

SENATE BILL 5259

State of Washington

52nd Legislature

1991 Regular Session

By Senators L. Smith, Hayner, Snyder, Owen, Matson and Oke.

Read first time January 25, 1991. Referred to Committee on Commerce & Labor.

1 AN ACT Relating to cigarette sales; amending RCW 19.91.010,
2 19.91.020, 19.91.140, 19.91.150, and 19.91.190; creating new sections;
3 repealing RCW 82.24.500, 82.24.510, 82.24.520, 82.24.530, 82.24.540,
4 82.24.550, and 82.24.560; repealing 1986 c 321 s 1 (uncodified);
5 repealing 1986 c 321 s 14 (uncodified); repealing 1986 c 321 s 15
6 (uncodified); and prescribing penalties.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 NEW SECTION. **Sec. 1.** The legislature declares that resale
9 price maintenance is not a true solution to problems arising out of
10 trade conflicts or unfair and deceptive practices. The legislature
11 further declares that active enforcement of antitrust legislation and
12 of laws curbing unfair and deceptive methods of competition provide
13 adequate safeguards for all concerned, including manufacturers,
14 distributors, and buyers.

1 It is the intent of the legislature to protect our system of
2 business competition by stopping the offering for sale or the selling
3 of cigarettes below cost in the wholesale and retail trade.

4 **Sec. 2.** RCW 19.91.010 and 1986 c 321 s 2 are each amended to read
5 as follows:

6 When used in this chapter, the following words and phrases shall
7 have the meaning ascribed to them in this section, except where the
8 context clearly indicates a different meaning:

9 (1) "Person" means and includes any individual, firm, association,
10 company, partnership, corporation, joint stock company, club, agency,
11 syndicate, municipal corporation, or other political subdivision of
12 this state, trust, receiver, trustee, fiduciary and conservator.

13 (2) "Wholesaler" includes any person who:

14 (a) Purchases cigarettes directly from the manufacturer, or

15 (b) Purchases cigarettes from any other person who purchases from
16 or through the manufacturer, for the purpose of bona fide resale to
17 retail dealers or to other persons for the purpose of resale only, or

18 (c) Services retail outlets by the maintenance of an established
19 place of business for the purchase of cigarettes, including, but not
20 limited to, the maintenance of warehousing facilities for the storage
21 and distribution of cigarettes.

22 Nothing contained herein shall prevent a person from qualifying in
23 different capacities as both a "wholesaler" and "retailer" under the
24 applicable provisions of this chapter.

25 (3) "Retailer" means and includes any person who operates a store,
26 stand, booth, concession, or vending machine for the purpose of making
27 sales of cigarettes at retail.

28 (4) "Cigarettes" means any roll for smoking made wholly or in part
29 of tobacco, irrespective of size or shape and whether or not such

1 tobacco is flavored, adulterated, or mixed with any other ingredient,
2 the wrapper or cover of which is made of paper or any other substance
3 or material except tobacco.

4 (5) "Sale" means any transfer for a consideration, exchange,
5 barter, gift, offer for sale and distribution, in any manner, or by any
6 means whatsoever.

7 (6) "Sell at wholesale", "sale at wholesale" and "wholesale" sales
8 mean and include any bona fide transfer of title to cigarettes for a
9 valuable consideration, made in the ordinary course of trade or in the
10 usual conduct of the wholesaler's business, to a retailer for the
11 purpose of resale.

12 (7) "Sell at retail", "sale at retail" and "retail sales" mean and
13 include any transfer of title to cigarettes for a valuable
14 consideration, made in the ordinary course of trade or usual conduct of
15 the seller's business, to the purchaser for consumption or use.

16 (8) "Basic cost of cigarettes" means the invoice cost of cigarettes
17 to the retailer or wholesaler, as the case may be, or the replacement
18 cost of cigarettes to the retailer or wholesaler, as the case may be,
19 in the quantity last purchased(~~(, whichever is lower)~~). Quantity last
20 purchased includes any and all cigarettes that are held in stock.
21 These cigarettes shall be increased or decreased to the price of those
22 cigarettes that are invoiced at an increase or decrease in price due to
23 a manufacturer's price change or for a change due to a federal or state
24 tax increase or decrease. This increase or decrease in cost becomes
25 effective on the date when cigarettes are first delivered and received
26 at the retailer's or wholesaler's place of business and are invoiced at
27 the higher or lower cost, as the case may be, or on the effective date
28 of the federal or state tax increase or decrease, as the case may be,
29 to which shall be added the full face value of any stamps which may be
30 required by any cigarette tax act of this state and by ordinance of any

1 municipality thereof, now in effect or hereafter enacted, if not
2 already included by the manufacturer in ((his)) the list price. The
3 disposition of the manufacturers' cash discount is at the discretion of
4 the wholesaler. Any retailer or wholesaler who actually receives and
5 sells cigarettes with trade or cash discounts shall execute a sworn
6 affidavit and obtain a sworn affidavit from the person granting the
7 discount, whether a manufacturer or wholesaler, which shows: (a)
8 Amount or rate of the discount, (b) date the discount was granted, (c)
9 names of the persons granting and receiving the discount, and (d)
10 whether the discount is for cash or trade purposes. Sworn affidavits
11 under this section are maintained for five years and available for
12 inspection by the department of revenue's request. The department of
13 revenue may impose a civil penalty not to exceed two hundred fifty
14 dollars for each failure to maintain affidavits under this section.

15 Nothing in this section may be construed to require any retailer to
16 obtain affidavits from retail purchasers of cigarettes.

17 (9) (a) The term "cost to the wholesaler" means the "basic cost of
18 cigarettes" to the wholesaler plus the "cost of doing business by the
19 wholesaler" which said cost of doing business amount shall be expressed
20 percentage-wise in the ratio that said wholesalers "cost of doing
21 business" bears to said wholesalers dollar volume for all products sold
22 by the wholesaler per annum, and said "cost of doing business by the
23 wholesaler" shall be evidenced and determined by the standards and
24 methods of accounting regularly employed by him or her for the purpose
25 of federal income tax reporting for the total operation of his or her
26 establishment in his or her allocation of overhead costs and expenses,
27 paid or incurred, and must include, without limitation, labor costs
28 (including reasonable salaries for partners, executives, and officers),
29 rent, depreciation, selling cost, maintenance of equipment, delivery
30 costs, all types of licenses, taxes, insurance and advertising,

1 expressed as a percentage and applied to the "basic cost of
2 cigarettes". However, if the wholesaler is an affiliate or a
3 subsidiary, or otherwise operates under common direction and control of
4 a person who is engaged in the business of making sales of other
5 products at wholesale to a retailer, both persons shall be considered
6 to be one wholesaler for purposes of determining the "cost of doing
7 business by the wholesaler." Any fractional part of a cent amounting
8 to one-tenth of one cent or more in cost to the wholesaler per carton
9 of ten packages of cigarettes shall be rounded off to the next higher
10 cent.

11 (b) For the purposes of this chapter the "cost of doing business"
12 may not be computed using a percentage less than the overall percentage
13 shown in subsection (9)(a) of this section or in the absence of the
14 filing with the department of revenue of satisfactory proof of a lesser
15 or higher cost of doing business by the wholesaler making the sale, the
16 "cost of doing business by the wholesaler" shall be presumed to be the
17 percentage of the "basic cost of cigarettes" to the wholesaler
18 specified in (c) of this subsection, plus cartage to the retail outlet,
19 if performed or paid for by the wholesaler, which cartage cost, in the
20 absence of the filing with the department of revenue of satisfactory
21 proof of a lesser or higher cost, shall be deemed to be one-half of one
22 percent of the "basic cost of cigarettes" to the wholesaler.

23 (c) For the purposes of (b) of this subsection, the percentage of
24 the basic cost of cigarettes to the wholesaler shall be((÷

25 ~~(i) Four percent until July 1, 1987;~~

26 ~~(ii) Three and one half percent from July 1, 1987, until July 1,~~
27 ~~1988;~~

28 ~~(iii) Three percent from July 1, 1988, until July 1, 1989;~~

29 ~~(iv) Two and one half percent from July 1, 1989, until July 1,~~
30 ~~1990; and~~

1 ~~(v) Two percent from July 1, 1990, until July 1, 1991)~~ presumed to
2 be four percent of the "basic cost of cigarettes" to the wholesaler,
3 plus cartage to the retail outlet, if performed or paid for by the
4 wholesaler, which cartage cost, in the absence of the filing with the
5 department of revenue of satisfactory proof of a lesser or higher cost,
6 shall be deemed to be one-half of one percent of the "basic cost of
7 cigarettes" to the wholesaler.

8 (10) (a) The term "cost to the retailer" means the "basic cost of
9 cigarettes" to the retailer plus the "cost of doing business by the
10 retailer" which said cost of doing business amount shall be expressed
11 percentage-wise in the ratio that said retailers "cost of doing
12 business" bears to said retailers dollar volume per annum, and said
13 "cost of doing business by the retailer" shall be evidenced and
14 determined by the standards and methods of accounting regularly
15 employed by him or her for the purpose of federal income tax reporting
16 for the total operation of his or her establishment in his or her
17 allocation of overhead costs and expenses, paid or incurred, and must
18 include, without limitation, labor (including reasonable salaries for
19 partners, executives, and officers), rent, depreciation, selling costs,
20 maintenance of equipment, delivery costs, all types of licenses, taxes,
21 insurance and advertising, expressed as a percentage and applied to the
22 "basic cost of cigarettes": PROVIDED, That any retailer who, in
23 connection with the retailer's purchase, receives not only the
24 discounts ordinarily allowed upon purchases by a retailer but also, in
25 whole or in part, discounts ordinarily allowed upon purchases by a
26 wholesaler shall, in determining "cost to the retailer", pursuant to
27 this (~~subdivision~~) subsection, add the "cost of doing business by the
28 wholesaler," as defined in (~~subdivision~~) subsection (9) of this
29 section, to the "basic cost of cigarettes" to said retailer, as well as
30 the "cost of doing business by the retailer". Any fractional part of

1 a cent amounting to one-tenth of one cent or more in cost to the
2 retailer per carton of ten packages of cigarettes shall be rounded off
3 to the next higher cent.

4 (b) In the absence of the filing with the department of revenue of
5 satisfactory proof of a lesser or higher cost of doing business by the
6 retailer making the sale, the "cost of doing business by the retailer"
7 shall be presumed to be the percentage of the "basic cost of
8 cigarettes" to the retailer specified in (d) of this subsection.

9 (c) In the absence of the filing with the department of revenue of
10 satisfactory proof of a lesser or higher cost of doing business, the
11 "cost of doing business by the retailer", who, in connection with the
12 retailer's purchase, receives not only the discounts ordinarily allowed
13 upon purchases by a retailer but also, in whole or in part, the
14 discounts ordinarily allowed upon purchases by a wholesaler, shall be
15 presumed to be the percentage of the sum of the "basic cost of
16 cigarettes" and the "cost of doing business by the wholesaler"
17 specified in (d) of this subsection.

18 (d) For the purposes of (b) and (c) of this subsection, the
19 percentage shall be(~~(:~~

20 ~~(i) Eleven and one-half percent until July 1, 1987;~~

21 ~~(ii) Ten and one-half percent from July 1, 1987, until July 1,~~
22 ~~1988;~~

23 ~~(iii) Nine and one-half percent from July 1, 1988, until July 1,~~
24 ~~1989;~~

25 ~~(iv) Eight and one-half percent from July 1, 1989, until July 1,~~
26 ~~1990;~~

27 ~~(v) Seven and one-half percent from July 1, 1990, until July 1,~~
28 ~~1991)) twelve and one-half percent.~~

29 (11) "Business day" means any day other than a Sunday or a legal
30 holiday.

1 (12) "Master license system" means the mechanism established by
2 chapter 19.02 RCW by which master licenses, endorsed for individual
3 state-issued licenses, are issued and renewed utilizing a master
4 application and a master license expiration date common to each
5 renewable license endorsement.

6 **Sec. 3.** RCW 19.91.020 and 1987 c 456 s 28 are each amended to read
7 as follows:

8 (1) It is a class 1 civil infraction:

9 (a) For any retailer or wholesaler with intent to injure
10 competitors or destroy or substantially lessen competition:

11 (i) To advertise, offer to sell, or sell, at retail or wholesale,
12 cigarettes at less than cost to such a retailer or wholesaler, as said
13 cost is defined in this chapter, as the case may be;

14 (ii) To offer a rebate in price, to give a rebate in price, to
15 offer a concession of any kind, or to give a concession of any kind or
16 nature whatsoever, including the use of other products and services, in
17 connection with the sale of cigarettes.

18 (b) For any retailer with intent to injure competitors or destroy
19 or substantially lessen competition:

20 (i) To induce or attempt to induce or to procure or attempt to
21 procure the purchase of cigarettes at a price less than "cost to
22 wholesalers" as defined in this chapter;

23 (ii) To induce or attempt to induce or to procure or attempt to
24 procure any rebate or concession of any kind or nature whatsoever,
25 including other products, in connection with the purchase of
26 cigarettes.

27 (c) For any wholesaler to knowingly sell cigarettes to a retailer
28 who does not possess the required state retailer's licenses.

1 (2) Any individual who as a director, officer, partner, member, or
2 agent of any person violating the provisions of this section assists or
3 aids, directly or indirectly in such violation, shall equally with the
4 person for whom he or she acts, be responsible therefor.

5 (3) Evidence of advertisement, offering to sell, or sale of
6 cigarettes by any retailer or wholesaler at less than cost to him or
7 her, or evidence of any offer of a rebate in price, or the giving of a
8 rebate in price or an offer of a concession, or the inducing, or
9 attempt to induce, or the procuring, or the attempt to procure the
10 purchase of cigarettes at a price less than cost to the wholesaler or
11 the retailer, shall be prima facie evidence of intent to injure
12 competitors and to destroy or substantially lessen competition.

13 (~~((4) This section shall expire July 1, 1991.))~~)

14 **Sec. 4.** RCW 19.91.140 and 1983 c 2 s 4 are each amended to read as
15 follows:

16 (1) A fee of six hundred fifty dollars shall accompany each
17 wholesaler's license application or license renewal application, if
18 that wholesaler's annual cigarette tax collections are two million
19 dollars or less. A fee of eight hundred fifty dollars shall accompany
20 each wholesaler's license application or license renewal application,
21 if that wholesaler's annual cigarette tax collections exceed two
22 million dollars. If a wholesaler sells or intends to sell cigarettes
23 at two or more places of business, whether established or temporary, a
24 separate license with a license fee of one hundred fifteen dollars
25 shall be required for each additional place of business. Each license,
26 or certificate thereof, and such other evidence of license as the
27 department of revenue shall require, shall be exhibited in the place of
28 business for which it is issued and in such manner as is prescribed for
29 the display of a master license. The department of revenue shall

1 require each licensed wholesaler to file (~~with him~~) a bond in an
2 amount not less than one thousand dollars to guarantee the proper
3 performance of his or her duties and the discharge of his or her
4 liabilities under this chapter. The bond shall be executed by such
5 licensed wholesaler as principal, and by a corporation approved by the
6 department of revenue and authorized to engage in business as a surety
7 company in this state, as surety. The bond shall run concurrently with
8 the wholesaler's license.

9 (2) All moneys generated from the fees under subsection (1) of this
10 section must be deposited into the cigarette sales enforcement fund
11 under section 7 of this act.

12 **Sec. 5.** RCW 19.91.150 and 1983 c 2 s 5 are each amended to read as
13 follows:

14 A fee of (~~ten~~) twenty-five dollars shall accompany each
15 retailer's license application or license renewal application. A fee
16 of one additional dollar for each vending machine shall accompany each
17 application or renewal for a license issued to a retail dealer
18 operating a cigarette vending machine.

19 **Sec. 6.** RCW 19.91.190 and 1979 c 107 s 2 are each amended to read
20 as follows:

21 All fees, except under RCW 19.91.140, and penalties received or
22 collected by the department of revenue pursuant to the provisions of
23 this chapter shall be paid to the state treasurer, to be credited to
24 the general fund.

25 NEW SECTION. **Sec. 7.** The cigarette sales enforcement fund is
26 created in the custody of the state treasurer. All receipts from the
27 fees under RCW 19.91.140 shall be deposited into the fund.

1 Expenditures from the fund may be used only for the enforcement of
2 chapter 19.91 RCW. Only the director of the department of revenue or
3 the director's designee may authorize expenditures from the fund. The
4 fund is subject to allotment procedures under chapter 43.88 RCW, but no
5 appropriation is required for expenditures.

6 NEW SECTION. **Sec. 8.** The following acts or parts of acts are
7 each repealed:

- 8 (1) RCW 82.24.500 and 1986 c 321 s 4;
- 9 (2) RCW 82.24.510 and 1986 c 321 s 5;
- 10 (3) RCW 82.24.520 and 1986 c 321 s 6;
- 11 (4) RCW 82.24.530 and 1986 c 321 s 7;
- 12 (5) RCW 82.24.540 and 1986 c 321 s 8;
- 13 (6) RCW 82.24.550 and 1986 c 321 s 9;
- 14 (7) RCW 82.24.560 and 1986 c 321 s 10;
- 15 (8) 1986 c 321 s 1 (uncodified);
- 16 (9) 1986 c 321 s 14 (uncodified); and
- 17 (10) 1986 c 321 s 15 (uncodified).