

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

State of Arkansas
83rd General Assembly
Regular Session, 2001

A Bill

HOUSE BILL 2251

By: Representative D. Elliott

For An Act To Be Entitled

AN ACT TO REPEAL ARKANSAS CODE 4-75-701 THROUGH 4-75-713, THE "UNFAIR CIGARETTE SALES ACT"; AND FOR OTHER PURPOSES.

Subtitle

AN ACT TO REPEAL ARKANSAS CODE 4-75-701 THROUGH 4-75-713, 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 Arkansas Code 4-75-701 is repealed:

~~4-75-701. Title.~~

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

SECTION 2. Arkansas Code 4-75-702 is repealed:

~~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 Arkansas Tobacco Control Board;~~

~~(3) "Cigarettes" means and includes any roll for smoking made~~

1 wholly or in part of tobacco, irrespective of size or shape and whether or not
2 the tobacco is flavored, adulterated, or mixed with any other ingredient, the
3 wrapper or cover of which is made of paper or any other substance or material,
4 except tobacco;

5 (4) ~~"Wholesaler" means and includes:~~

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

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

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

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

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

~~(6) "Buying pool" means and includes any combination, corporation, association, affiliation, or group of retail dealers operating jointly in the purchase, sale, exchange, or barter of cigarettes, the profits of which accrue directly or indirectly to the retail dealers;~~

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

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

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

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

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

~~(B) In the absence of proof of a lesser or higher cost of doing business by the wholesale dealer making the sale, the cost of doing business by the wholesale dealer shall be presumed to be two percent (2%) of the basic cost of the cigarettes to the wholesale dealer, plus cartage to the~~

~~retail outlet, if performed or paid for by the wholesale dealer, which cartage cost, in the absence of proof of a lesser or higher cost, shall be presumed to be three fourths of one percent (0.75%) of the basic cost of the cigarettes to the wholesale dealer; and~~

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

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

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

SECTION 3. Arkansas Code 4-75-703 is repealed:

~~4-75-703. Sales excepted from subchapter.~~

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

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

~~(2) Where cigarettes are advertised, offered for sale, or sold in a bona fide clearance sale for the purpose of discontinuing trade in such cigarettes, and the advertising, offer to sell, or sale shall state the reason~~

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

(3) Where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and the advertising, offer to sell, or sale shall state the reason therefor and the quantity of the cigarettes advertised, offered for sale, or to be sold;

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

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

SECTION 4. Arkansas Code 4-75-704 is repealed:

~~4-75-704. Transactions permitted to meet lawful competition.~~

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

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

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

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

SECTION 5. Arkansas Code 4-75-705 is repealed:

~~4-75-705. Contracts in violation of subchapter void.~~

Any contract, express or implied, made by any person in violation

~~of any of the provisions of this subchapter is illegal and void and no recovery shall be had thereon.~~

SECTION 6. Arkansas Code 4-75-706 is repealed:

~~4-75-706. Director of the Arkansas Tobacco Control Board Powers and duties.~~

~~(a)(1) The Director of the Arkansas Tobacco Control Board shall prescribe, adopt, and enforce rules and regulations relating to the administration and enforcement of this subchapter.~~

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

~~(B) The director is also empowered to investigate price fixing.~~

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

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

~~(c) Any ruling, order, or decision of the director shall be subject to review, as provided by law, in any court of competent jurisdiction in the county in which the person affected resides.~~

SECTION 7. Arkansas Code 4-75-707 is repealed:

~~4-75-707. License requirement.~~

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

~~(b) All such licenses shall be issued by the Director of the Arkansas~~

~~Tobacco Control Board, or his designated agent, who shall make rules and regulations respecting applications therefor and issuance thereof.~~

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

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

SECTION 8. Arkansas Code 4-75-708 is repealed:

~~4-75-708. Sales at less than cost, rebates, concessions, etc.~~

~~Penalty.~~

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

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

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

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

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

~~(e) Evidence of advertisement, offering to sell, or sale of cigarettes by any wholesaler or retailer at less than cost to him, or evidence of any offer of a rebate in price or the giving of a rebate in price or an offer of a concession or the giving of a concession of any kind or nature whatsoever in~~

1 connection with the sale of cigarettes, or the inducing or attempt to induce
 2 or the procuring or the attempt to procure the purchase of cigarettes at a
 3 price less than cost to the wholesaler or the retailer shall be prima facie
 4 evidence of intent to injure competitors and destroy or substantially lessen
 5 competition.

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 7 SECTION 9. Arkansas Code 4-75-709 is repealed:

8 ~~4-75-709. Combination sales.~~

9 ~~In all advertisements, offers for sale, or sales involving two (2) or~~
 10 ~~more items, at least one (1) of which items is cigarettes, at a combined~~
 11 ~~price, and in all advertisements, offers for sale, or sales involving the~~
 12 ~~giving of any gift or concession of any kind, whether coupons or otherwise,~~
 13 ~~the wholesaler's or retailer's combined selling price shall not be below the~~
 14 ~~cost to the wholesaler or the cost to the retailer, respectively, of the total~~
 15 ~~of all articles, products, commodities, gifts, and concessions included in the~~
 16 ~~transactions; but if any such articles, products, commodities, gifts, or~~
 17 ~~concessions shall not be cigarettes, the basic cost thereof shall be~~
 18 ~~determined in the manner provided in § 4-75-702(10).~~

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 20 SECTION 10. Arkansas Code 4-75-710 is repealed:

21 ~~4-75-710. Sales by wholesaler to a wholesaler.~~

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

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 27 SECTION 11. Arkansas Code 4-75-711 is repealed:

28 ~~4-75-711. Determination of cost generally—cost surveys.~~

29 ~~(a) In determining cost to the wholesaler and cost to the retailer, the~~
 30 ~~court shall receive, and consider as bearing on the bona fides of the cost,~~
 31 ~~evidence tending to show that any person complained against under any of the~~
 32 ~~provisions of this subchapter purchased the cigarettes involved in the~~
 33 ~~complaint before the court at a fictitious price or upon terms or in such~~
 34 ~~manner or under such invoices as to conceal the true cost, discounts, or terms~~
 35 ~~of purchase, and shall also receive and consider as bearing on the bona fides~~
 36 ~~of the costs, evidence of the normal, customary, and prevailing terms and~~

~~discounts in connection with other sales of a similar nature in the trade area or state.~~

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

SECTION 12. Arkansas Code 4-75-712 is repealed:

~~4-75-712. Determination of cost—Sales outside ordinary channels of business.~~

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

SECTION 13. Arkansas Code 4-75-713 is repealed:

~~4-75-713. Remedies.~~

~~(a) The Director of the Arkansas Tobacco Control Board or any person injured by any violation or who would suffer injury from any threatened violation of this subchapter may maintain an action in any court of equitable jurisdiction to prevent, restrain, or enjoin the violation or threatened violation.~~

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

~~(2) In the action it is not necessary that actual damages to the plaintiff be alleged or proved, but, where alleged or proved, the plaintiff in~~

~~the action, in addition to the injunctive relief and costs of suit, including reasonable attorney's fees, shall be entitled to recover from the defendant the actual damages sustained by him.~~

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