

SENATE BILL 770

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9lr2643
CF HB 680

By: **Senator Astle**

Introduced and read first time: February 6, 2009

Assigned to: Finance

A BILL ENTITLED

1 AN ACT concerning

2 **Commercial Law - Maryland Cigarette Sales Below Cost Act - Cost to**
3 **Retailer and Wholesaler**

4 FOR the purpose of altering the definitions of “basic cost of cigarettes” and “cost to the
5 retailer” for purposes of the Maryland Cigarette Sales Below Cost Act; repealing
6 the definition of “cost to the wholesaler”; repealing certain special cost
7 provisions; altering the elements of certain prohibited acts; and generally
8 relating to the Maryland Cigarette Sales Below Cost Act.

9 BY repealing and reenacting, with amendments,
10 Article – Commercial Law
11 Section 11–501, 11–504, 11–505, and 11–506
12 Annotated Code of Maryland
13 (2005 Replacement Volume and 2008 Supplement)

14 BY repealing
15 Article – Commercial Law
16 Section 11–503
17 Annotated Code of Maryland
18 (2005 Replacement Volume and 2008 Supplement)

19 BY renumbering
20 Article – Commercial Law
21 Section 11–504 through 11–510, respectively
22 to be Section 11–503 through 11–509, respectively
23 Annotated Code of Maryland
24 (2005 Replacement Volume and 2008 Supplement)

25 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
26 MARYLAND, That the Laws of Maryland read as follows:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 **Article – Commercial Law**

2 11–501.

3 (a) In this subtitle the following words have the meanings indicated.

4 (b) “Basic cost of cigarettes” means the [lesser of the] invoice cost or the
5 replacement cost of cigarettes [to the retailer or wholesaler; plus any in–freight charge
6 to the wholesaler otherwise not included in the invoice cost or the replacement cost;
7 plus, for the wholesaler, the full face value of any applicable Maryland cigarette tax
8 payable by the wholesaler; minus any trade discount or discount for cash].9 (c) (1) “Cigarettes” means any size or shaped roll for smoking that is
10 made of tobacco or tobacco mixed with another ingredient and wrapped in paper or in
11 any other material except tobacco.

12 (2) “Cigarettes” does not include cigars.

13 (d) (1) “Cost to the retailer”[, subject to the special cost provisions of §
14 11–503 of this subtitle,] means the basic cost of cigarettes to a retailer, which includes
15 [the cost to a wholesaler, plus] a markup to cover his cost of doing business, which cost
16 of doing business, in the absence of satisfactory proof of a lesser cost, is presumed to be
17 8 percent of the basic cost of cigarettes to him.18 (2) As to each carton of 200 cigarettes, a fractional part of a cent equal
19 to one–tenth of a cent or more in the cost to the retailer shall be rounded off to the
20 next higher cent.21 [(e) (1) “Cost to the wholesaler”, subject to the special cost provisions of §
22 11–503 of this subtitle, means the basic cost of cigarettes to a wholesaler, plus a
23 markup to cover his cost of doing business, which cost of doing business:

24 (i) Includes the cartage cost to a retailer; and

25 (ii) In the absence of satisfactory proof of a lesser cost, is
26 presumed to be 5 percent of the basic cost of cigarettes to him.27 (2) As to each carton of 200 cigarettes, a fractional part of a cent equal
28 to one–tenth of a cent or more in the cost to the wholesaler shall be rounded off to the
29 next higher cent.]30 [(f) (E) “Person” includes an individual, corporation, business trust, estate,
31 trust, partnership, association, two or more persons having a joint or common interest,
32 or any other legal or commercial entity.33 [(g) (F) “Replacement cost” means the cost per unit for which the cigarettes
34 could have been bought by the wholesaler or retailer at any time within 30 days before

1 the date of sale by him if bought in the same quantity as his last purchase of the
2 cigarettes.

3 [(h)] (G) “Retail sale of cigarettes” includes any sale whereby cigarettes are
4 sold for a valuable consideration, including an exchange or barter and a sale through a
5 vending machine, made in the ordinary course of trade or the usual conduct of the
6 seller’s business to a purchaser for consumption or use other than resale.

7 [(i)] (H) (1) “Retailer” includes any person engaged in the business of
8 making retail sales of cigarettes within the State at a store, stand, booth, or
9 concession, through vending machines, or otherwise.

10 (2) If the person is engaged in the business of making both retail sales
11 of cigarettes and wholesale sales of cigarettes, the word only applies to the retail sales
12 of cigarettes portion of the business.

13 [(j)] (I) “Sell” includes advertise, offer to sell, or offer for sale.

14 [(k)] (J) “Vending machine operator” means a person who:

15 (1) Makes retail sales of cigarettes or has cigarettes in his possession
16 with the intent to sell them exclusively at retail through the medium of a vending
17 machine or any other mechanical device used for dispensing cigarettes;

18 (2) Owns, operates, and services vending machines or other
19 mechanical devices used to dispense cigarettes on 40 or more premises; and

20 (3) Services the machines or devices by maintaining an established
21 place of business for the purchase of cigarettes, including warehousing facilities for the
22 storage and distribution of cigarettes.

23 [(l)] (K) (1) “Wholesale sale of cigarettes” includes any sale whereby
24 cigarettes are sold for a valuable consideration, made in the ordinary course of trade or
25 in the usual conduct of the seller’s business to a retailer, other than to a vending
26 machine operator or to a sub-wholesaler described in subsection [(m)(2)] (L)(2) of this
27 section, for the bona fide purpose of resale.

28 (2) “Wholesale sale of cigarettes” includes any transfer of cigarettes on
29 consignment or otherwise, whereby title is retained by the seller as security for the
30 payment of the purchase price.

31 [(m)] (L) (1) “Wholesaler” means a person who purchases cigarettes
32 directly from a manufacturer.

33 (2) “Wholesaler” includes a person, who, as a sub-wholesaler:

1 (i) Purchases cigarettes from another wholesaler solely for the
2 purpose of bona fide resale to retailers other than those directly or indirectly owned,
3 affiliated, or controlled by him; and

4 (ii) Services the retailers by maintaining an established place of
5 business for the sale of cigarettes, including warehouse facilities, adequate inventory,
6 proper accounting records, and necessary equipment and vehicles for the storage and
7 distribution of cigarettes.

8 (3) If the person is engaged in the business of making both wholesale
9 sales of cigarettes and retail sales of cigarettes, the word only applies to the wholesale
10 sales of cigarettes portion of the business.

11 [11-503.

12 (a) In a wholesale sale of cigarettes, the presumptive wholesale markup of 5
13 percent provided for in § 11-501(e) of this subtitle may be reduced by 2 cents for each
14 carton of 200 cigarettes, if:

15 (1) The cigarettes are not delivered unless their full price is received
16 by the wholesaler at or before delivery; and

17 (2) The purchaser performs or pays for the cartage cost of the
18 cigarettes to the place of business of the purchaser.

19 (b) (1) In the absence of satisfactory proof of a lesser aggregate cost of
20 doing business, a vending machine operator or retailer who purchases cigarettes at
21 prices ordinarily invoiced to a wholesaler and who receives the wholesaler's discounts
22 on them shall:

23 (i) First, add to his basic cost of cigarettes the wholesale
24 markup of 5 percent provided for in § 11-501(e) of this subtitle to cover the cost of
25 doing business as a wholesaler; and

26 (ii) Then, on the resultant sum, add the retail markup of 8
27 percent provided for in § 11-501(d) of this subtitle.

28 (2) If the discount received by the vending machine operator or
29 retailer is less than that ordinarily allowed to wholesalers, the wholesale markup of 5
30 percent may be reduced by the difference between the discount ordinarily allowed to
31 wholesalers and the discount received by the retailer or vending machine operator.

32 (c) (1) A wholesaler who sells cigarettes to another wholesaler or to a
33 vending machine operator is not required to include in his selling price the cost to the
34 wholesaler. However, in the absence of satisfactory proof of a lesser cost for the service
35 rendered, the wholesaler shall include in the selling price his basic cost of cigarettes,
36 plus a charge of 1 percent of his basic cost of cigarettes.

1 (2) If a wholesaler purchases cigarettes from another wholesaler, then,
2 on resale of the cigarettes to a retailer, he is the wholesaler for the purposes of this
3 subtitle.]

4 11-504.

5 (a) A retailer or wholesaler with intent to injure a competitor or to destroy or
6 substantially lessen competition may not make a retail sale of cigarettes or a
7 wholesale sale of cigarettes at less than the **INVOICE** cost to the retailer or the
8 **INVOICE** cost to the wholesaler, respectively.

9 (b) A retailer may not purchase cigarettes from a wholesaler at [a] **AN**
10 **INVOICE** cost which directly or indirectly is less than the **INVOICE** cost to the
11 wholesaler by any means, including offering, accepting, inducing, or attempting to
12 induce a rebate in price or a concession of any kind in connection with the sale or
13 purchase of cigarettes.

14 11-505.

15 (a) Except as provided in subsection (b) of this section, a retailer or
16 wholesaler with intent to injure a competitor or to destroy or substantially lessen
17 competition may not:

18 (1) Sell cigarettes in combination with any other item of merchandise
19 if the other item is given free of charge or sold at a price below its cost to the retailer
20 or its cost to the wholesaler, respectively, as defined in Subtitle 4 of this title;

21 (2) Sell cigarettes in combination with any other item of merchandise
22 if the total sale price for the cigarettes and all other items included in the sale is less
23 than the sum of:

24 (i) The **INVOICE** cost to the retailer or the **INVOICE** cost to the
25 wholesaler, respectively, of the cigarettes; and

26 (ii) The cost to the retailer or the cost to the wholesaler,
27 respectively, as defined in Subtitle 4 of this title, of all other items included in the sale,
28 including items given free of charge in connection with the sale;

29 (3) Give cigarettes free of charge, except in the case of specially
30 packaged manufacturers' samples which are designated on the package as not to be
31 sold; or

32 (4) Make any rebate, advertising allowance, or any other concession by
33 any means or device in connection with the sale of cigarettes whereby the cigarettes
34 are in effect sold below their **INVOICE** cost to the retailer or their **INVOICE** cost to the
35 wholesaler, respectively.

1 (b) A retailer or wholesaler may pass on to a purchaser any reduction in cost
2 which results from:

3 (1) Payment or compensation given by a manufacturer of cigarettes on
4 a uniform and nondiscriminatory basis for promotional services; or

5 (2) Any coupon issued and ultimately redeemed by a cigarette
6 manufacturer.

7 11-506.

8 (a) In any proceeding under this subtitle, including a proceeding relating to
9 licenses before the State Comptroller, proof of a sale by a retailer or a wholesaler of
10 cigarettes or of any other item in combination or in connection with cigarettes at less
11 than their **INVOICE** cost to the retailer or their **INVOICE** cost to the wholesaler,
12 respectively, is prima facie evidence of intent to injure a competitor or to destroy or
13 substantially lessen competition.

14 (b) In determining **INVOICE** cost to the retailer or **INVOICE** cost to the
15 wholesaler, the State Comptroller or the court shall receive and consider evidence:

16 (1) That the person complained against purchased cigarettes at a
17 fictitious price or on terms, in a manner, or under invoices which conceal the true
18 costs, discounts, or terms of purchase; and

19 (2) Of the normal, customary, and prevailing terms and discounts in
20 connection with other sales of a similar nature in the trade area.

21 SECTION 2. AND BE IT FURTHER ENACTED, That Section(s) 11-504
22 through 11-510, respectively, of Article – Commercial Law of the Annotated Code of
23 Maryland be renumbered to be Section(s) 11-503 through 11-509, respectively.

24 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect
25 October 1, 2009.