafter and shall be open for inspection by the commissioner or his duly authorized representative.

(b) Upon the termination of a sale licensed hereunder the applicant shall within thirty days of such termination file a statement with the commissioner stating:

(1) The total retail value of the goods, wares or merchandise not disposed of during the sale, and

(2) The ultimate disposition thereof and if transferred to another, the name and address of the transferee.

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§47-11B-15. Penalties for violations.

Any person who shall violate any of the provisions of this article is guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than $100 or by imprisonment not exceeding thirty days. Each day any sale is conducted in violation of the provisions of this article shall constitute and be a separate violation of the provisions of this article.

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§47-11B-16. Severability.

If any part or parts of this article shall be held to be unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the Constitutionality or validity of the remaining part or parts of this article. The Legislature hereby declares that it would have passed the remaining part or parts of this article if it had known that such part or parts would be declared unconstitutional or invalid.

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§47-11B-17. Effective date.

This article shall become effective on July 1, 1967.

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