WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1939

ENROLLED

SENATE BILL No. 134

(By Mr. Allen)

PASSED March 9th, 1939

In Effect 90 days after Passage

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.
ENROLLED

Senate Bill No. 134

(By Mr. Allen, by request)

[Passed March 9, 1939; in effect ninety days from passage.]

AN ACT relating to unfair methods of competition; making certain unfair trade practices unlawful; defining the duties of clerks of courts and of the attorney general in regard thereto; declaring certain contracts illegal and forbidding recovery thereon; providing for injunction proceedings to restrain a continuance of acts in violation of the provisions hereof and providing for the recovery of damages; vesting circuit courts with jurisdiction to order the forfeiture of charters, rights, franchises and privileges of corporations or joint stock companies violating the provisions of this act; making the violation of the provisions of this act a misdemeanor and provid-
Be it enacted by the Legislature of West Virginia:

Section 1. The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice. It is hereby declared that any advertisement, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost, as defined in this act, or any advertisement of an intent to give, any offer to give, or gift of any merchandise, either by retailers or wholesalers, for the purposes of unfairly diverting trade from or otherwise injuring competitors and destroying competition, is an unfair method of competition contrary to public policy and in contravention of the policy of this act, which shall be known and designated as the "Unfair Practices Act."

Sec. 2. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association
engaged in business as a retailer or wholesaler within this state, to sell, offer for sale or advertise for sale any article, product or item of merchandise at less than the cost thereof to the vendor, or give, offer to give or advertise the intent to give away any article, product or item of merchandise for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition. Each violation shall constitute a misdemeanor and upon conviction thereof, any person, partnership, firm, corporation, joint stock company, or other association violating this section shall be subject to the penalty set out in section eleven hereof.

Sec. 3. 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 act.

Sec. 4. 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 act, 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.

Sec. 5. (a) The term "retailer" shall mean and include every person, partnership, firm, corporation, joint stock company or other association engaged in the business of making sales at retail within this state: Provided, however, That in the case of a person, partnership, firm, corporation, joint stock company or other association engaged in the business of making sales both at retail and at wholesale, such terms shall be applied only to the retail portion of such business.

(b) The term "wholesaler" shall mean and include every person, partnership, firm, corporation, joint stock company, or other association engaged in the business of making sales at wholesale within this state; provided that, in the case of a person, partnership, firm, corporation, joint stock company, or other association 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 act 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 in the usual prose-
cution 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 retailed by the retailer as security for the payment of such
purchase price.

(d) The provisions of this act 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 pur-
chase price.
Sec. 6. (a) The term "cost" when applicable to the business of retailer shall mean bona fide cost and shall mean (1) the invoice cost of the article, product or item of merchandise to the retailer or the replacement cost thereof to the retailer within thirty 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 (2) 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 retail outlet if done or paid for by the retailer.

2. A mark-up to cover, in part, the cost of doing business, which mark-up, in the absence of proof of a lesser cost, shall be seven per-cent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges.

(b) The term "cost" when applicable to the business of a wholesaler shall mean bona fide cost and shall mean (1)
the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler within thirty 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 (2) 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 mark-up to cover, in part, the cost of doing business, which mark-up in the absence of proof of a lesser cost, shall be two per-cent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as afore-said, and plus said freight charges.

Sec. 7. 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, closeout 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, closeout 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.

Sec. 8. The provisions of this act shall not apply to any sale made:

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

(b) When the goods are damaged or deteriorated in qual-
ity or where merchandise is sold in bona fide clearance sales, and, in each case, merchandise is advertised, marked and sold as such;

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

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

(e) For charitable purposes or to relief agencies;

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

Sec. 9. Any person, firm, partnership, corporation, joint stock company, or trade association may maintain a proceeding to enjoin a continuance of any act or acts in violation of the provisions of this act and, if injured thereby, for the recovery of damages in the circuit court of the county wherein said act is alleged to have been or is being violated. If, in such proceeding, the court shall find that the defendant is violating or has violated any of the provisions of this act, it shall enjoin such defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be
alleged or proved. In addition to such injunctive relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages, if any, sustained.

Sec. 10. Whenever any corporation or joint stock company shall be convicted of, or shall be enjoined from violating any of the provisions of this act, it shall be the duty of the clerk of the court wherein said corporation or joint stock company has been convicted or enjoined to certify said conviction or injunction decree, as the case may be, to the attorney general of this state. Upon the third conviction for the violation of this act by any corporation or joint stock company, or whenever any corporation or joint stock company shall have been enjoined three times from violating this act, it shall be the duty of the attorney general to institute proper suits in any circuit court in this state for the forfeiture of its charter, rights, franchises or privileges and powers exercised by such corporation or joint stock company, and to enjoin permanently such violator from transacting business within this state; and if in such suit the court shall find that the party defendant is guilty of violating said act as aforesaid, it shall enjoin said
party defendant from doing business in this state, permanently or for such time as the court, in its discretion, shall order, and if the order be for permanent injunction against the transaction of business, the court shall order the forfeiture of the charter, rights, franchises or privileges and powers exercised by such party defendant.

Jurisdiction is hereby vested in the circuit courts of this state to carry into effect the provisions of sections nine and ten hereof.

Sec. 11. Any person, firm, partnership, corporation, joint stock company or other association, whether as principal, agent, officer or director, for himself, 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 act, is guilty of a misdemeanor for each single violation and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment not exceeding ninety days or by both said fine and imprisonment, in the discretion of the court.

Sec. 12. Any contract, express or implied, made by any
person, firm, partnership, corporation, joint stock company
or other association, in violation of any of the provisions of
this act, is hereby declared to be an illegal contract and no re-
cover thereon shall be had.

Sec. 13. If any section, sentence, clause or phrase of this
act is for any reason held to be unconstitutional, such decision
shall not affect the validity of the remaining portions of the
act.

Sec. 14. In any injunction proceeding or in any prosecution
for a misdemeanor under the provisions of this act, proof of
any advertisement, offer to sell, or sale of any merchandise by
a retailer or wholesaler, at less than cost, or any advertise-
ment of an intent to give, offer to give, or gift of any mer-
chandise by a retailer or wholesaler, or any secret payment,
allowance of rebates, refunds, commissions, or unearned dis-
counts, 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, shall be prima facie evidence of a violation of this
act, and proof of a violation of this act by any person as of-
icer, director or agent shall be sufficient proof of a violation of
this act by the person, firm or corporation for whom or for
which he acts.

Sec. 15. The Legislature declares that the purpose of this
act is to safeguard the public against the creation or per-
petuation of monopolies and to foster and encourage competi-
tion, by prohibiting unfair and discriminatory practices by
which fair and honest competition is destroyed or prevented.
This act shall be liberally construed that its beneficial pur-
poses may be subserved.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

E. D. Wiseman  
Chairman Senate Committee

Nellie M. Walker  
Chairman House Committee

Originated in the Senate.

Takes effect thirty days from passage.

Samuel F. Albritton  
Clerk of the Senate

Wooster  
Clerk of the House of Delegates

H. H. S. Taber  
President of the Senate

James E. Thomas  
Speaker House of Delegates

I certify that the foregoing act, having been presented to the Governor for his approval, and not having been returned by him to the House of the Legislature in which it originated within the time prescribed by the constitution of the state, has become a law without his approval.

This the 17th day of March, 1939.

Governor

[Signature]

Secretary of State