

IC 24-3-2

Chapter 2. Cigarette Fair Trade Act

IC 24-3-2-1

Declaration of policy

Sec. 1. It is declared to be the public policy of this state to promote the public welfare by making unlawful unfair, dishonest, deceptive, destructive and fraudulent business practices now existing in transactions involving the sale of, offer to sell, or inducement to sell cigarettes in this state in wholesale and retail trades. The offering for sale or sale of cigarettes below cost in the retail or wholesale trade with the intent of injuring competitors or destroying or substantially lessening competition is an unfair and deceptive business practice and adversely affects the collection of revenue due this state from the sale of cigarettes.

(Formerly: Acts 1949, c.51, s.1.)

IC 24-3-2-2

Definitions

Sec. 2. Unless the context in this chapter requires otherwise, the term:

(a) "Cigarette" shall mean and include any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and irrespective of tobacco being flavored, adulterated, or mixed with any other ingredient, where such roll has a wrapper or cover made of paper or any other material; provided the definition in this paragraph shall not be construed to include cigars.

(b) "Person" or the term "company", used in this chapter interchangeably, means and includes any individual, assignee, receiver, commissioner, fiduciary, trustee, executor, administrator, institution, bank, consignee, firm, partnership, limited liability company, joint vendor, pool, syndicate, bureau, association, cooperative association, society, club, fraternity, sorority, lodge, corporation, municipal corporation, or other political subdivision of the state engaged in private or proprietary activities or business, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(c) "Distributor" shall mean and include every person who sells, barter, exchanges, or distributes cigarettes in the state of Indiana to retail dealers for the purpose of resale, or who purchases for resale cigarettes from a manufacturer of cigarettes or from a wholesaler, jobber, or distributor outside the state of Indiana who is not a distributor holding a registration certificate issued under the provisions of IC 6-7-1.

(d) "Retailer" shall mean every person, other than a distributor, who purchases, sells, offers for sale, or distributes cigarettes to consumers or to any person for any purpose other than resale, irrespective of quantity or amount or the number of sales.

(e) "Sell at retail", "sale at retail", and "retail sales" shall mean

and include any transfer of title to cigarettes for a valuable consideration made in the ordinary course of trade or usual conduct of the seller's business to the purchaser for consummation or use.

(f) "Sell at wholesale", "sale at wholesale", and "wholesale sales" shall mean and include any transfer of title to cigarettes for a valuable consideration made in the ordinary course of trade or usual conduct of a distributor's business.

(g) "Basic cost of cigarettes" shall mean the invoice cost of cigarettes to the retailer or distributor, as the case may be, or the replacement cost of cigarettes to the retailer or distributor, as the case may be, within thirty (30) days prior to the date of sale, in the quantity last purchased, whichever is the lower, less all trade discounts and customary discounts for cash, plus the cost at full face value of any stamps which may be required by IC 6-7-1, if not included by the manufacturer in his selling price to the distributor.

(h) "Department" shall mean the alcohol and tobacco commission or its duly authorized assistants and employees.

(i) "Cost to the retailer" shall mean the basic cost of cigarettes 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 in his allocation of overhead costs and expenses paid or incurred 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; however, any retailer who, in connection with the retailer's purchase, receives not only the discounts ordinarily allowed upon purchases by a retailer, but also, in whole or in part, discounts ordinarily allowed on purchases by a distributor shall, in determining costs to the retailer pursuant to this section, add the cost to the distributor, as defined in paragraph (j), to the basic cost of cigarettes to said retailer as well as the cost of doing business by the retailer. 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 ten percent (10%) of the basic cost of cigarettes to the retailer. In the absence of proof of a lesser or higher cost of doing business, the cost of doing business by the retailer, who in connection with the retailer's purchase receives not only the discounts ordinarily allowed upon purchases by a retailer, but also, in whole or in part, the discounts ordinarily allowed upon purchases by a distributor, shall be presumed to be ten percent (10%) of the sum of the basic cost of cigarettes plus the cost of doing business by the distributor.

(j) "Cost to the distributor" shall mean the basic cost of cigarettes to the distributor, plus the cost of doing business by the distributor as evidenced by the standards and methods of accounting regularly employed by him in his allocation of overhead costs and expenses, paid or incurred, 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. In the absence of proof of

a lesser or higher cost of doing business by the distributor making the sale, the cost of doing business by the wholesaler shall be presumed to be four percent (4%) of the basic cost of cigarettes to the distributor, plus cartage to the retail outlet, if performed or paid for by the distributor, which cartage cost, in the absence of proof of a lesser or higher cost, shall be deemed to be one-half of one percent (0.5%) of the basic cost of cigarettes to the distributor.

(k) "Registration certificate" refers to the registration certificate issued to cigarette distributors by the department of state revenue under IC 6-7-1-16.

(Formerly: Acts 1949, c.51, s.2.) As amended by P.L.152-1986, SEC.35; P.L.8-1993, SEC.344; P.L.204-2001, SEC.61; P.L.252-2003, SEC.12; P.L.172-2011, SEC.130.

IC 24-3-2-3

Sale at less than cost; penalty

Sec. 3. (a) It is a Class A infraction for a retailer or distributor, with intent to injure competitors or destroy or substantially lessen competition, to offer to sell or sell at retail or wholesale cigarettes at less than the cost to him. The registration certificate held by such a distributor under IC 6-7-1 may be revoked by the department for the balance of the term thereof.

(b) Evidence of offering to sell or sale of cigarettes by any retailer or distributor at less than the cost to him is prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(c) Notwithstanding IC 34-28-5-5(c), a judgment for a violation of this section shall be deposited in the enforcement and administration fund established under IC 7.1-4-10-1.

(Formerly: Acts 1949, c.51, s.3.) As amended by Acts 1978, P.L.2, SEC.2408; P.L.252-2003, SEC.13.

IC 24-3-2-4

Sale of multiple items at combined price

Sec. 4. In all offers for sale or sales involving two (2) or more items, at least one (1) of which items is cigarettes, at a combined price, and in all offers for sale or sales, involving the giving of any gift or concession of any kind whatsoever (whether it be coupons or otherwise), the retailer's or distributor's combined selling price shall not be below the cost to the retailer or the cost to the distributor, irrespective of the total of all articles, products, commodities, gifts and concessions included in such transactions.

(Formerly: Acts 1949, c.51, s.4.)

IC 24-3-2-4.7

Failure to provide documentary evidence of distributor; penalty; seizure of cigarettes or other tobacco products

Sec. 4.7. (a) A retailer shall produce an invoice or other documentary evidence proving that the retailer obtained cigarettes or a tobacco product (as defined in IC 6-7-2-5) from a distributor that

holds a valid registration certificate.

(b) Each day a retailer fails to produce an invoice or other evidence under subsection (a) constitutes a separate violation of this section.

(c) This subsection applies in addition to or instead of any other civil or criminal penalty. The department or the department of state revenue may impose on a retailer that violates subsection (a) a civil penalty that does not exceed the greater of:

(1) five hundred percent (500%) of the retail value of the cigarettes described in subsection (a); or

(2) five thousand dollars (\$5,000);

for each violation.

(d) In addition to any other penalty described in this section, the department or the department of state revenue may seize the cigarettes or other tobacco products for which the retailer is unable to produce the invoice or documentary evidence described in subsection (a). The seized cigarettes or other tobacco products shall be forfeited to the state and destroyed.

(e) Civil penalties collected under this chapter shall be deposited as follows:

(1) Seventy percent (70%) to the enforcement and administration fund established under IC 7.1-4-10.

(2) Thirty percent (30%) to the state general fund for the use of the department of state revenue.

As added by P.L.252-2003, SEC.14.

IC 24-3-2-5

Cost to the distributor; further definition

Sec. 5. When one distributor sells cigarettes to any other distributor, the former shall not be required to include in his selling price to the latter cost to the distributor as provided in section 2(j) of this chapter, but the latter distributor, upon resale to the retailer, shall be subject to the provisions of section 2(j) of this chapter.

(Formerly: Acts 1949, c.51, s.5.) As amended by P.L.152-1986, SEC.36.

IC 24-3-2-6

Exceptions

Sec. 6. The provisions of this chapter shall not apply to sales at retail or sales at wholesale made:

(a) in an isolated transaction and not in the usual course of business;

(b) where cigarettes are offered for sale or sold in bona fide clearance sales for the purpose of discontinuing trade in such cigarettes and said advertising, offer to sell, or sale shall state the reason thereof and the quantity of such cigarettes offered for sale or to be sold;

(c) where cigarettes are offered for sale or sold as imperfect or damaged and said offering to sell or sale shall state the reason therefor and the quantity of such cigarettes offered for sale or

to be sold;

(d) where cigarettes are sold upon the final liquidation of a business; or

(e) where cigarettes are offered for sale or sold by any fiduciary or other officer acting under the order or direction of any court.

(Formerly: Acts 1949, c.51, s.6.) As amended by P.L.152-1986, SEC.37.

IC 24-3-2-7

Sale to meet price of competitor

Sec. 7. (a) Any retailer may 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 him as a retailer, as defined in section 2(i) of this chapter. Any distributor may 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 him as a distributor, as defined in section 2(j) of this chapter. The price of cigarettes offered for sale or sold under the exceptions specified in section 6 of this chapter 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.

(b) In the absence of proof of the price of a competitor under this section, the lowest cost to the retailer or the lowest cost to the distributor, as the case may be, determined by any cost survey made pursuant to section 11 of this chapter, may be deemed the price of a competitor within the meaning of this section.

(Formerly: Acts 1949, c.51, s.7.) As amended by P.L.152-1986, SEC.38.

IC 24-3-2-8

Contract in violation of chapter; contract

Sec. 8. Any contract, expressed or implied, made by any person in violation of any of the provisions of this chapter is declared to be an illegal and void contract, and no recovery thereon shall be had.

(Formerly: Acts 1949, c.51, s.8.) As amended by P.L.152-1986, SEC.39.

IC 24-3-2-9

Evidence to establish cost

Sec. 9. (a) In determining cost to the retailer and cost to the distributor, the court or the department, as the case may be, shall receive and consider as bearing on the bona fides of such cost evidence tending to show that any person complained against under any of the provisions of this chapter purchased cigarettes with respect to the sale of which complaint is made at a fictitious price, or upon terms, or in such manner, or under such invoices, as to conceal the true cost, discounts, or terms of purchase, and shall also receive and consider as bearing on the bona fides of such cost 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) Merchandise given gratis or payment made to a retailer or distributor for display, or advertising, or promotion purposes, or otherwise shall not be considered in determining the cost of cigarettes to the retailer or distributor.

(Formerly: Acts 1949, c.51, s.9.) As amended by P.L.152-1986, SEC.40.

IC 24-3-2-10

Evidence of price outside ordinary channels of trade

Sec. 10. (a) In establishing the cost of cigarettes to the retailer or distributor, the invoice cost of said cigarettes purchased at a forced, bankrupt, or close-out sale, or other sale outside of the ordinary channels of trade, may not be used as a basis for justifying a price lower than one based upon the replacement cost of the cigarettes to the retailer or distributor, within thirty (30) days prior to the date of sale, in the quantity last purchased, through the ordinary channels of trade.

(b) Any cigarettes that are imported or reimported into the United States for sale or distribution under a trade name, trade dress, or trademark that is the same as or confusingly similar to a trade name, trade dress, or trademark used for cigarettes manufactured in the United States for sale or distribution in the United States are presumed to be purchased outside the ordinary channels of trade.

(Formerly: Acts 1949, c.51, s.10.) As amended by P.L.21-2000, SEC.9.

IC 24-3-2-11

Cost survey as evidence

Sec. 11. Where a cost survey pursuant to recognized statistical and cost accounting practices has been made for the trading area in which the offense is committed to establish the lowest cost to the retailer and the lowest cost to the distributor, said cost survey shall be deemed competent evidence to be used in proving the cost to the person complained against within the provisions of this chapter.

(Formerly: Acts 1949, c.51, s.11.) As amended by P.L.152-1986, SEC.41.

IC 24-3-2-12

Injunction

Sec. 12. (a) The department, or any person injured by any violation or who shall suffer injury from any threatened violation of this chapter, may maintain an action in any court of equitable jurisdiction to prevent, restrain, or enjoin such violation or threatened violation. If in such action a violation or threatened violation of this chapter shall be established, the court shall enjoin and restrain or otherwise prohibit such 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. In such action it shall not be necessary that actual damages to the plaintiff be alleged or proved, but where alleged and proved, the plaintiff in said action, in addition to such 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.

(b) In the event that no injunctive relief is sought or required, any person injured by a violation of this chapter may maintain an action for damages and costs of suit in any court of general jurisdiction. *(Formerly: Acts 1949, c.51, s.12.) As amended by P.L.152-1986, SEC.42.*

IC 24-3-2-13

Rules; powers of department

Sec. 13. (a) The department may adopt rules for the enforcement of this chapter, and the department is empowered to and may undertake a cost survey, as provided for in section 11 of this chapter. The department may, in accordance with IC 4-21.5-3, suspend or revoke any registration certificate issued by it to a distributor under IC 6-7-1 for failure of any registrant to comply with this chapter or any rule adopted under this chapter.

(b) All the powers vested in the department by IC 6-7-1 shall be available to the department in the enforcement of this chapter. *(Formerly: Acts 1949, c.51, s.13.) As amended by P.L.152-1986, SEC.43; P.L.7-1987, SEC.105.*