

**SENATE BILL NO. 2389
with House Amendments**

Fifty-ninth
Legislative Assembly
of North Dakota

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 a new chapter to title 51 of the North Dakota Century
2 Code, relating to below-cost sales in the marketing and selling of motor fuel.

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

4 **SECTION 1.** A new chapter to title 51 of the North Dakota Century Code is created and
5 enacted as follows:

6 **Definitions.**

7 1. For motor fuel offered for sale by posted pricing or indicating meter by a retailer at
8 a retail location where motor fuel is dispensed into the fuel tank of a passenger
9 motor vehicle or truck by a consumer, "cost" means:

10 a. The invoice cost of motor fuel to the wholesaler or retailer, as the case may
11 be, or the lowest replacement cost of motor fuel within three days before the
12 date of sale, less, in either of these two cases, all trade discounts except
13 customary discounts for cash, plus the full value of freight costs, state and
14 federal taxes, and credit card processing fees assessed to the retailer.

15 b. The customary discount for cash includes any allowance, whether a part of a
16 larger discount, made to a wholesaler or retailer when that person pays for
17 motor fuel within a limited or specified time.

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

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

5 2. "Retailer" means any person engaged in the business of making sales at retail
6 within this state. In the case of a person engaged in the business of making sales
7 at retail and sales at wholesale, the term applies only to the retail portion of such
8 business.

9 3. "Sell at retail", "sales at retail", and "retail sale" mean any transfer for a valuable
10 consideration, made in the ordinary course of trade or in the usual prosecution of
11 the seller's business, of title to tangible personal property to the purchaser for
12 consumption or use other than resale or further processing or manufacturing.

13 4. "Sell at wholesale", "sales at wholesale", and "wholesale sales" mean any transfer
14 for valuable consideration made in the ordinary course of trade or the usual
15 conduct of the seller's business, of title to tangible personal property to the
16 purchaser for purposes of resale or further processing or manufacturing.

17 5. "Wholesaler" means any person engaged in the business of making sales at
18 wholesale in this state. In the case of a person engaged in the business of making
19 both sales at wholesale and sales at retail, the term applies only to the wholesale
20 portion of the business.

21 **Certain motor fuel marketing practices prohibited.** An offer for resale of motor fuel
22 by a retailer by posted pricing or indicating meter that is below cost, as defined in this chapter,
23 is a violation of this chapter. A retailer that sells motor fuel at the same or higher legally posted
24 price of a competitor in the same market area on the same day is not in violation of this
25 chapter. A marketer with more than one location may not use profits from one location to cover
26 losses from below-cost selling of motor fuel at another location. Refiners may not use profits
27 from refining crude oil to cover below normal or negative returns earned from motor fuel
28 marketing operations. A business may not use profits from nonmotor fuel sales to cover losses
29 from below-cost selling of motor fuel.

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

- 1 1. A person injured by a violation, or who would suffer injury from a threatened
2 violation, of this chapter may maintain an action in a court to prevent, restrain, or
3 enjoin the violation or threatened violation. If in the action a violation or threatened
4 violation of this chapter is established, the court shall enjoin and restrain, or
5 otherwise prohibit, the violation or threatened violation and the court shall assess
6 in favor of the plaintiff and against the defendant the costs of the action, including
7 reasonable attorney's fees. In an action it is not necessary that actual damages to
8 the plaintiff be alleged or proved, but if alleged and proved, the plaintiff, in addition
9 to injunctive relief and costs and reasonable attorney's fees, is entitled to recover
10 from the defendant the damages sustained by the plaintiff.
- 11 2. A person injured as a result of an act or practice that violates this chapter may
12 bring a civil action for appropriate relief, including an action for a declaratory
13 judgment, injunctive relief, and for actual damages. Any actual damages found to
14 have resulted from a violation of this chapter must be trebled by the court in
15 making its award. An action under this chapter must be brought within two years
16 after the alleged violation occurred.
- 17 3. In making an award under this chapter, the court may award court costs and
18 reasonable attorney's fees to the prevailing party.
- 19 4. Venue lies in the county where any defendant resides or does business or where
20 the cause of action accrues.

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

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

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

Fifty-ninth
Legislative Assembly

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