



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**ROUNDTABLE ON RESALE BELOW COST LAWS AND REGULATIONS**

**-- Note by the United States --**

*This note is submitted by the Delegation of the United States FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2005.*

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## **1. Introduction**

1. In the United States, there is no federal law that broadly prohibits below-cost sales (“BCS”). A majority of U.S. states, however, have some type of BCS laws, which prohibit retailers from setting prices below a statutorily mandated level of cost. The primary concern with these laws is that they deter firms from lowering their prices, and thus deprive consumers of the benefits of competition. BCS laws may apply generally to all retail sales or may apply only to sales of specific items, such as milk, alcohol, gasoline, or tobacco. Most BCS laws define cost in a way that includes both fixed and variable costs. Although many of these laws require a plaintiff to show that the defendant’s pricing had an adverse effect on “competition,” most courts interpreting BCS laws have found that evidence of sales being diverted from a competitor to the price-cutting defendant satisfies this adverse effect requirement. Accordingly, a plaintiff can prevail under BCS laws even if there is no proof of harm to competition. This contrasts with courts’ treatment of predatory pricing claims under federal antitrust laws, where plaintiffs must show that the defendant’s price-cutting is likely to harm consumers.

2. Because there is no necessary relationship between liability under BCS laws and effects on consumer welfare, BCS laws almost certainly condemn competitive conduct. Enforcement of BCS laws varies among states, but recent court cases and press reports suggest that they are likely to constrain firms’ pricing decisions in some places. To the extent that firms adjust their behaviour to avoid liability, BCS laws are likely to deter firms from cutting their prices below the statutory minimum. Because these price cuts are unlikely to threaten competition, consumers are worse off.

3. There are relatively few empirical studies of the effects of BCS laws. There is no consensus among the studies that have been conducted of how BCS laws affect market outcomes. Some early studies that focus on industry structure as opposed to market outcome variables, such as price or margins, find contradictory results with regard to the relationship between BCS laws and market concentration or the presence of small businesses. More recent studies of gasoline-specific BCS laws also arrive at mixed results. Although some studies find that BCS laws are associated with higher gasoline prices, others have found no effect or evidence that BCS laws are associated with lower long-run gasoline prices. The inability to control for the vigour of enforcement of a state’s BCS law – and thus whether the BCS law is a binding constraint on pricing decisions – may be partially responsible for these varied results.

4. This paper provides an overview of state BCS laws and how they are likely to affect competition. It also discusses relevant empirical work and competition advocacy by the Federal Trade Commission involving BCS laws.

## **2. State Below-Cost Sales Laws**

5. While federal antitrust law prohibits predatory pricing, there is no specific federal prohibition on below-cost sales. There are two types of state BCS laws – laws of general application that apply to all retail merchandise; and laws that apply only to the sales of specific products, such as gasoline, cigarettes, alcoholic beverages, or milk. Twenty-five states currently have general BCS laws and thirty-one states have laws that cover the sale of specific items (see Table 1).

6. BCS laws make it illegal for a retailer to sell below some statutorily defined measure of cost with the intent to injure competition. State laws define cost differently, but most rely on a measure that includes both fixed and variable costs. For example, Alabama’s Motor Fuel Marketing Act (“AMFMA”), which is typical, defines “cost” to include the lesser of “the invoice or replacement cost of the motor fuel . . . less all trade discounts except customary discounts for cash,” plus applicable taxes and fees and “the cost of doing business.”<sup>1</sup> The cost of motor fuel is defined as the lower of “(i) the invoice cost of the motor fuel .

. . . or (ii) the lowest replacement cost of motor fuel . . . within five days prior to the date of sale, in the quantity last purchased.”<sup>2</sup> The Act defines the “cost of doing business” to include:

labour (including salaries of executives and officers), rent (which rent must be no less than fair market value based on current use), interest on borrowed capital, depreciation, selling cost, maintenance of equipment, transportation or freight cost, losses due to breakage or damage; credit card fees, or other charges; credit losses, all types of licenses, taxes, insurance, and advertising.<sup>3</sup>

7. Other states define cost to include a minimum mark-up over incurred costs. For example, for cigarettes, alcoholic beverages, and gasoline, Wisconsin’s Unfair Sales Act defines “cost to retailer” as invoice or replacement cost plus a mark-up ranging from 3 percent to 9.18 percent, depending on the product and type of seller involved in the transaction.<sup>4</sup>

8. Many BCS laws allow plaintiffs to present evidence of below-cost sales to satisfy the “intent” element of the violation as well.<sup>5</sup> Some BCS statutes require that the defendant’s conduct have an adverse effect on competition<sup>6</sup> or allow a fact finder to infer intent to injure competition from evidence of actual effect.<sup>7</sup> BCS laws, however, typically define harm to competition with regard to how a defendant’s below-cost sales affect its competitors.

9. For example, although Alabama’s Motor Fuel Marketing Act makes it illegal to sell gasoline below cost “where the effect is to injure competition,” judicial interpretation of the statute has made it clear that evidence that the below-cost sales in question caused one competitor to lose business will suffice.<sup>8</sup> Likewise, the Tenth Circuit has held that evidence that the defendant’s sales increased while its competitor’s sales decreased satisfies the requirement that a below-cost sale must “substantially lessen competition” to violate the Oklahoma Unfair Sales Act.<sup>9</sup>

10. Some courts, however, have attempted to bring state BCS laws into closer harmony with predatory pricing jurisprudence by requiring plaintiffs to show likely harm to competition. For example, in *Wal-Mart Stores, Inc. v. American Drugs, Inc.*, the Supreme Court of Arkansas overturned a Chancery Court finding that Wal-Mart had violated the Arkansas Unfair Practices Act (“AUPA”) by selling certain health and beauty products below cost.<sup>10</sup> The court noted that Wal-Mart’s “loss-leader strategy . . . is readily justifiable as a tool to gain a competitive edge,” and that as opposed to threatening competition, Wal-Mart’s pricing “simply enhanced competition in the area” and accordingly prevented the plaintiffs from “making the profits that they once did.”<sup>11</sup> The court concluded that “[a] competitor that has been injured by legitimate competitive pricing . . . should not be permitted to use the [AUPA] as a fountain for recouping its losses.”<sup>12</sup>

11. Most BCS laws allow for various defences to a *prima facie* case. Wisconsin’s Unfair Sales Act is representative, providing that the prohibition against below-cost sales “shall not apply” to sales when:

1. merchandise is sold in bona fide clearance sales;
2. perishable merchandise must be sold promptly in order to forestall loss;
3. merchandise is imperfect or damaged or is being discontinued;
4. merchandise is sold upon the final liquidation of any business;
5. merchandise is sold for charitable purposes or to relief agencies;

6. merchandise is sold on contract to departments of the government or governmental institutions;
  7. the price of merchandise is made in good faith to meet an existing price of a competitor and is based on evidence in the possession of the retailer ... in the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer ... in the ordinary course of trade or the usual conduct of business;
- Merchandise is sold by any officer acting under the order or direction of any court.
  - Motor vehicle fuel is sold by a person to a wholesaler of motor vehicle fuel, who may sell the motor vehicle fuel at either retail or wholesale.<sup>13</sup>

12. General BCS laws explicitly are concerned with “fair” treatment of businesses and consumers rather than the protection of consumer welfare. Enacted earlier in the century, against the backdrop of the Depression, most states passed general BCS laws to protect small businesses from “unfair” competition from chain stores. Thus, by contrast with the current view of the goals of competition law, states designed BCS laws specifically to protect small competitors from larger rivals. An additional goal behind BCS laws was to protect consumers from being deceived by retailers that use loss-leaders to lure customers into their stores and then charge the unwary customers “unfairly” high prices for other goods.<sup>14</sup> For example, Wisconsin’s Unfair Sales Act, enacted in 1939, states that:

The practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce. Such practice causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy.<sup>15</sup>

13. Similarly, in 1959 the U.S. Supreme Court said the following about loss leaders while commenting on the constitutionality of the Oklahoma Unfair Sales Act:

One of the chief aims of state laws prohibiting sales below cost was to put an end to “loss leaders” selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains.<sup>16</sup>

14. Clearly, this statement runs counter to the Supreme Court’s current view that because “low prices benefit consumers regardless of how those prices are set,” below-cost sales “are of no moment to the antitrust laws if competition is not injured.”<sup>17</sup>

15. BCS laws that specifically concern gasoline generally are of a more recent vintage, and may have been enacted as a way to protect small independent station owners from vertically integrated refiners and other high-volume competitors, such as warehouse clubs.<sup>18</sup> Increased competition from these new business models has caused a steady erosion in the number of gasoline stations – especially small independent stations – in the U.S. since the 1970s.<sup>19</sup> Some modern proponents of gasoline BCS laws try to connect the protection of small businesses to increased consumer welfare by arguing that prohibitions on below-cost sales by multi-product retailers and vertically integrated refiners is likely to make entry more probable, and thus lead to more competitors and lower prices.<sup>20</sup>

### 3. Competitive Impact of BCS Laws

16. The primary concern with BCS laws is that they will deter firms from lowering their prices, thus depriving consumers of the benefits of competition. In the U.S., below-cost pricing that is likely to harm competition is addressed by Section 2 of the Sherman Act<sup>21</sup> and the Robinson-Patman Act.<sup>22</sup> To maximize the likelihood that only pricing behaviour that is likely to harm competition is subject to antitrust challenge, the U.S. Supreme Court has imposed a heavy burden on plaintiffs trying to make a predatory-pricing claim. In states with BCS laws, however, the bar for plaintiff is set much lower; firms risk liability for cutting prices below the statutorily defined measure of cost, even when their actions have no possibility of harming competition.

#### 3.1 Predatory Pricing Under US Antitrust Law

17. All legal rules have costs associated with falsely convicting the innocent (“type-I errors”) and letting the culpable go free (“type-II errors”). The expected cost of error associated with a particular rule has two components: the probability of committing an error and the cost that making an error imposes on society. When legal rules have high type-I error rates, legal conduct that is erroneously being condemned is deterred, and the more valuable the deterred conduct, the larger the social cost.

18. In the context of antitrust law, a rule with a high type-I error rate deters firms from engaging in procompetitive conduct. It is widely recognized that competition provides consumers with tremendous benefits in terms of lower prices, better quality, and greater variety.<sup>23</sup> Accordingly, legal rules that reduce firms’ incentives to compete impose costs upon consumers.

19. The Supreme Court’s jurisprudence under Section 2 of the Sherman Act, which is concerned with unilateral conduct, shows a keen awareness of type-I error costs.<sup>24</sup> This concern has been most pronounced in predatory pricing jurisprudence, where the conduct under scrutiny – lowering prices – is the hallmark of competition; a legal rule that condemns price-cutting too easily is likely to deter firms from competing on price as vigorously as they otherwise would, to the detriment of consumers. In *Matsushita Electric Industries Co. v. Zenith Radio*, for example, the Court observed that “cutting prices in order to increase business often is the very essence of competition,” and stated that “mistaken inferences” in cases involving generally procompetitive conduct, “are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”<sup>25</sup> In its most recent decision concerning predatory pricing, *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, the Court again expressed concern with the error costs associated with legal rules that attempt to distinguish predatory pricing from procompetitive price-cutting: “[T]he costs of an erroneous finding of liability are high. The mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition.”<sup>26</sup>

20. To minimize error costs, the Supreme Court set out a two-part test to detect price-cutting that is likely to harm consumers. First, a necessary (but not sufficient) condition for pricing to be unlawful is that the low prices must be “below an appropriate measure of [the defendant’s] cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.”<sup>27</sup> Although the Court has not stated what the measure of cost should be, prominent antitrust scholars and several federal circuit courts have concluded that the price-cutter’s marginal costs, or a close proxy such as average variable costs, should be the criterion.<sup>28</sup> This rule prevents firms from facing antitrust scrutiny for prices that, even though below cost, are likely to make business sense regardless of any strategic effect they may have on rivals.

21. Second, even if prices are below appropriate costs, courts examine whether the defendant is likely to be able to recoup its investment through future supracompetitive pricing.<sup>29</sup> The rationale is that

even if a defendant were pricing below cost, if recoupment is unlikely consumers unambiguously benefit; they enjoy lower prices in the short-run without the risk of supracompetitive prices in the long run. As the Supreme Court has noted, “unsuccessful predation is in general a boon to consumers[;] . . . [t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured.”<sup>30</sup>

22. To determine the likelihood of recoupment, courts examine factors such as the defendant’s market share, entry barriers, and capacity constraints.<sup>31</sup> As a practical matter, some courts have examined recoupment first to avoid the complex determination of whether costs are “predatorily” low.<sup>32</sup>

### **3.2 Liability Standards under State BCS Laws**

23. In contrast to federal predatory pricing jurisprudence, under most states’ BCS laws, a plaintiff can prevail in cases in which the defendant’s actions have no potential to harm competition. First, BCS laws prohibit pricing below a benchmark that includes both fixed and variable costs. Prices below these statutory minimums, however, are likely to make business sense without regard to any strategic effect on competitors. Second, even if BCS laws used appropriate cost benchmarks, these laws impose liability without regard to anticompetitive effect. As discussed above, even if the statute requires a showing of harm to competition, courts have held that this requirement is satisfied by a mere showing of harm to a single competitor.<sup>33</sup>

24. Because there is no relationship between liability under BCS laws and consumer welfare, BCS laws almost certainly condemn competitive conduct. To the extent that retailers adjust their behaviour to comply with these laws, they are likely to be deterred from cutting their prices below the statutory minimum, even though this conduct is unlikely to have a negative impact on consumers in the long run. The degree to which retailers adjust their pricing to avoid liability is likely to be a positive function of how vigorously enforcement officials and private parties enforce their states’ BCS laws. We lack empirical data on the level of enforcement, but recent court cases and press accounts suggest that these laws may act as binding constraints on firms’ pricing in at least some states.<sup>34</sup>

25. When they affect firm behaviour, BCS laws are likely to deprive consumers of low prices and protect inefficient firms without providing any countervailing long-run benefits such as protection from future anticompetitive prices. Further, such laws may lead firms to engage in inefficient competition by providing extra services for which consumers otherwise would not be willing to pay.

## **4. Empirical Evidence**

26. Empirical studies of the effect of BCS laws on market outcomes are sparse and differ with respect to their results.

27. Two studies from the 1980s examine the effect of general BCS laws on retail structure. Houston examines the relationship between the presence of BCS laws and the number of single proprietorships and partnerships in a state in 1977.<sup>35</sup> Controlling for other factors, he finds no statistical evidence that BCS laws have led to a greater number (or proportion) of small businesses. Mueller & Paterson examine the relationship between general BCS laws and various measures of retail grocery concentration in 237 metropolitan areas in 1977 and find a negative relationship between BCS laws and concentration.<sup>36</sup> The authors attempt to control for vigour of enforcement and find that in states with BCS laws that allocate a portion of their budget to BCS enforcement, concentration is lower than for states that merely have a law on the books but did not report a specific budgetary allocation to enforcement activities. One study from the 1980s examines the effect of BCS laws and gasoline prices and margins.<sup>37</sup> The authors control for vigour of enforcement and other exogenous factors and find that self-service and full-service gasoline

prices were 0.9 and 2.67 cents more expensive, respectively, in states with BCS laws than in states without them.

28. More recent empirical work has concentrated on gasoline-specific BCS laws. Anderson & Johnson study forty-three metropolitan areas from 1992-1993 and find that margins and prices for gasoline retailers are positively related to the presence of BCS laws.<sup>38</sup> Further, the authors find some evidence that inflated margins resulting from BCS laws attract entry: states with gasoline-specific BCS laws have more retail outlets, each of which on average sells less gasoline than outlets in states without BCS laws. In a report prepared for the Canadian Competition Bureau, Johnson examines the relationship between BCS laws and the number and size of gasoline stations in a state.<sup>39</sup> Using data from 1987 and 1992, Johnson's results suggest that gasoline-specific BCS laws have had no statistically significant impact on the number of stations in a state, but may be weakly associated with smaller average station size. Vita does not examine the effect of BCS laws directly but controls for the presence of BCS laws when comparing prices in states that require divorcement (restricting the integration of gasoline refiners and retailers) versus those that do not.<sup>40</sup> His results suggest that the presence of BCS laws do not affect retail gasoline prices. Skidmore, Peltier & Alm study state-level retail prices and margins from 1983-2002.<sup>41</sup> They find that five years after the enactment of a gasoline-specific BCS law prices fall by about one cent and that states with such laws have larger numbers of large and medium-sized competitors than states without them.

29. These mixed findings are, at least partially, a likely result of an inability to control for the extent to which BCS laws are a binding constraint on firms' pricing decisions. As discussed above, these laws are likely to have an adverse competitive effect only when they affect firms' behaviour; if a state has a law on the books, but neither public officials nor private parties enforce it, firms almost certainly will not take the law into account when setting prices.<sup>42</sup>

## **5. FTC Advocacy**

30. Congress has charged the FTC with enforcing laws prohibiting unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>43</sup> The FTC's competition advocacy program helps fulfil this mission by drawing on its expertise to encourage federal and state legislators, courts, and other agencies to consider how certain policies that they are considering are likely to affect consumers and markets. Competition advocacy most often takes the form of letters from FTC staff or the full Commission to interested regulators but also consists of testimony, formal submissions to regulatory agencies, and amicus curiae briefs to courts.

31. During the last two years, the Commission staff has commented on five proposed and existing gasoline-specific BCS laws.<sup>44</sup> For the reasons discussed in the previous sections of this paper, the Commission staff argued in its comments that these laws are likely to result in higher prices for consumers. After receiving FTC comments, proposed laws in Kansas, Michigan, and North Carolina never left committee and the governor of New York did not sign the proposed BCS bill.

## **6. Conclusion**

32. Unlike claims of predatory pricing under federal antitrust laws where plaintiffs must show a likelihood of harm to competition, plaintiffs can show a violation of a BCS law when the defendant's conduct poses no threat to competition. To the extent that firms adjust their pricing to conform with state BCS laws, these laws are likely to have an adverse effect on consumer welfare by discouraging firms from competing as vigorously on price than they otherwise would and by protecting high-cost firms from competition from more efficient rivals. Empirical work on the effect of BCS laws on prices, margins, and market structure has arrived at different results, likely in large part due to an inability to control accurately for the extent to which BCS laws affect firms' pricing decisions. Given the likelihood that BCS laws,

where binding on firms' pricing, will negatively impact consumer welfare, the FTC's competition advocacy program has tried – successfully in some cases – to persuade state legislators not to enact these laws.



**General BCS Laws**

**Arkansas**

ARK. CODE ANN. § 4-75-209

**California**

CAL. BUS. & PROF. CODE ANN. §§ 17030, 17043, 17044, 17071.5

**Colorado**

COLO. REV. STAT. § 6-2-105(1)-(3)

**Hawaii**

HAW. REV. STAT. §§ 481-3, 481-5

**Idaho**

IDAHO CODE § 48-104

**Kentucky**

KY. REV. STAT. ANN. § 365.030

**Louisiana**

LA. REV. STAT. ANN. § 51:422

**Maine**

ME. REV. STAT. ANN. tit. 10, §§ 1202-1207

**Maryland**

MD. CODE ANN., COM. LAW §§ 11-401, 11-404

**Massachusetts**

MASS. GEN. L. ch. 93, §§ 14E, 14F

MASS. GEN. L. ch. 94A § 14

**Minnesota**

MINN. STAT. ANN. §§ 325D.01-325D.04

**Mississippi**

Mississippi Unfair Cigarette Sales Law, MISS. CODE ANN. § 75-23-7

**Montana**

MONT. CODE ANN. §§ 30-14-209 to 30-14-211

**Nebraska**

NEB. REV. STAT. § 59-805

**North Dakota**

N.D. CENT. CODE §§ 51-10-01 to 51-10-04

**Ohio**

Unfair Cigarette Sales Act, OHIO REV. CODE ANN. §§ 1333.11, 1333.12

**Product-Specific BCS Laws**

**Alabama**

ALA. CODE § 8-22-6 (gasoline)

**Arkansas**

Unfair Cigarette Sales Act, ARK. CODE ANN. § 4-75-701

**Colorado**

COLO. REV. STAT. § 6-2-105(1)(b) (gasoline)

**Delaware**

Unfair Cigarette Sales Act, 6 DEL. C. § 2601

**District of Columbia**

Cigarette Sales Below Cost Act of 1994, D.C. STAT. § 28-4522

**Florida**

FLA. STAT. § 526.304 (gasoline)

**Georgia**

GA. CODE ANN. § 10-1-254 (gasoline)

**Iowa**

IOWA CODE § 421B.3 (cigarettes)

**Indiana**

Cigarette Fair Trade Act, IND. CODE § 24-3-2

**Kansas**

KAN. CODE § 41-2726 (cereal malt beverages)

**Kentucky**

Unfair Cigarette Sales Law, KY. REV. STATE. ANN. § 365.280

**Maine**

ME. REV. STAT. ANN. tit. 10, § 1209 (gasoline)  
ME. REV. STAT. ANN. tit. 7, § 2983 (milk)

**Maryland**

MD. CODE ANN., COM. LAW § 10-304.1 (gasoline)  
Cigarette Sales Below Cost Act, §§ 11-501 - 510

**Massachusetts**

MASS. GEN. L. ch. 94 § 295P (gasoline)

**Minnesota**

MINN. STAT. ANN. § 325D.71  
Minnesota Dairy Industry Unfair Trade Practices Act, MINN. STAT. ch. 32 § 72  
Minnesota Unfair Cigarette Sales Act, MINN. STAT. ANN. ch. 64C § 13

**Missouri**

Missouri Motor Fuel Marketing Act  
MO. REV. STAT. § 416.615  
Unfair Milk Sales Practices Act,  
MO. REV. STAT. § 416.415

**Montana**

MONT. CODE ANN. § 16-10-301 (cigarettes)

**Oklahoma**

Oklahoma Unfair Sales Act, 15 OKLA. STAT. tit. 15, § 598.1 et seq.

**Pennsylvania**

P.A. Cons. Stat. Ann. § 73:21

**Rhode Island**

R.I. GEN. LAWS §§ 6-13-1 to 6-13-8

**South Carolina**

S.C. CODE ANN. § 39-3-150

**Tennessee**

TENN. CODE. ANN. § 47-25-201 to 47-25-206

**Utah**

UTAH CODE ANN. § 13-5-7

**West Virginia**

W. VA. CODE § 47-11A-2

**Wisconsin**

WIS. STAT. ANN. § 100.30(1)

**Wyoming**

WYO. STAT. § 40-4-107

**Nebraska**

Unfair Cigarette Sales Act,  
NEB. REV. STAT. § 59-1501 to 59-1518

**Nevada**

NEV. STAT. § 370.371 (cigarettes)  
NEV. STAT. § 584.583 (dairy products)

**New Hampshire**

N.H. REV. STAT. ANN. § 178:21 (on-premises  
liquor and beverages)

**New Jersey**

N.J. STAT. ANN. § 56:6-2(b) (gasoline)  
Unfair Cigarette Sales Act of 1952, N.J. STAT.  
ANN. § 56:7-20

**New York**

Motor Fuel Marketing Practices Act,  
GEN. BUS. § 370  
TAX § 484, 485(b) (cigarettes)

**North Carolina**

N.C. GEN. STAT. § 75-82 (gasoline)  
N.C. GEN. STAT. § 106-266.19 (milk)

**Oklahoma**

Unfair Cigarette and Tobacco Products Sales  
Act, OKLA. STAT. tit. 68, § 333

**Pennsylvania**

Cigarette Sales and Licensing Act, P.A. CONS.  
STAT. ANN. § 72:218-A

**Rhode Island**

R.I. Division of Taxation Regulation CIG 91-11  
(cigarettes)

**South Carolina**

S.C. CODE ANN. § 39-5-325 (gasoline)

**South Dakota**

S.D. CODIFIED LAWS § 37-10-14 (cigarettes)

**Tennessee**

TENN. CODE. ANN. § 47-25-611 (gasoline)  
TENN. CODE. ANN. § 47-25-303 (cigarettes)  
TENN. CODE. ANN. § 53-3-202 (milk products)

**Utah**

UTAH CODE ANN. § 13-16-4 (gasoline)

**Washington**

WASH. REV. CODE § 19.91.300 (cigarettes)

## NOTES

1. ALA. CODE § 8-22-4(15) (cost to wholesaler); ALA. CODE § 8-22-4(16) (cost to retailer).
2. *Id.* at § 8-22-4(14).
3. *Id.* at § 8-22-4(17). *See also* CAL. BUS. & PROF. CODE § 17029 (same).
4. WIS. STAT. § 100.30(2)(am). *See also* MD. CODE § 11-401(b) (cost to retailer is defined as invoice and transportation costs plus a 5-7% markup); CAL. BUS. & PROF. CODE § 17026 (cost to distribution is invoice or replacement cost plus a 6 percent markup in absence of proof of “cost of doing business.”).
5. *See, e.g.*, WIS. STAT. § 100.30(3); OKLA. STAT. 15 § 598.5(c); MD. CODE § 11-404(b).
6. *See* ALA. CODE § 8-22-6.
7. *See* CAL. PROF. & BUS. CODE § 17071.
8. Alabama’s Supreme Court has held that “injury to a competitor suffices to establish a violation of the AMFMA” because “the legislature specifically defined ‘competition’ for the purposes of the AMFMA to include *any person who competes.*” *McGuire Oil.*, 612 So.2d at 422. *See also Star Service & Petroleum Co. v. Alabama*, 518 So. 2d 126, 129 (Ala. Civ. App. 1986) (affirming the trial court’s finding that the defendant’s below-cost pricing had injured competition when competitors testified that they were “actually losing money” and that defendant’s pricing “definitely injured my business”); *Home Oil Co. Inc. v. Sam’s East, Inc.*, 252 F. Supp. 2d 1302, 1308-11 (M.D. Ala. 2003) (interpreting Alabama law and holding that a genuine issue of material fact exists as to whether defendant’s actions injured competition under the AMFMA when plaintiff adduced evidence that its sales volumes were lower every month for the 12-month period after defendant opened than they were for the corresponding month during the 12-month period prior to defendant’s opening); *Campbell & Sons Oil Co. v. Murphy Oil USA, Inc.*, 2001 U.S. Dist. LEXIS 25127, at \* 29 n.40 (N.D. Ala. May 7, 2001) (reaffirming the rule in *Star Service* that testimony that defendant’s competitors were injured by below-cost pricing is sufficient to support a finding that the defendant had injured competition.)
9. *Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d 639, 648-49 (10th Cir. 2004).
10. 891 S.W.2d 30 (Ark. 1995). *See also Gowan Car Care Ctr. v. Murphy Oil USA, Inc.*, 2000 U.S. App. LEXIS 24867 (6th Cir. 2000) (interpreting Tennessee’s BCS law to require a showing of harm to competition rather than just to individual competitors, and dismissing claim where plaintiff had at most 14% of the retail gasoline market).
11. *Id.* at \*\*35-36.
12. *Id.*
13. WIS. STAT. § 100.30(6)(a). *See also* ALA. CODE §§ 8-22-8(b), 8-22-12, 8-22-13; MD. CODE §11-402.
14. *See* William H. Jordan, *Predatory Pricing After Brooke Group: The Problem of State “Sales Below Cost” Statutes*, 44 EMORY L.J. 267, 304 (1995).

15. WIS. STAT. § 100.30(1).
16. *Safeway Stores v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334, 340 (1959).
17. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223-24 (1992).
18. See R. Anderson & R. Johnson, *Antitrust and Sales-Below-Cost Laws: The Case of Retail Gasoline*, 14 REV. IND. ORG. 189 (1999).
19. See RONALD N. JOHNSON, THE IMPACT OF SALES-BELOW-COST LAWS ON THE U.S. RETAIL GASOLINE MARKET, REPORT PREPARED FOR INDUSTRY CANADA, COMPETITION BUREAU (Feb. 1999).
20. See Mark Skidmore, James Peltier & James Alm, *Do State Motor Fuel Sales-below-cost Laws Lower Prices?*, 57 J. URBAN ECON. 189, 192-93 (2005); Willard F. Mueller & Thomas W. Paterson, *Effectiveness of State Sales-Below-Cost Laws: Evidence from the Grocery Trade*, 62 J. RETAILING 166, 168-69 (1986).
21. 15 U.S.C. § 2.
22. 15 U.S.C. § 13(a).
23. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (“The assumption that competition is the best method of allocating resources in a free market recognises that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favourably affected by the free opportunity to select among alternative offers.”) (citation omitted).
24. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993) (“[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which “inherently is fraught with anticompetitive risk.”); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 414 (2004).
25. 475 U.S. 574, 594 (1986).
26. 509 U.S. at 226 (internal quotation omitted). See also *id.* at 223 (“Low prices benefit consumers regardless of how those prices are set. . . . To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.”) (internal quotations and citations omitted); *AA Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400 (7th Cir. 1989) (“a price ‘too low’ for an inefficient rival may be just right from a consumers’ perspective, showing only that the defendant’s costs of production are lower than those of the plaintiff – for which it should receive a reward in the market rather than a penalty in the courthouse.”).
27. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 117 (1986).
28. Marginal costs are those costs associated with producing an additional unit of output. See *United States v. AMR Corp.*, 335 F.3d 1109, 1116 (10th Cir. 2003) (marginal cost and average variable cost are relevant in determining whether prices are predatory); *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff'd on other grounds*, 492 U.S. 257 (1989) (finding that “[p]rices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable cost . . . are presumed predatory”); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1122-23 (7th Cir. 1983) (holding that no predatory intent can be presumed from prices at or above long-run incremental cost); P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 724; P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). In *Brooke Group*, the parties both agreed that average variable cost should be the appropriate measure.

29. *Brooke Group*, 509 U.S. at 224 (“The second prerequisite to holding a competitor liable under the [federal] antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.”).
30. *Brooke Group*, 509 U.S. at 224 (internal quotations and citations omitted).
31. *See id.* at 226.
32. *See Rose Acre Farms, Inc.*, 881 F.2d at 1401.
33. *See, e.g., Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d 639, 648-49 (10th Cir. 2004); *Gross v. Woodman’s Food Market, Inc.*, 655 N.W.2d 718 (Wis. 2002).
34. *See Star Fuel Marts, LLC v. Sam’s E., Inc.*, 362 F.3d 639 (10th Cir. 2004) (Oklahoma); *Richmond Pharmacy & Surgical, Inc. v. Therasense, Inc.*, 2004 U.S. Dist LEXIS 22152 (N.D. Cal. 2004); *Orion Flight Serv., Inc. v. Basler Flight Serv.*, 692 N.W.2d 804 (Wis. 2004); *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33 (Mo. 2004); *Fisherman’s Wharf Bay Cruise Corp. v. Superior Court of San Francisco*, 7 Cal. Rptr. 3d 628 (Cal. 2003); *Lorillard Tobacco Co. v. Roth*, 786 N.E.2d 7 (N.Y. 2003); *Gross v. Woodman’s Food Mkt.*, 655 N.W.2d 718 (Wis. 2002); *Village Food & Liquor Mart v. H & S Petroleum, Inc.*, 647 N.W.2d 177 (Wis. 2002); *Home Oil Co. v. Sam’s E., Inc.*, 2002 WL 857391 (M.D. Ala. 2002); *R.L. Jordan Oil Co. of N.C., Inc. v. Boardman Petroleum, Inc.*, 572 S.E.2d 288 (S.C. 2002); *Campbell & Sons Oil Co., Inc. v. Murphy Oil USA, Inc.*, 2001 U.S. Dist. LEXIS 25127 (N.D. Ala. 2001); *Trade ‘N Post, LLC v. World Duty Free Am., Inc.*, 628 N.W.2d 707 (N.D. 2001); *Ports Petroleum Co., Inc. v. Nixon*, 37 S.W.3d 237 (Mo. 2001); *Eby-Brown Co., LLC v. Wis. Dept. of Agric., Trade, & Consumer Prot.*, 213 F.Supp.2d 993 (7th Cir. 2001) (Wisconsin); *Associated Wholesalers, Inc. v. Commonwealth*, 780 A.2d 759 (Pa. 2001); *Gowan Car Care Ctr. v. Murphy Oil USA, Inc.*, 2000 U.S. App. LEXIS 24867 (6th Cir. 2000) (Tennessee); *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 83 Cal. Rptr. 2d 548 (Cal. 1999); *Wal-Mart Stores, Inc. v. Am. Drugs, Inc.*, 891 S.W.2d 30 (Ark. 1995). *See also* Susan R. Miller, *Bill Aims to Repeal Law on Gas Price*, PALM BEACH POST, at 1B (Aug. 23, 2005) (reporting on Florida enforcement); Steve McMillan, *Gas Deals Fuel Legal Battle*, DENVER POST at K1 (July 3, 2005) (reporting on Colorado enforcement); Ben Jones & Steve Wideman, *State’s Markup Law Taps Wallet*, POST CRESCENT, at 1A (June 5, 2005) (reporting on Wisconsin enforcement); Justin Blum, *Maryland Hits Brakes on Fleeting Gasoline Price War*, WASHINGTON POST, at A1 (May 6, 2005) (reporting on Maryland enforcement); Donna Walter, *State, Quick Trip Headed Back to Court Over Below-cost Gas*, ST. LOUIS DAILY RECORD (Apr. 1, 2004) (reporting on Missouri enforcement); Bruce Mohl, *Midland Farms Releases Milk-Price Data to State Move May Clear Path to Resolving Allegation of Below-Cost Sales*, BOSTON GLOBE, at E1 (Nov. 27, 2002).
35. Michael J. Houston, *Minimum Markup Laws: An Empirical Assessment*, 57 J. RETAILING 98 (1981).
36. Willard F. Mueller & Thomas W. Paterson, *Effectiveness of State Sales-Below-Cost Laws: Evidence from the Grocery Trade*, 62 J. RETAILING 166 (1986).
37. Robert N. Fenili & William C. Lane, *Thou Shalt Not Cut Prices! Sales-Below-Cost Laws for Gas Stations*, 9 REGULATION 31 (Sept./Oct. 1985).
38. Anderson & Johnson, *supra* note 18.
39. Johnson, *supra* note 19.
40. Michael G. Vita, *Regulatory Restrictions on Vertical Integration and Control: The Competitive Impact of Gasoline Divorcement Policies*, 18 J. OF REG. ECON. 217 (2000). Vita is an economist with the FTC’s Bureau of Economics.
41. Skidmore *et al.*, *supra* note 20.

42. There may be little or no private enforcement in a state when the BCS statute provides no private right of action or when state courts have interpreted the BCS statute to require a plaintiff to show that the defendant's conduct is likely to threaten competition.
43. Federal Trade Commission Act, 15 U.S.C. § 45.
44. Letter from the FTC Staff to Michigan State Representative Gene DeRossett (June 18, 2004), at <http://www.ftc.gov/os/2004/06/040618staffcommentsmichiganpetrol.pdf>; Letter from the FTC Staff to Kansas State Senator Les Donovan (Mar. 12, 2004), at <http://www.ftc.gov/be/v040009.pdf>; Letter from the FTC Staff to Alabama State Representative Demetrius Newton (Jan. 29, 2004), at <http://www.ftc.gov/be/v040005.htm>; Letter from the FTC Staff to Wisconsin State Representative Shirley Krug (Oct. 15, 2003), at <http://www.ftc.gov/be/v030015.htm>; Letter from FTC staff to New York Attorney General Eliot Spitzer (July 24, 2003), at <http://www.ftc.gov/be/nymfmpa.pdf>; Letter from the FTC Staff to North Carolina State Senator Daniel G. Clodfelter (May 19, 2003), at <http://www.ftc.gov/os/2003/05/ncclsenatorclodfelter.pdf>.