

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 2478

BY DELEGATES STEELE, PACK, LOVEJOY, MANDT AND

ROHRBACH

[Introduced January 08, 2020; Referred

to the Committee on Small Business,

Entrepreneurship and Economic Development then

the Judiciary.]

1 A BILL to amend and reenact §47-11A-6 and §47-11A-9 of the Code of West Virginia, 1931, as
2 amended, relating to including “applicable taxes” to the definition of “cost” for retailers; and
3 providing for treble damages, court costs, litigation costs, and attorney fees for filing a suit
4 in bad faith.

Be it enacted by the Legislature of West Virginia:

ARTICLE 11A. UNFAIR TRADE PRACTICES.

§47-11A-6. How cost determined.

1 (a) The term “cost” when applicable to the business of retailer shall mean bona fide cost
2 and shall mean: (i) The invoice cost of the product or item of merchandise to the retailer to include
3 applicable taxes, or the replacement cost thereof to the retailer within 30 days prior to the date of
4 sale, offer for sale or advertisement for sale, as the case may be, in the quantity last purchased,
5 whichever is lower, from either of which there shall be deducted all trade discounts, except
6 customary discounts for cash; and (ii) to either of which there shall be added the following items
7 of expense:

8 (1) Freight charges not otherwise included in the cost of the article, product or item of
9 merchandise, but which freight charges shall not be construed as including cartage to retail outlet
10 if done or paid for by the retailer;

11 (2) A markup to cover, in part, the cost of doing business, which markup, in the absence
12 of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement
13 cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges:
14 *Provided*, That such a markup to cover the cost of doing business as provided for in this
15 subdivision shall be exclusive of any federal and state motor fuel taxes.

16 (b) The term “cost” when applicable to the business of a wholesaler shall mean bona fide
17 cost and shall mean: (i) The invoice cost of the merchandise to the wholesaler to include
18 applicable taxes, or the replacement cost of the merchandise to the wholesaler within 30 days
19 prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity

20 last purchased, whichever is lower, from either of which there shall be deducted all trade discounts
21 except customary discounts for cash; and (ii) to either of which there shall be added the following
22 items of expense:

23 (1) Freight charges not otherwise included in the cost of the article, product or item of
24 merchandise, but which freight charges shall not be construed as including cartage to the retail
25 outlet if done or paid for by the wholesaler;

26 (2) A markup to cover, in part, the cost of doing business, which markup in the absence
27 of proof of a lesser cost, shall be four percent of the aggregate of invoice cost or replacement cost
28 (whichever is used), less trade discounts as aforesaid, and plus said freight charges: *Provided*,
29 That such a markup to cover the cost of doing business as provided for in this subdivision shall
30 be exclusive of any federal and state motor fuel taxes.

§47-11A-9. Injunctions; damage suits; and jurisdiction.

1 (a) Any person, partnership, firm, corporation, or other entity injured by a violation of the
2 provisions of this article may maintain an action to enjoin a continuance of any such violation in
3 the circuit court of the county wherein said violation is alleged to have occurred. If a violation is
4 established in such an action, the court shall enjoin, restrain or otherwise prohibit such violation.
5 In such action, if damages are alleged and proven, the plaintiff in the action, in addition to
6 injunctive relief, shall recover from the defendant the actual damages sustained and proven to be
7 a result of the violation. Upon a finding by the court of bad faith on the part of the violator, the
8 court may award the plaintiff treble damages, court costs, litigation costs, and attorneys' fees.

9 (b) In the event no injunctive relief is sought or required, any person, partnership, firm,
10 corporation, or other entity injured by a violation of the provisions of this article may maintain an
11 action for damages alone in the circuit court of the county wherein said violation is alleged to have
12 occurred. If a violation is established in such an action and proven, a plaintiff shall recover from
13 the defendant the actual damages sustained and proven to be a result of the violation. Upon a

14 finding by the court of bad faith on the part of the violator, the court may award the plaintiff treble
15 damages, court costs, litigation costs, and attorneys' fees.

16 (c) In any action under §47-11A-9(a) or §47-11A-9(b) of this code it shall be an absolute
17 defense that the sale price of any product or item of merchandise alleged to be in violation of this
18 article is equal to or greater than the sales price of the same product or item being sold by a
19 competitor of the defendant.

20 (d) A court may dismiss any action under §47-11A-9 (a) or §47-11A-9(b) of this code upon
21 a motion for summary judgment if the court finds pursuant to Rule 56 of the West Virginia Rules
22 of Civil Procedure that the provisions of §47-11A-9(c) of this code have been satisfied.

23 (e) The circuit courts of this state shall have jurisdiction of actions under this section.

NOTE: The purpose of this bill is to modify the Fair Trade Practices Act with regard to costs and damages.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.