

Stricken language would be deleted from and underlined language would be added to law as it existed prior to the 82nd General Assembly.

1 State of Arkansas
2 82nd General Assembly
3 Regular Session, 1999

A Bill

SENATE BILL 500

4
5 By: Senators Fitch, Bisbee
6
7

For An Act To Be Entitled

8
9 "AN ACT TO AMEND SUBCHAPTER 7 OF CHAPTER 75 OF TITLE 4
10 OF THE ARKANSAS CODE, THE UNFAIR CIGARETTE SALES ACT;
11 AND FOR OTHER PURPOSES."

Subtitle

12
13
14 "TO AMEND THE UNFAIR CIGARETTE SALES ACT."
15
16

17 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
18

19 SECTION 1. Subchapter 7 of Chapter 75 of Title 4 of the Arkansas Code
20 is amended to read as follows:

21 "4-75-701. Title.

22 This subchapter shall be known and may be cited as the 'Unfair Cigarette
23 Sales Act'.

24
25 § 4-75-702. Definitions.

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

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

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

34 (3) 'Cigarettes' means and includes any roll for smoking made wholly or
35 in part of tobacco, irrespective of size or shape and whether or not the
36 tobacco is flavored, adulterated, or mixed with any other ingredient, the

1 wrapper or cover of which is made of paper or any other substance or material,
2 except tobacco;

3 ~~_____ (4) 'Wholesaler' means and includes:~~

4 ~~_____ (A) Any person other than a buying pool as defined in this section,~~
5 ~~wherever resident or located, who brings or causes to be brought into this~~
6 ~~state unstamped cigarettes purchased directly from the manufacturer thereof~~
7 ~~and who maintains an established place of business where substantially all of~~
8 ~~the business is the sale of cigarettes and related merchandise at wholesale to~~
9 ~~cigarette licensees and where at all times a substantial stock of cigarettes~~
10 ~~and related merchandise is available for resale, if seventy-five percent (75%)~~
11 ~~thereof are sold to retailers or other wholesalers not connected with the~~
12 ~~wholesaler by reason of any business connection or otherwise; and~~

13 ~~_____ (B) Any person retailing cigarettes to consumers, if at least seventy-~~
14 ~~five percent (75%) of his purchases are made directly from the manufacturers~~
15 ~~thereof; and~~

16 ~~_____ (C) Any person in this state other than a buying pool, as defined in~~
17 ~~this section, who purchases cigarettes from any other person who purchases~~
18 ~~from a manufacturer, at least seventy-five percent (75%) of which are for~~
19 ~~purposes of resale to retailers in this state not connected with the~~
20 ~~wholesaler by reason of any business connection or otherwise and who maintains~~
21 ~~an established place of business where cigarettes and related merchandise are~~
22 ~~sold at wholesale to persons licensed under this subchapter, and where at all~~
23 ~~times a substantial stock of cigarettes and related merchandise is available~~
24 ~~to all retailers for resale; and~~

25 ~~_____ (D) Any person in this state who acquires cigarettes solely for the~~
26 ~~purpose of resale in cigarette vending machines, provided the person operates~~
27 ~~thirty (30) or more machines;~~

28 ~~(5)(4)~~ (4) 'Retailer' means and includes any person who is engaged in this
29 state in the business of selling cigarettes at retail and includes any group
30 of persons, cooperative organizations, buying pools, and any other person or
31 group of retailers purchasing cigarettes on a cooperative basis from licensed
32 distributors or wholesalers. Any person placing a cigarette vending machine
33 at, on, or in any premises shall be deemed to be a retailer for each such
34 vending machine;

35 ~~(6)(5)~~ (5) 'Buying pool' means and includes any combination, corporation,
36 association, affiliation, or group of retail dealers operating jointly in the

1 purchase, sale, exchange, or barter of cigarettes, the profits of which accrue
2 directly or indirectly to the retail dealers;

3 ~~(7)(6)~~ 'Sale' or 'sell' means any transfer for a consideration,
4 exchange, barter, gift, offer for sale, advertising for sale, soliciting an
5 order for cigarettes, and distribution in any manner or by any means
6 whatsoever;

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

10 ~~(9)(7)~~ 'Sell at retail', 'sale at retail', or 'retail sales' means and
11 includes any sale for consumption or use made in the ordinary course of trade
12 or usual conduct of the seller's business;

13 ~~(10)(8)~~ 'Basic cost of cigarettes' means whichever of the two (2)
14 following amounts is lower, namely, the invoice cost of cigarettes to the
15 wholesaler or retailer, as the case may be, or the lowest replacement cost of
16 cigarettes to the wholesaler or retailer, as the case may be, within thirty
17 (30) days prior to the date of sale, in the quantity last purchased, whether
18 within or before the thirty-day period, less, in either of the two (2) cases,
19 all trade discounts except customary discounts for cash, plus the full face
20 value of any stamps or any tax which may be required by any cigarette tax act
21 of this state or political subdivision thereof, now in effect or hereafter
22 enacted, if not already included in the invoice cost of cigarettes to the
23 wholesaler or retailer, as the case may be;

24 ~~(11)(A)~~ 'Cost to wholesaler' means the basic cost of the cigarettes
25 involved to the wholesaler plus the cost of doing business by the wholesaler
26 as evidenced by the standards and methods of accounting regularly employed by
27 him and must include, without limitation, labor costs, including salaries of
28 executives and officers, rent, depreciation, selling costs, maintenance of
29 equipment, delivery costs, all types of licenses, taxes, insurance, and
30 advertising.

31 ~~(B)~~ In the absence of proof of a lesser or higher cost of doing
32 business by the wholesale dealer making the sale, the cost of doing business
33 by the wholesale dealer shall be presumed to be two percent (2%) of the basic
34 cost of the cigarettes to the wholesale dealer, plus cartage to the retail
35 outlet, if performed or paid for by the wholesale dealer, which cartage cost,
36 in the absence of proof of a lesser or higher cost, shall be presumed to be

1 ~~three-fourths of one percent (0.75%) of the basic cost of the cigarettes to~~
 2 ~~the wholesale dealer; and~~

3 (12)(9)(A) 'Cost to the retailer' means the basic cost of the
 4 cigarettes involved to the retailer plus the cost of doing business by the
 5 retailer as evidenced by the standards and methods of accounting regularly
 6 employed by him and must include, without limitation, labor including salaries
 7 of executives and officers, rent, depreciation, selling costs, maintenance of
 8 equipment, delivery costs, all types of licenses, taxes, insurance, and
 9 advertising.

10 (B) In the absence of proof of a lesser or higher cost of doing
 11 business by the retailer making the sale, the cost of doing business by the
 12 retailer shall be presumed to be six percent (6%) of the basic cost of
 13 cigarettes to the retailer.

14 (C) In the case of any retail dealer who in connection with the retail
 15 dealer's purchase of any cigarettes shall receive not only the discounts
 16 ordinarily allowed upon purchases by a retail dealer but also in whole or in
 17 part the discounts ordinarily allowed upon purchases by a wholesale dealer,
 18 the cost of doing business by the retail dealer with respect to the said
 19 cigarettes shall be, in the absence of proof of a lesser or higher cost of
 20 doing business by the retail dealer, the sum of the cost of doing business by
 21 the retail dealer and, to the extent that he shall have received the full
 22 discounts ordinarily allowed to a wholesale dealer, the cost of doing business
 23 by a wholesale dealer as defined in subdivision (11)(B) of this section.

24
 25 § 4-75-703. Sales excepted from subchapter.

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

28 (1) In an isolated transaction and not in the usual course of business;

29 (2) Where cigarettes are advertised, offered for sale, or sold in a
 30 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
 36 the reason therefor and the quantity of the cigarettes advertised, offered for

1 sale, or to be sold;

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

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

6 (6) Participation in a manufacturer's incentive program, discount
 7 program or special price program shall not cause a retailer to be in violation
 8 of this act.

9
 10 § 4-75-704. Transactions permitted to meet lawful competition.

11 ~~(a)(1) Any wholesaler may advertise, offer to sell, or sell cigarettes~~
 12 ~~at a price made in good faith to meet the price of a competitor who is~~
 13 ~~rendering the same type of service and is selling the same article at cost to~~
 14 ~~the competing wholesaler as defined by this subchapter.~~

15 ~~(2)(a)~~ Any retailer may advertise, offer to sell, or sell cigarettes at
 16 a price made in good faith to meet the price of a competitor who is selling
 17 the same article at cost to the competing retailer as defined in this
 18 subchapter.

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

24 (c) In the absence of proof of the actual cost to the ~~competing~~
 25 ~~wholesaler or to the competing retailer, as the case may be,~~ the cost may be
 26 presumed to be the ~~lowest cost to wholesalers or the lowest cost to retailers,~~
 27 ~~as the case may be,~~ within the same trading area as determined by a cost
 28 survey made pursuant to § 4-75-711(b).

29
 30 § 4-75-705. Contracts in violation of subchapter void.

31 Any contract, express or implied, made by any person in violation of any
 32 of the provisions of this subchapter is illegal and void and no recovery shall
 33 be had thereon.

34
 35 § 4-75-706. Director of the Department of Finance and Administration -
 36 Powers and duties.

1 (a)(1) The Director of the Department of Finance and Administration
2 shall prescribe, adopt, and enforce rules and regulations relating to the
3 administration and enforcement of this subchapter.

4 (2) The director is empowered to and may from time to time undertake
5 and make or cause to be made one (1) or more cost surveys for the state or
6 such trading area as he shall define, and when the cost survey shall have been
7 made by or approved by him, it shall be permissible to use such cost survey as
8 provided in § 4-75-711(b).

9 (3) The director may revoke or suspend the license issued under the
10 provisions of this subchapter of any person who refuses or neglects to comply
11 with any provisions of this subchapter or any rule or regulation of the
12 director prescribed under this subchapter.

13 (b) Whenever any person fails to comply with any provision of this
14 subchapter or any rule or regulation of the director promulgated thereunder,
15 the director upon hearing, after giving the person ten (10) days' notice in
16 writing specifying the time and place of the hearing and requiring him to show
17 cause why his license should not be revoked, may revoke or suspend the license
18 held by the person.

19 (c) Any ruling, order, or decision of the Director of the Department of
20 Finance and Administration shall be subject to review, as provided by law, in
21 any court of competent jurisdiction in the county in which the person affected
22 resides.

23
24 § 4-75-707. License requirement.

25 (a) No person shall engage in or conduct the business of purchasing for
26 resale or selling cigarettes without having first obtained the appropriate
27 license for that purpose.

28 (b) All such licenses shall be issued by the Director of the Department
29 of Finance and Administration or his designated agent, who shall make rules
30 and regulations respecting applications therefor and issuance thereof.

31 (c) A wholesaler or retailer who sells or intends to sell cigarettes at
32 one (1) or more places of business shall be required to obtain a separate
33 license for each place of business.

34 (d) Any person licensed only as a wholesaler shall not operate as a
35 retailer unless the appropriate license therefor is first secured, and any
36 person licensed only as a retailer shall not operate as a wholesaler unless

1 the appropriate license therefor is first secured.

2
3 § 4-75-708. Sales at less than cost, rebates, concessions, etc. -
4 Penalty.

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

9 (b) It shall be unlawful for any ~~wholesaler or~~ retailer, with intent to
10 injure competitors or destroy or substantially lessen competition, to offer a
11 rebate in price, to give a rebate in price, to offer a concession of any kind,
12 or to give a concession of any kind or nature whatsoever in connection with
13 the sale of cigarettes.

14 ~~—(c)(1) It shall be unlawful for any retail dealer to induce or attempt to~~
15 ~~induce or to procure or attempt to procure the purchase of cigarettes at a~~
16 ~~price less than cost to the wholesaler.~~

17 ~~(2)(c)~~ (c) It shall be unlawful for any retail dealer to induce or attempt
18 to induce or to procure or attempt to procure any rebate or concession of any
19 kind or nature whatsoever in connection with the purchase of cigarettes.

20 (d) Any ~~wholesaler or~~ retailer who violates the provisions of this
21 section shall be guilty of a misdemeanor and be punishable by a fine of not
22 more than five hundred dollars (\$500).

23 (e) Evidence of advertisement, offering to sell, or sale of cigarettes
24 by any ~~wholesaler or~~ retailer at less than cost to him, or evidence of any
25 offer of a rebate in price or the giving of a rebate in price or an offer of a
26 concession or the giving of a concession of any kind or nature whatsoever in
27 connection with the sale of cigarettes, or the inducing or attempt to induce
28 or the procuring or the attempt to procure the purchase of cigarettes at a
29 price less than cost to the ~~wholesaler or the~~ retailer shall be prima facie
30 evidence of intent to injure competitors and destroy or substantially lessen
31 competition.

32
33 § 4-75-709. Combination sales.

34 In all advertisements, offers for sale, or sales involving two (2) or
35 more items, at least one (1) of which items is cigarettes, at a combined
36 price, and in all advertisements, offers for sale, or sales involving the

1 giving of any gift or concession of any kind, whether coupons or otherwise,
 2 the ~~wholesaler's or retailer's~~ combined selling price shall not be below the
 3 ~~cost to the wholesaler or the~~ cost to the retailer, respectively, of the total
 4 of all articles, products, commodities, gifts, and concessions included in the
 5 transactions; but if any such articles, products, commodities, gifts, or
 6 concessions shall not be cigarettes, the basic cost thereof shall be
 7 determined in the manner provided in § 4-75-702(10).

8
 9 ~~§ 4-75-710. Sales by a wholesaler to a wholesaler.~~

10 ~~When one wholesaler sells cigarettes to any other wholesaler, the former~~
 11 ~~shall not be required to include in his selling price to the latter the cost~~
 12 ~~to the wholesaler, as provided by § 4-75-702, but the latter wholesaler, upon~~
 13 ~~resale to a retailer, shall be subject to the provisions of that section.~~

14
 15 § 4-75-711. Determination of cost generally - Cost surveys.

16 (a) In determining ~~cost to the wholesaler and~~ cost to the retailer, the
 17 court shall receive, and consider as bearing on the bona fides of the cost,
 18 evidence tending to show that any person complained against under any of the
 19 provisions of this subchapter purchased the cigarettes involved in the
 20 complaint before the court at a fictitious price or upon terms or in such
 21 manner or under such invoices as to conceal the true cost, discounts, or terms
 22 of purchase, and shall also receive and consider as bearing on the bona fides
 23 of the costs, evidence of the normal, customary, and prevailing terms and
 24 discounts in connection with other sales of a similar nature in the trade area
 25 or state.

26 (b) Where a cost survey pursuant to recognized statistical and cost
 27 accounting practices has been made for the trading area in which a violation
 28 of this subchapter is committed or charged to determine and establish on the
 29 basis of actual existing conditions ~~the lowest cost to wholesalers or the~~
 30 ~~lowest cost to retailers~~ within the area, the cost survey shall be deemed
 31 competent evidence in any action or proceeding under this subchapter as
 32 tending to prove ~~actual cost to the wholesaler or actual cost to the retailer~~
 33 complained against, but any party against whom any such cost survey may be
 34 introduced in evidence shall have the right to offer evidence tending to prove
 35 any inaccuracy of the cost survey or any state of facts which would impair its
 36 probative value.

1
 2 § 4-75-712. Determination of cost - Sales outside ordinary channels of
 3 business.

4 In establishing the basic cost of cigarettes to ~~a wholesaler or a~~
 5 retailer, it shall not be permissible to use the invoice cost or the actual
 6 cost of any cigarettes purchased at a forced, bankrupt, or closeout sale, or
 7 other sale outside of the ordinary channels of trade.

8
 9 § 4-75-713. Remedies.

10 (a) The Director of the Department of Finance and Administration, or
 11 any person injured by any violation or who would suffer injury from any
 12 threatened violation of this subchapter, may maintain an action in any court
 13 of equitable jurisdiction to prevent, restrain, or enjoin the violation or
 14 threatened violation.

15 (b)(1) If, in such action, a violation or threatened violation of this
 16 subchapter is established, the court shall enjoin and restrain, or otherwise
 17 prohibit, the violation or threatened violation, and, in addition thereto, the
 18 court shall assess in favor of the plaintiff and against the defendant the
 19 costs of suit including reasonable attorney's fees.

20 (2) In the action it is not necessary that actual damages to the
 21 plaintiff be alleged or proved, but, where alleged or proved, the plaintiff in
 22 the action, in addition to the injunctive relief and costs of suit, including
 23 reasonable attorney's fees, shall be entitled to recover from the defendant
 24 the actual damages sustained by him.

25 (c) In the event that no injunctive relief is sought or required, any
 26 person injured by a violation of this subchapter may maintain an action for
 27 damages and costs of suit in any court of general jurisdiction."
 28

29 SECTION 2. All provisions of this act of a general and permanent nature
 30 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
 31 Revision Commission shall incorporate the same in the Code.
 32

33 SECTION 3. 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
 36 the invalid provision or application, and to this end the provisions of this

1 act are declared to be severable.

2
3 SECTION 4. All laws and parts of laws in conflict with this act are
4 hereby repealed.

5
6 SECTION 5. EMERGENCY CLAUSE. It is hereby found and determined by the
7 Eighty-second General Assembly that the Unfair Cigarette Sales Act has served
8 the purposes for which enacted and is no longer beneficial to the state, the
9 cigarette wholesalers or retailers, or to the consumers in the state; that the
10 act now serves only as an unfair burden on cigarette wholesalers and retailers
11 and an unreasonable and unfair restriction on fair competition; that it is in
12 the best interest of the state and all parties concerned that the Unfair
13 Cigarette Sales Act be repealed at the earliest practical date and that this
14 act is designed to accomplish this purpose and should be given effect
15 immediately. Therefore, an emergency is declared to exist and this act being
16 immediately necessary for the preservation of the public peace, health and
17 safety shall become effective on the date of its approval by the Governor. If
18 the bill is neither approved nor vetoed by the Governor, it shall become
19 effective on the expiration of the period of time during which the Governor
20 may veto the bill. If the bill is vetoed by the Governor and the veto is
21 overridden, it shall become effective on the date the last house overrides the
22 veto.