56:7-18

LEGISLATIVE HISTORY CHECKLIST

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LAWS OF: 1952 **CHAPTER:** 247

NJSA: 56:7-18 (Regulates sale of cigarettes at wholesale and retail)

BILL NO: A254

SPONSOR(S) Smith

DATE INTRODUCED: January 28, 1952

COMMITTEE: **ASSEMBLY:** Judiciary

SENATE: ---

AMENDED DURING PASSAGE: Yes

DATE OF PASSAGE: **ASSEMBLY:** March 19, 1952

SENATE: March 24, 1952

DATE OF APPROVAL: May 19, 1952

FOLLOWING ARE ATTACHED IF AVAILABLE:

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A254

SPONSOR'S STATEMENT: (Begins on page 10 of bill) Yes

COMMITTEE STATEMENT: **ASSEMBLY:** No

SENATE: No

FLOOR AMENDMENT STATEMENT: No

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NEW JERSEY CASE LAW:

Lane Distributors v. Amos Tilton, 7 N.J. 349 (1951)

LAW

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ASSEMBLY, No. 254

STATE OF NEW JERSEY

INTRODUCED JANUARY 28, 1952

By Mr. N. C. SMITH

Referred to Committee on Judiciary

An Act to prevent unfair competition and unfair trade practices in the sale of cigarettes; to prohibit sales of cigarettes below cost; to protect and stabilize the collection of taxes on the sale of cigarettes and revenues from the licensing of persons engaged in the sale of cigarettes; to confer powers and impose duties on the Department of Taxation and Finance and on persons, as herein defined, engaged in the sale of cigarettes at retail or wholesale; and providing remedies and imposing penalties for violations thereof.

Whereas, Unfair, dishonest, deceptive, destructive and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell, cigarettes in the retail and wholesale trades in this State have been and are demoralizing and disorganizing said trades; and

Whereas, The advertising, 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

Whereas, Such practices adversely affect the collection of taxes from the sale of cigarettes and license fees imposed on distributors, wholesalers, retailers and others engaged in the sale of cigarettes; and

Whereas, It is hereby declared to be the policy of this State to promote the public welfare by prohibiting such sales, and it is the purpose of this act to carry out that policy in the public interest; therefore,

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Unfair Cigarette Sales Act of 1952."

2. The following words, terms and phrases, when used in this act, shall have the meaning ascribed to them in this section except where the context clearly indicates a different meaning;

a. "Person" shall mean and include any individual, firm, association, company, partnership, corporation, joint stock company, club, agency, syndicate, municipal corporation or other political subdivision of this State, trust, receiver, trustee, fiduciary and conservator.

b. "Cigarettes" shall mean and include any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, excepting tobacco.

c. "Sale" shall mean any transfer for a consideration, exchange, barter, gift, offer for sale and distribution in any manner or by any means whatsoever.

d. "Wholesaler" shall include any person who:

(1) purchases cigarettes directly from the manufacturer; or

(2) purchases cigarettes from any other person who purchases from the manufacturer and who acquires such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

(3) services retail outlets by the maintenance of an established place of business for the purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.

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

e. "Retailer" shall mean and include any person who operates a store, stand, booth or concession for the purpose of making sales of cigarettes at retail.

f. "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 consumption or use.

g. "Sell at wholesale," "sale at wholesale" and "wholesale sales" shall mean and include any bona fide transfer of title to cigarettes for a valuable consideration, made in the ordinary course of trade or in the usual conduct of the wholesaler's business, to a retailer for the purpose of resale.

h. "Basic cost of cigarettes" shall mean the invoice cost of cigarettes to the retailer or wholesaler, as the case may be, or the replacement cost of cigarettes to the retailer or wholesaler, as the case may be, in the quantity last purchased, whichever is lower, less all trade discounts and customary discounts for cash, to which shall be added the full face value of any stamps which may be required by any cigarette tax act of this State and by ordinance of any municipality thereof, now in effect or hereafter enacted, if not already included by the manufacturer in his list price.

i. "Director" means the Director of the Division of Taxation, in the Department of the Treasury.

j. "Business day" shall mean any day other than a Sunday or a legal holiday.

3. It shall be unlawful and a violation of this act:

a. For any retailer or wholesaler with intent to injure competitors or destroy or substantially lessen competition—

(1) to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such a retailer or wholesaler, as the case may be,

(2) 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;

b. For any retailer—

(1) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than "cost to wholesaler" as defined in this act.

(2) 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.

c. Any retailer or wholesaler who violates the provisions of this section is a disorderly person and shall be prosecuted and punished by a fine of not more than one hundred dollars ($100.00) for each offense, in accordance with the provisions of subtitle twelve of Title 2A of the New Jersey Statutes.

d. Evidence of advertisement, offering to sell or sale of cigarettes by any retailer, or wholesaler 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 connection with the sale of cigarettes or the inducing or attempt to induce or the procuring or the attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

4. a. The term "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; *provided,* that 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 upon purchases by a

wholesaler shall, in determining "cost to the retailer," pursuant to this subsection, add the "cost of doing business by the wholesaler," as defined in section five of this act, to the "basic cost of cigarettes" to said retailer, as well as the "cost of doing business by the retailer."

b. In the absence of the filing with the director of satisfactory 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 eight per centum (8%) of the "basic cost of cigarettes" to the retailer.

c. In the absence of the filing with the director of satisfactory 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 wholesaler, shall be presumed to be eight per centum (8%) of the sum of the "basic cost of cigarettes" and the "cost of doing business by the wholesaler."

5. a. The term "cost to the wholesaler" shall mean the "basic cost of cigarettes" 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 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.

b. In the absence of the filing with the director of satisfactory proof of a lesser or higher cost of doing business by the wholesaler making the sale, the "cost of doing business by the wholesaler" shall be presumed to be three and one-half per centum (3½%) of the "basic cost of cigarettes" to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of the filing with the director of satisfactory proof of a lesser or higher cost, shall be deemed to be three-

fourths of one per centum (¾ of 1%) of the "basic cost of cigarettes" to the wholesaler.

6. In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, 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 wholesaler's combined selling price shall not be below the "cost to the retailer" or the "cost to the wholesaler," respectively, of the total costs of all articles, products, commodities, gifts and concessions included in such transactions.

7. When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, "cost to the wholesaler," as provided by section five of this act, except that no such sale shall be made at a price less than the "basic cost of cigarettes" as defined in said section two of this act, but the latter wholesaler, upon resale to a retailer, shall be deemed to be the wholesaler governed by the provisions of said section five of this act.

8. The provisions of this act shall not apply to sales at retail or sales at wholesale made (a) as an isolated transaction and not in the usual course of business; (b) where cigarettes are advertised, 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 advertised, offered for sale, or to be sold; (c) where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and said advertising, offer to sell, or sale shall state the reason therefore and the quantity of such cigarettes advertised, offered for sale, or to be sold; (d) where cigarettes are sold upon the final liquidation of a business; or (e) where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

9. a. 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 him as a retailer as prescribed in this act. 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 him as a wholesaler as prescribed in this act. The price of cigarettes advertised, offered for sale, or sold under the exceptions specified in section eight 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 wholesaler," as the case may be, determined by any "cost survey," made pursuant to section thirteen of this act, may be deemed the "price of a competitor," within the meaning of this section.

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

11. a. In determining "cost to the retailer" and "cost to the wholesaler" the Director or a court 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 act purchased cigarettes, with respect to the sale of which complaint is made, at a fictitious price, or upon terms, or in such a 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 wholesaler by the manufacturer thereof for display, or advertising, or promotion

purposes, or otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler.

12. In establishing the cost of cigarettes to the retailer or wholesaler, 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 wholesaler in the quantity last purchased, through the ordinary channels of trade.

13. 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 wholesaler," 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 act.

14. The director may adopt rules and regulations for the enforcement of this act and he is empowered to and may undertake a "cost survey" as provided for in section thirteen of this act.

15. a. An action may be maintained in any court of equitable jurisdiction to prevent, restrain or enjoin a violation, or threatened violation, of any of the provisions of this act. Such an action may be instituted by any person injured by any violation or threatened violation of this act or by the Attorney-General, upon the request of the director. If in such action a violation or threatened violation of this act shall be established, the court shall enjoin and restrain, or otherwise prohibit, such violation or threatened violation. 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 such plaintiff.

b. In the event that no injunctive relief is sought or required, any person injured by a violation of this act may maintain an action for damages and costs of suit in any court of competent jurisdiction.

16. a. In addition to the provisions of section three and section fifteen of this act, the director is empowered to suspend or revoke the license or any licenses of any person, licensed under the provisions of the "Cigarette Tax Act." No such license or licenses shall be suspended or revoked except upon notice to the licensee and after a hearing as prescribed by said director. The said director, upon a finding by him that the licensee has failed to comply with any provision of this act or any rule or regulation promulgated thereunder, shall, in the case of the first offender, suspend the license or licenses of the said licensee for a period of not less than five nor more than twenty consecutive business days, and, in the case of a second or plural offender, shall suspend said license or licenses for a period of not less than twenty consecutive business days nor more than twelve months, and, in the event said director finds the offender has been guilty of willful and persistent violations, he may revoke said person's license or licenses.

b. Any person whose license or licenses have been so revoked may apply to the director at the expiration of one year for a reinstatement of his license or licenses. Such license or licenses may be reinstated by the director if it shall appear to the satisfaction of said director that the licensee will comply with the provisions of this act and the rules and regulations promulgated thereunder.

17. No person whose license has been suspended or revoked shall sell cigarettes or permit cigarettes to be sold during the period of such suspension or revocation on the premises occupied, by him or upon other premises controlled by him or others or in any other manner or form whatever. Nor shall any disciplinary proceedings or action be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of the "Cigarette Tax Act."

18. Any determination by the director and any order of suspension or revocation of a license or licenses thereunder or refusal to reinstate a license or licenses after revocation shall be reviewable by the Superior Court by proceedings in lieu of the prerogative writs.

19. In order to effectuate the purposes of this act it shall be the duty of the director to carry out the enforcement provisions of this act. In accordance with the provisions of Title 11, Civil Service, of the Revised Statutes, the director may, within the limits of available appropriations, employ and fix the duties and compensation of such inspectors and other personnel necessary to carry out the provisions of this act.

20. All of the powers vested in the Director of the Division of Taxation by the provisions of the "Cigarette Tax Act," aforesaid, shall be available to the said Director in the enforcement of this Unfair Cigarette Sales Act.

21. The provisions of this act shall be deemed to be severable and if for any reason any provision shall be determined to be unconstitutional or invalid, such determination shall not be held to affect any other provision hereof. And no such determination shall be deemed to invalidate or render ineffectual any of the provisions of the "Cigarette Tax Act."

22. This act shall take effect immediately.

ASSEMBLY, No. 254

STATE OF NEW JERSEY

INTRODUCED JANUARY 28, 1952

By Mr. N. C. SMITH

Referred to Committee on Judiciary

An Act to prevent unfair competition and unfair trade practices in the sale of cigarettes; to prohibit sales of cigarettes below cost; to protect and stabilize the collection of taxes on the sale of cigarettes and revenues from the licensing of persons engaged in the sale of cigarettes; to confer powers and impose duties on the Department of Taxation and Finance and on persons, as herein defined, engaged in the sale of cigarettes at retail or wholesale; and providing remedies and imposing penalties for violations thereof.

Whereas, Unfair, dishonest, deceptive, destructive and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell, cigarettes in the retail and wholesale trades in this State have been and are demoralizing and disorganizing said trades; and

Whereas, The advertising, 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

Whereas, Such practices adversely affect the collection of taxes from the sale of cigarettes and license fees imposed on distributors, wholesalers, retailers and others engaged in the sale of cigarettes; and

Whereas, It is hereby declared to be the policy of this State to promote the public welfare by prohibiting such sales, and it is the purpose of this act to carry out that policy in the public interest; therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Unfair Cigarette Sales Act of 1952."

2. The following words, terms and phrases, when used in this act, shall have the meaning ascribed to them in this section except where the context clearly indicates a different meaning;

a. "Person" shall mean and include any individual, firm, association, company, partnership, corporation, joint stock company, club, agency, syndicate, municipal corporation or other political subdivision of this State, trust, receiver, trustee, fiduciary and conservator.

b. "Cigarettes" shall mean and include any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, excepting tobacco.

c. "Sale" shall mean any transfer for a consideration, exchange, barter, gift, offer for sale and distribution in any manner or by any means whatsoever.

d. "Wholesaler" shall mean and include any person who:

(1) purchases cigarettes directly from the manufacturer; or

(2) purchases cigarettes from any other person who purchases from the manufacturer and who acquires such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

(3) performs wholesale functions in servicing retail outlets by the maintenance of an established place of business for the mass purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.

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

e. "Retailer" shall mean and include any person who operates a store, stand, both or concession for the purpose of making sales of cigarettes at retail.

f. "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 consumption or use.

g. "Sell at wholesale," "sale at wholesale and "wholesale sales" shall mean and include any bona fide transfer of title to cigarettes for a valuable consideration, made in the ordinary course of trade or in the usual conduct of the wholesaler's business, to a retailer for the purpose of resale.

h. "Basic cost of cigarettes" shall mean the invoice cost of cigarettes to the retailer or wholesaler, as the case may be, or the replacement cost of cigarettes to the retailer or wholesaler, as the case may be, in the quantity last purchased, whichever is lower, less all trade discounts and customary discounts for cash, to which shall be added the full face value of any stamps which may be required by any cigarette tax act of this State and by ordinance of any municipality thereof, now in effect or hereafter enacted, if not already included by the manufacturer in his list price.

i. "Director" means the Director of the Division of Taxation, in the Department of the Treasury.

j. "Business day" shall mean any day other than a Sunday or a legal holiday.

3. It shall be unlawful and a violation of this act:

a. For any retailer or wholesaler with intent to injure competitors or destroy or substantially lessen competition—

(1) to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such a retailer or wholesaler, as the case may be,

(2) 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;

b. For any retailer—

(1) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than "cost to wholesaler" as defined in this act.

(2) 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.

c. Any retailer or wholesaler who violates the provisions of this section is a disorderly person and shall be prosecuted and punished by a fine of not more than one hundred dollars ($100.00) for each offense, in accordance with the provisions of subtitle twelve of Title 2A of the New Jersey Statutes.

d. Evidence of advertisement, offering to sell or sale of cigarettes by any retailer, or wholesaler 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 connection with the sale of cigarettes or the inducing or attempt to induce or the procuring or the attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

4. a. The term "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; *provided,* that 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 upon purchases by a

wholesaler shall, in determining "cost to the retailer," pursuant to this subsection, add the "cost of doing business by the wholesaler," as defined in section five of this act, to the "basic cost of cigarettes" to said retailer, as well as the "cost of doing business by the retailer."

b. In the absence of the filing with the director of satisfactory 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 eight per centum (8%) of the "basic cost of cigarettes" to the retailer.

c. In the absence of the filing with the director of satisfactory 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 wholesaler, shall be presumed to be eight per centum (8%) of the sum of the "basic cost of cigarettes" and the "cost of doing business by the wholesaler."

5. a. The term "cost to the wholesaler" shall mean the "basic cost of cigarettes" 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 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.

b. In the absence of the filing with the director of satisfactory proof of a lesser or higher cost of doing business by the wholesaler making the sale, the "cost of doing business by the wholesaler" shall be presumed to be three and one-half per centum (3½%) of the "basic cost of cigarettes" to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of the filing with the director of satisfactory proof of a lesser or higher cost, shall be deemed to be three-

fourths of one per centum (¾ of 1%) of the "basic cost of cigarettes" to the wholesaler.

6. In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, 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 wholesaler's combined selling price shall not be below the "cost to the retailer" or the "cost to the wholesaler," respectively, of the total costs of all articles, products, commodities, gifts and concessions included in such transactions.

7. When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, "cost to the wholesaler," as provided by section five of this act, except that no such sale shall be made at a price less than the "basic cost of cigarettes" as defined in said section two of this act, but the latter wholesaler, upon resale to a retailer, shall be deemed to be the wholesaler governed by the provisions of said section five of this act.

8. The provisions of this act shall not apply to sales at retail or sales at wholesale made (a) as an isolated transaction and not in the usual course of business; (b) where cigarettes are advertised, 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 advertised, offered for sale, or to be sold; (c) where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and said advertising, offer to sell, or sale shall state the reason therefore and the quantity of such cigarettes advertised, offered for sale, or to be sold; (d) where cigarettes are sold upon the final liquidation of a business; or (e) where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

9. a. 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 him as a retailer as prescribed in this act. 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 him as a wholesaler as prescribed in this act. The price of cigarettes advertised, offered for sale, or sold under the exceptions specified in section eight 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 wholesaler," as the case may be, determined by any "cost survey," made pursuant to section thirteen of this act, may be deemed the "price of a competitor," within the meaning of this section.

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

11. a. In determining "cost to the retailer" and "cost to the wholesaler" the Director or a court 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 act purchased cigarettes, with respect to the sale of which complaint is made, at a fictitious price, or upon terms, or in such a 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 wholesaler by the manufacturer thereof for display, or advertising, or promotion

purposes, or otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler.

12. In establishing the cost of cigarettes to the retailer or wholesaler, 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 wholesaler in the quantity last purchased, through the ordinary channels of trade.

13. 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 wholesaler," 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 act.

14. The director may adopt rules and regulations for the enforcement of this act and he is empowered to and may undertake a "cost survey" as provided for in section thirteen of this act.

15. a. An action may be maintained in any court of equitable jurisdiction to prevent, restrain or enjoin a violation, or threatened violation, of any of the provisions of this act. Such an action may be instituted by any person injured by any violation or threatened violation of this act or by the Attorney-General, upon the request of the director. If in such action a violation or threatened violation of this act 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 such plaintiff.

b. In the event that no injunctive relief is sought or required, any person injured by a violation of this act may maintain an action for damages and costs of suit in any court of competent jurisdiction.

16. a. In addition to the provisions of section three and section fifteen of this act, the director is empowered to suspend or revoke the license or any licenses of any person, licensed under the provisions of the "Cigarette Tax Act." No such license or licenses shall be suspended or revoked except upon notice to the licensee and after a hearing as prescribed by said director. The said director, upon a finding by him that the licensee has failed to comply with any provision of this act or any rule or regulation promulgated thereunder, shall, in the case of the first offender, suspend the license or licenses of the said licensee for a period of not less than five nor more than twenty consecutive business days, and, in the case of a second or plural offender, shall suspend said license or licenses for a period of not less than twenty consecutive business days nor more than twelve months, and, in the event said director finds the offender has been guilty of willful and persistent violations, he may revoke said person's license or licenses.

b. Any person whose license or licenses have been so revoked may apply to the director at the expiration of one year for a reinstatement of his license or licenses. Such license or licenses may be reinstated by the director if it shall appear to the satisfaction of said director that the licensee will comply with the provisions of this act and the rules and regulations promulgated thereunder.

17. No person whose license has been suspended or revoked shall sell cigarettes or permit cigarettes to be sold during the period of such suspension or revocation on the premises occupied, by him or upon other premises controlled by him or others or in any other manner or form whatever. Nor shall any disciplinary proceedings or action be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of the "Cigarette Tax Act."

18. Any determination by the director and any order of suspension or revocation of a license or licenses thereunder or refusal to reinstate a license

or licenses after revocation shall be reviewable by the Superior Court by proceedings in lieu of the prerogative writs.

19. In order to effectuate the purposes of this act it shall be the duty of the director to carry out the enforcement provisions of this act. In accordance with the provisions of Title 11, Civil Service, of the Revised Statutes, the director may, within the limits of available appropriations, employ and fix the duties and compensation of such inspectors and other personnel necessary to carry out the provisions of this act.

20. All of the powers vested in the Director of the Division of Taxation by the provisions of the "Cigarette Tax Act," aforesaid, shall be available to the said Director in the enforcement of this Unfair Cigarette Sales Act.

21. The provisions of this act shall be deemed to be severable and if for any reason any provision shall be determined to be unconstitutional or invalid, such determination shall not be held to affect any other provision hereof. And no such determination shall be deemed to invalidate or render ineffectual any of the provisions of the "Cigarette Tax Act."

22. This act shall take effect immediately.

SPONSOR'S STATEMENT

The recent decision of the New Jersey Supreme Court in the case of *Lane Distributors* vs. *Amos Tilton, et als,* invalidated the Unfair Cigarette Sales Act of 1948 as amended, because of invalid definitions of "wholesaler" and "retailer." This act re-enacts the 1948 law in conformity with the decision of the Supreme Court.

This bill is a companion bill to Assembly Bill No. 255.

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ASSEMBLY, No. 254

STATE OF NEW JERSEY

INTRODUCED JANUARY 28, 1952

By Mr. N. C. SMITH

Referred to Committee on Judiciary

An Act to prevent unfair competition and unfair trade practices in the sale of cigarettes; to prohibit sales of cigarettes below cost; to protect and stabilize the collection of taxes on the sale of cigarettes and revenues from the licensing of persons engaged in the sale of cigarettes; to confer powers and impose duties on the Department of Taxation and Finance and on persons, as herein defined, engaged in the sale of cigarettes at retail or wholesale; and providing remedies and imposing penalties for violations thereof.

Whereas, Unfair, dishonest, deceptive, destructive and fraudulent business practices existing in transactions involving the sale of, offer to sell, or inducement to sell, cigarettes in the retail and wholesale trades in this State have been and are demoralizing and disorganizing said trades; and

Whereas, The advertising, 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

Whereas, Such practices adversely affect the collection of taxes from the sale of cigarettes and license fees imposed on distributors, wholesalers, retailers and others engaged in the sale of cigarettes; and

Whereas, It is hereby declared to be the policy of this State to promote the public welfare by prohibiting such sales, and it is the purpose of this act to carry out that policy in the public interest; therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Unfair Cigarette Sales Act of 1952."

2. The following words, terms and phrases, when used in this act, shall have the meaning ascribed to them in this section except where the context clearly indicates a different meaning;

a. "Person" shall mean and include any individual, firm, association, company, partnership, corporation, joint stock company, club, agency, syndicate, municipal corporation or other political subdivision of this State, trust, receiver, trustee, fiduciary and conservator.

b. "Cigarettes" shall mean and include any roll for smoking, made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of paper or any other substance or material, excepting tobacco.

c. "Sale" shall mean any transfer for a consideration, exchange, barter, gift, offer for sale and distribution in any manner or by any means whatsoever.

d. "Wholesaler" shall mean and include any person who:

(1) purchases cigarettes directly from the manufacturer; or

(2) purchases cigarettes from any other person who purchases from the manufacturer and who acquires such cigarettes solely for the purpose of bona fide resale to retail dealers or to other persons for the purposes of resale only; or

(3) performs wholesale functions in servicing retail outlets by the maintenance of an established place of business for the mass purchase of cigarettes, including, but not limited to, the maintenance of warehousing facilities for the storage and distribution of cigarettes.

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

e. "Retailer" shall mean and include any person who operates a store, stand, both or concession for the purpose of making sales of cigarettes at retail.

f. "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 consumption or use.

g. "Sell at wholesale," "sale at wholesale and "wholesale sales" shall mean and include any bona fide transfer of title to cigarettes for a valuable consideration, made in the ordinary course of trade or in the usual conduct of the wholesaler's business, to a retailer for the purpose of resale.

h. "Basic cost of cigarettes" shall mean the invoice cost of cigarettes to the retailer or wholesaler, as the case may be, or the replacement cost of cigarettes to the retailer or wholesaler, as the case may be, in the quantity last purchased, whichever is lower, less all trade discounts and customary discounts for cash, to which shall be added the full face value of any stamps which may be required by any cigarette tax act of this State and by ordinance of any municipality thereof, now in effect or hereafter enacted, if not already included by the manufacturer in his list price.

i. "Director" means the Director of the Division of Taxation, in the Department of the Treasury.

j. "Business day" shall mean any day other than a Sunday or a legal holiday.

3. It shall be unlawful and a violation of this act:

a. For any retailer or wholesaler with intent to injure competitors or destroy or substantially lessen competition—

(1) to advertise, offer to sell, or sell, at retail or wholesale, cigarettes at less than cost to such a retailer or wholesaler, as the case may be,

(2) 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;

b. For any retailer—

(1) to induce or attempt to induce or to procure or attempt to procure the purchase of cigarettes at a price less than ''cost to wholesaler'' as defined in this act.

(2) 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.

c. Any retailer or wholesaler who violates the provisions of this section is a disorderly person and shall be prosecuted and punished by a fine of not more than one hundred dollars ($100.00) for each offense, in accordance with the provisions of subtitle twelve of Title 2A of the New Jersey Statutes.

d. Evidence of advertisement, offering to sell or sale of cigarettes by any retailer, or wholesaler 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 connection with the sale of cigarettes or the inducing or attempt to induce or the procuring or the attempt to procure the purchase of cigarettes at a price less than cost to the wholesaler or the retailer shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

4. a. The term ''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; *provided,* that 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 upon purchases by a

wholesaler shall, in determining "cost to the retailer," pursuant to this subsection, add the "cost of doing business by the wholesaler," as defined in section five of this act, to the "basic cost of cigarettes" to said retailer, as well as the "cost of doing business by the retailer."

b. In the absence of the filing with the director of satisfactory 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 eight per centum (8%) of the "basic cost of cigarettes" to the retailer.

c. In the absence of the filing with the director of satisfactory 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 wholesaler, shall be presumed to be eight per centum (8%) of the sum of the "basic cost of cigarettes" and the "cost of doing business by the wholesaler."

5. a. The term "cost to the wholesaler" shall mean the "basic cost of cigarettes" 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 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.

b. In the absence of the filing with the director of satisfactory proof of a lesser or higher cost of doing business by the wholesaler making the sale, the "cost of doing business by the wholesaler" shall be presumed to be three and one-half per centum (3½%) of the "basic cost of cigarettes" to the wholesaler, plus cartage to the retail outlet, if performed or paid for by the wholesaler, which cartage cost, in the absence of the filing with the director of satisfactory proof of a lesser or higher cost, shall be deemed to be three-

fourths of one per centum ($\frac{3}{4}$ of 1%) of the "basic cost of cigarettes" to the wholesaler.

6. In all advertisements, offers for sale or sales involving two or more items, at least one of which items is cigarettes, at a combined price, and in all advertisements, 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 wholesaler's combined selling price shall not be below the "cost to the retailer" or the "cost to the wholesaler," respectively, of the total costs of all articles, products, commodities, gifts and concessions included in such transactions.

7. When one wholesaler sells cigarettes to any other wholesaler, the former shall not be required to include in his selling price to the latter, "cost to the wholesaler," as provided by section five of this act, except that no such sale shall be made at a price less than the "basic cost of cigarettes" as defined in said section two of this act, but the latter wholesaler, upon resale to a retailer, shall be deemed to be the wholesaler governed by the provisions of said section five of this act.

8. The provisions of this act shall not apply to sales at retail or sales at wholesale made (a) as an isolated transaction and not in the usual course of business; (b) where cigarettes are advertised, 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 advertised, offered for sale, or to be sold; (c) where cigarettes are advertised, offered for sale, or sold as imperfect or damaged, and said advertising, offer to sell, or sale shall state the reason therefore and the quantity of such cigarettes advertised, offered for sale, or to be sold; (d) where cigarettes are sold upon the final liquidation of a business; or (e) where cigarettes are advertised, offered for sale, or sold by any fiduciary or other officer acting under the order or direction of any court.

9. a. 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 him as a retailer as prescribed in this act. 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 him as a wholesaler as prescribed in this act. The price of cigarettes advertised, offered for sale, or sold under the exceptions specified in section eight 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 wholesaler," as the case may be, determined by any "cost survey," made pursuant to section thirteen of this act, may be deemed the "price of a competitor," within the meaning of this section.

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

11. a. In determining "cost to the retailer" and "cost to the wholesaler" the Director or a court 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 act purchased cigarettes, with respect to the sale of which complaint is made, at a fictitious price, or upon terms, or in such a 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 wholesaler by the manufacturer thereof for display, or advertising, or promotion

purposes, or otherwise, shall not be considered in determining the cost of cigarettes to the retailer or wholesaler.

12. In establishing the cost of cigarettes to the retailer or wholesaler, 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 wholesaler in the quantity last purchased, through the ordinary channels of trade.

13. 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 wholesaler," 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 act.

14. The director may adopt rules and regulations for the enforcement of this act and he is empowered to and may undertake a "cost survey" as provided for in section thirteen of this act.

15. a. An action may be maintained in any court of equitable jurisdiction to prevent, restrain or enjoin a violation, or threatened violation, of any of the provisions of this act. Such an action may be instituted by any person injured by any violation or threatened violation of this act or by the Attorney-General, upon the request of the director. If in such action a violation or threatened violation of this act 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 such plaintiff.

b. In the event that no injunctive relief is sought or required, any person injured by a violation of this act may maintain an action for damages and costs of suit in any court of competent jurisdiction.

16. a. In addition to the provisions of section three and section fifteen of this act, the director is empowered to suspend or revoke the license or any licenses of any person, licensed under the provisions of the "Cigarette Tax Act." No such license or licenses shall be suspended or revoked except upon notice to the licensee and after a hearing as prescribed by said director. The said director, upon a finding by him that the licensee has failed to comply with any provision of this act or any rule or regulation promulgated thereunder, shall, in the case of the first offender, suspend the license or licenses of the said licensee for a period of not less than five nor more than twenty consecutive business days, and, in the case of a second or plural offender, shall suspend said license or licenses for a period of not less than twenty consecutive business days nor more than twelve months, and, in the event said director finds the offender has been guilty of willful and persistent violations, he may revoke said person's license or licenses.

b. Any person whose license or licenses have been so revoked may apply to the director at the expiration of one year for a reinstatement of his license or licenses. Such license or licenses may be reinstated by the director if it shall appear to the satisfaction of said director that the licensee will comply with the provisions of this act and the rules and regulations promulgated thereunder.

17. No person whose license has been suspended or revoked shall sell cigarettes or permit cigarettes to be sold during the period of such suspension or revocation on the premises occupied, by him or upon other premises controlled by him or others or in any other manner or form whatever. Nor shall any disciplinary proceedings or action be barred or abated by the expiration, transfer, surrender, continuance, renewal or extension of any license issued under the provisions of the "Cigarette Tax Act."

18. Any determination by the director and any order of suspension or revocation of a license or licenses thereunder or refusal to reinstate a license

or licenses after revocation shall be reviewable by the Superior Court proceedings in lieu of the prerogative writs.

19. In order to effectuate the purposes of this act it shall be the du of the director to carry out the enforcement provisions of this act. In cordance with the provisions of Title 11, Civil Service, of the Revised St utes, the director may, within the limits of available appropriations, empl and fix the duties and compensation of such inspectors and other person necessary to carry out the provisions of this act.

20. All of the powers vested in the Director of the Division of Taxati by the provisions of the "Cigarette Tax Act," aforesaid, shall be availa to the said Director in the enforcement of this Unfair Cigarette Sales A

21. The provisions of this act shall be deemed to be severable and for any reason any provision shall be determined to be unconstitutional invalid, such determination shall not be held to affect any other provisi hereof. And no such determination shall be deemed to invalidate or rend ineffectual any of the provisions of the "Cigarette Tax Act."

22. This act shall take effect immediately.