

1 State of Arkansas
2 80th General Assembly
3 Regular Session, 1995
4 By: Senator Lewellen

A Bill

SENATE BILL 561

For An Act To Be Entitled

"AN ACT TO AMEND THE UNFAIR CIGARETTE SALES ACT; AND FOR
OTHER PURPOSES."

Subtitle

"AN ACT TO AMEND THE UNFAIR CIGARETTE
SALES ACT."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 4-75-701 is amended to read as follows:
"4-75-701. Title.

This subchapter shall be known and may be cited as the Unfair
Cigarette Retail Sales Act."

SECTION 2. Arkansas Code § 4-75-702 is amended to read as follows:
"4-75-702. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) Person means and includes any individual, firm, association,
company, partnership, corporation, joint-stock company, club, agency,
syndicate, the State of Arkansas, county, municipal corporation, or other
political subdivision of this state, receiver, trustee, fiduciary or trade
association;

(2) Director means the Director of the Department of Finance and
Administration;

(3) Cigarettes means and includes any roll for smoking made wholly
or in part of tobacco, irrespective of size or shape and whether or not the
tobacco is flavored, adulterated, or mixed with any other ingredient, the
wrapper or cover of which is made of paper or any other substance or

1 material, except tobacco;

2 (4) Retailer means and includes any person who is engaged in this
3 state in the business of selling cigarettes at retail and includes any group
4 of persons, cooperative organizations, buying pools, and any other person or
5 group of retailers purchasing cigarettes on a cooperative basis from licensed
6 distributors or wholesalers. Any person placing a cigarette vending machine
7 at, on, or in any premises shall be deemed to be a retailer for each such
8 vending machine;

9 (5) Buying pool means and includes any combination, corporation,
10 association, affiliation, or group of retail dealers operating jointly in the
11 purchase, sale, exchange, or barter of cigarettes, the profits of which
12 accrue directly or indirectly to the retail dealers;

13 (6) Sale or sell means any transfer for a consideration, exchange,
14 barter, gift, offer for sale, advertising for sale, soliciting an order for
15 cigarettes and distribution in any manner or by any means whatsoever;

16 (7) Sell at wholesale, sale at wholesale, and wholesale sales
17 mean and include any sale made in the ordinary course of trade or usual
18 conduct of the wholesaler's business to a retailer for the purpose of resale;

19 (8) Sell at retail, sale at retail, or retail sales means and
20 includes any sale for consumption or use made in the ordinary course of trade
21 or usual conduct of the seller's business;

22 (9) Basic cost of cigarettes means whichever of the two (2)
23 following amounts is lower, namely, the invoice cost of cigarettes to the
24 wholesaler or retailer, as the case may be, or the lowest replacement cost of
25 cigarettes to the wholesaler or retailer, as the case may be, within thirty
26 (30) days prior to the date of sale, in the quantity last purchased, whether
27 within or before the thirty-day period, less, in either of the two (2) cases,
28 all trade discounts except customary discounts for cash, plus the full face
29 value of any stamps or any tax which may be required by any cigarette tax act
30 of this state or political subdivision thereof, now in effect or hereafter
31 enacted, if not already included in the invoice cost of cigarettes to the
32 wholesaler or retailer, as the case may be;

33 (10)(A) Cost to the retailer means the basic cost of the cigarettes
34 involved to the retailer plus the cost of doing business by the retailer as
35 evidenced by the standards and methods of accounting regularly employed by

1 him and must include, without limitation, labor including salaries of
2 executives and officers, rent, depreciation, selling costs, maintenance of
3 equipment, delivery costs, all types of licenses, taxes, insurance, and
4 advertising. *The wholesaler shall not invoice the cost to the retailer at a*
5 *price that is less than the manufacturer's invoiced price to the wholesaler*
6 *for such cigarettes, less any applicable trade or cash discounts, plus the*
7 *full face value of any stamps or any tax which may be required by any*
8 *cigarette tax act of this state or any political subdivision thereof.*

9 (B) In the absence of proof of a lesser or higher cost of doing
10 business by the retailer making the sale, the cost of doing business by the
11 retailer shall be presumed to be ten percent (10%) of the basic cost of
12 cigarettes to the retailer.

13 (C) In the case of any retail dealer who in connection with the
14 retail dealer's purchase of any cigarettes shall receive not only the
15 discounts ordinarily allowed upon purchases by a retail dealer but also in
16 whole or in part the discounts ordinarily allowed upon purchases by a
17 wholesale dealer, the cost of doing business by the retail dealer with
18 respect to the said cigarettes shall be, in the absence of proof of a lesser
19 or higher cost of doing business by the retail dealer, the sum of the cost of
20 doing business by the retail dealer and, to the extent that he shall have
21 received the full discounts ordinarily allowed to a wholesale dealer, the
22 cost of doing business by a wholesale dealer."

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24 SECTION 3. Arkansas Code § 4-75-703 is amended to read as follows:

25 "4-75-703. Sales excepted from subchapter.

26 The provisions of this subchapter shall not apply to a sale at retail
27 made:

28 (1) In an isolated transaction and not in the usual course of
29 business; (2) Where cigarettes are advertised, offered for sale, or sold
30 in a bona fide clearance sale for the purpose of discontinuing trade in such
31 cigarettes and the advertising, offer to sell, or sale shall state the reason
32 therefor and the quantity of such cigarettes advertised, offered for sale, or
33 to be sold;

34 (3) Where cigarettes are advertised, offered for sale, or sold as
35 imperfect or damaged, and the advertising, offer to sell, or sale shall state

1 the reason therefor and the quantity of the cigarettes advertised, offered
2 for sale, or to be sold;

3 (4) Where cigarettes are sold upon the final liquidation of a
4 business; or

5 (5) Where cigarettes are advertised, offered for sale, or sold by any
6 fiduciary or other officer acting under the order or direction of any court."

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8 SECTION 4. Arkansas Code § 4-75-704 is amended to read as follows:

9 "4-75-704. Transactions permitted to meet lawful competition.

10 (a) Any retailer may advertise, offer to sell, or sell cigarettes at a
11 price made in good faith to meet the price of a competitor who is selling the
12 same article at cost to the competing retailer as defined in this subchapter.

13 (b) The price of cigarettes advertised, offered for sale, or sold
14 under the exceptions specified in § 4-75-703 shall not be considered the
15 price of a competitor and shall not be used as a basis for establishing
16 prices below cost, nor shall the price established at a bankrupt sale be
17 considered the price of a competitor within the purview of this section.

18 (c) In the absence of proof of the actual cost to the competing
19 retailer, the cost may be presumed to be the lowest cost to retailers, within
20 the same trading area as determined by a cost survey made pursuant to §
21 4-75-711(b)."

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23 SECTION 5. Arkansas Code § 4-75-708 is amended to read as follows:

24 "4-75-708. Sales at less than cost, rebates, concessions, etc. -
25 Penalty.

26 (a) It shall be unlawful for any retailer, with intent to injure
27 competitors or destroy or substantially lessen competition, to advertise,
28 offer to sell, or sell, at retail or wholesale, cigarettes at less than cost
29 to the wholesaler or retailer, as the case may be.

30 (b) It shall be unlawful for any retailer, with intent to injure
31 competitors or destroy or substantially lessen competition, to offer a rebate
32 in price, to give a rebate in price, to offer a concession of any kind, or to
33 give a concession of any kind or nature whatsoever in connection with the
34 sale of cigarettes.

35 (c) It shall be unlawful for any retail dealer to induce or attempt to

1 induce or to procure or attempt to procure the purchase of cigarettes at a
2 price less than cost to wholesaler.

3 (d) Any retailer who violates the provisions of this section shall be
4 guilty of a misdemeanor and be punishable by fine of not more than five
5 hundred dollars (\$500).

6 (e) Evidence of advertisement, offering to sell, or sale of cigarettes
7 by any retailer at less than cost to him, or evidence of any offer of a
8 rebate in price or the giving of a rebate in price or an offer of a
9 concession or the giving of a concession of any kind or nature whatsoever in
10 connection with the sale of cigarettes, or the inducing or attempt to induce
11 or the procuring or the attempt to procure the purchase of cigarettes at a
12 price less than cost to the retailer shall be prima facie evidence of intent
13 to injure competitors and destroy or substantially lessen competition."
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15 SECTION 6. Arkansas Code § 4-75-709 is amended to read as follows:

16 "4-75-709. Combination sales.

17 In all advertisements, offers for sale, or sales involving two (2) or
18 more items, at least one (1) of which items is cigarettes, at a combined
19 price, and in all advertisements, offers for sale at retail, or sales
20 involving the giving of any gift or concession of any kind, whether coupons
21 or otherwise, the retailer's combined selling price shall not be below the
22 cost to the retailer of the total of all articles, products, commodities,
23 gifts, and concessions included in the transactions; but if any such
24 articles, products, commodities, gifts, or concessions shall not be
25 cigarettes, the basic cost thereof shall be determined in the manner provided
26 in § 4-75-702(10)."
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28 SECTION 7. Arkansas Code § 4-75-710 is amended to read as follows:

29 "4-75-710. Sales by a wholesaler to a wholesaler.

30 When one wholesaler sells cigarettes to any other wholesaler, the
31 former shall not be required to include in his selling price to the latter
32 the cost to the wholesaler, as provided by § 4-75-702."
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34 SECTION 8. Arkansas Code § 4-75-711 is amended to read as follows:

35 "4-75-711. Determination of cost generally - Cost surveys.

1 (a) In determining cost to the retailer, the court shall receive, and
2 consider as bearing on the bona fides of the cost, evidence tending to show
3 that any person complained against under any of the provisions of this
4 subchapter purchased the cigarettes involved in the complaint before the
5 court at a fictitious price or upon terms or in such manner or under such
6 invoices as to conceal the true cost, discounts, or terms of purchase, and
7 shall also receive and consider as bearing on the bona fides of the costs,
8 evidence of the normal, customary, and prevailing terms and discounts in
9 connection with other sales of a similar nature in the trade area or state.

10 (b) Where a cost survey pursuant to recognized statistical and cost
11 accounting practices has been made for the trading area in which a violation
12 of this subchapter is committed or charged to determine and establish on the
13 basis of actual existing conditions the lowest cost to retailers within the
14 area, the cost survey shall be deemed competent evidence in any action or
15 proceeding under this subchapter as tending to prove actual cost to the
16 retailer complained against, but any party against whom any such cost survey
17 may be introduced in evidence shall have the right to offer evidence tending
18 to prove any inaccuracy of the cost survey or any state of facts which would
19 impair its probative value."

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21 SECTION 9. Arkansas Code § 4-75-712 is amended to read as follows:

22 "4-75-712. Determination of cost - Sales outside ordinary channels of
23 business.

24 In establishing the basic cost of cigarettes to a retailer, it shall
25 not be permissible to use the invoice cost or the actual cost of any
26 cigarettes purchased at a forced, bankrupt, or closeout sale, or other sale
27 outside of the ordinary channels of trade."

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29 SECTION 10. All provisions of this act of a general and permanent
30 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
31 Code Revision Commission shall incorporate the same in the Code.

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33 SECTION 11. If any provision of this act or the application thereof to
34 any person or circumstance is held invalid, such invalidity shall not affect
35 other provisions or applications of the act which can be given effect without

1 the invalid provision or application, and to this end the provisions of this
2 act are declared to be severable.

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4 SECTION 12. All laws and parts of laws in conflict with this act are
5 hereby repealed.

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7 /s/Lewellen

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