

SENATE BILL NO. 2389

Introduced by

Senators Wardner, Mutch, Warner

Representatives Froseth, Kasper, S. Meyer

1 A BILL for an Act to create and enact four new sections to chapter 51-10 of the North Dakota
2 Century Code, relating to unfair trade practices in the marketing and selling of motor fuel; and to
3 amend and reenact subsection 1 of section 51-10-01 of the North Dakota Century Code,
4 relating to unfair trade practices.

5 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

6 **SECTION 1. AMENDMENT.** Subsection 1 of section 51-10-01 of the North Dakota
7 Century Code is amended and reenacted as follows:

- 8 1. "Cost" means the actual invoice cost of the merchandise or the replacement cost of
9 the merchandise, whichever is the lower, less all trade discounts, advertising
10 allowances, including customary discounts for cash, to which must be added
11 transportation, including cartage cost, not otherwise included in the invoice cost or
12 the replacement cost of the merchandise. ~~Where~~ If a manufacturer publishes a list
13 price, proof of ~~such~~ the list price, less all discounts, is prima facie evidence of
14 "cost". For motor fuel offered for sale by posted pricing or indicating meter by a
15 retailer at a retail location where motor fuel is dispensed into the fuel tank of a
16 passenger motor vehicle or truck by a consumer, "cost" means:
- 17 a. The invoice cost of motor fuel to the wholesaler or retailer, as the case may
18 be, or the lowest replacement cost of motor fuel within three days before the
19 date of sale, less, in either of these two cases, all trade discounts except
20 customary discounts for cash, plus the full value of freight costs, state and
21 federal taxes, and credit card processing fees assessed to the retailer.
- 22 b. The customary discount for cash includes any allowance, whether a part of a
23 larger discount, made to a wholesaler or retailer when that person pays for
24 motor fuel within a limited or specified time.

1 c. The cost of doing business or overhead expenses includes all costs incurred
2 in the conduct of business, including labor, including salaries of executives
3 and officers; rent; interest on borrowed capital; depreciation, selling cost;
4 maintenance of equipment; transportation or freight cost; losses due to
5 breakage or damage; credit card fees or other charges; credit losses; and all
6 types of licenses, taxes, insurance, and advertising.

7 d. A person may not limit the quantity of gasoline sold or offered for sale from a
8 motor fuel pump to any one customer to a quantity less than the entire supply
9 owned or possessed by the seller for which the seller is authorized to sell at
10 the place of the sale or offering for sale.

11 **SECTION 2.** A new section to chapter 51-10 of the North Dakota Century Code is
12 created and enacted as follows:

13 **Certain motor fuel marketing practices as unfair trade practice.** An offer for resale
14 of motor fuel by a retailer by posted pricing or indicating meter that is below cost, as defined in
15 section 51-10-01, is a violation of section 51-10-05. In addition to the penalties and remedies
16 provided injured parties in this chapter, the attorney general may use the authority under
17 section 51-10-05.1 to prevent any violation of this section. A retailer that sells motor fuel at the
18 same or higher legally posted price of a competitor in the same market area on the same day is
19 not in violation of this section. Unfair competition in the marketing of motor fuel occurs when a
20 marketer with more than one location uses profits from one location to cover losses from
21 below-cost selling of motor fuel at another location, when refiners use profits from refining crude
22 oil to cover below normal or negative returns earned from motor fuel marketing operations, and
23 when a business uses profits from nonmotor fuel sales to cover losses from below-cost selling
24 of motor fuel.

25 **SECTION 3.** A new section to chapter 51-10 of the North Dakota Century Code is
26 created and enacted as follows:

27 **Claim for relief by person injured by violation of chapter authorized - Injunctive**
28 **relief - Damages - Attorney's fees - Jurisdiction.**

29 1. A person injured by a violation, or who would suffer injury from a threatened
30 violation, of this chapter may maintain an action in a court to prevent, restrain, or
31 enjoin the violation or threatened violation. If in the action a violation or threatened

1 violation of this chapter is established, the court shall enjoin and restrain, or
2 otherwise prohibit, the violation or threatened violation and the court shall assess in
3 favor of the plaintiff and against the defendant the costs of the action, including
4 reasonable attorney's fees. In an action it is not necessary that actual damages to
5 the plaintiff be alleged or proved, but if alleged and proved, the plaintiff, in addition
6 to injunctive relief and costs and reasonable attorney's fees, is entitled to recover
7 from the defendant the damages sustained by the plaintiff.

8 2. A person injured as a result of an act or practice that violates this chapter may
9 bring a civil action for appropriate relief, including an action for a declaratory
10 judgment, injunctive relief, and for actual damages. Any actual damages found to
11 have resulted from a violation of this chapter must be trebled by the court in
12 making its award. An action under this section must be brought within two years
13 after the alleged violation occurred.

14 3. In making an award under subsection 2, the court may award court costs and
15 reasonable attorney's fees to the prevailing party.

16 4. Venue lies in the county where any defendant resides or does business or where
17 the cause of action accrues.

18 **SECTION 4.** A new section to chapter 51-10 of the North Dakota Century Code is
19 created and enacted as follows:

20 **Applicability of chapter.** This chapter does not apply to a sale when:

- 21 1. Motor fuel is advertised, offered for sale, or sold in a bona fide clearance sale for
22 the purpose of discontinuing trade;
23 2. Motor fuel is sold upon the final liquidation of a business; or
24 3. Motor fuel is advertised, offered for sale, or sold by fiduciary or other officer under
25 the order or direction of a court.

26 **SECTION 5.** A new section to chapter 51-10 of the North Dakota Century Code is
27 created and enacted as follows:

28 **Competitive sales.** A wholesaler may advertise, offer to sell, or sell motor fuel at a
29 price made in good faith to meet the price of a competitor that is rendering the same type of
30 service and is selling the same article at cost to the competing wholesaler as defined in this
31 chapter. A retailer may advertise, offer to sell, or sell motor fuel at a price made in good faith to

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- 1 meet the price of a competitor that is selling the same article at cost to the competing retailer as
- 2 defined in this chapter.