

No. 465, A.

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## CHAPTER 243

AN ACT to repeal and recreate 100.201 of the statutes, relating to unfair trade practices in the dairy industry and providing penalties.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

100.201 of the statutes is repealed and recreated to read:

100.201 UNFAIR TRADE PRACTICES IN THE DAIRY INDUSTRY. (1) DEFINITIONS. Unless context requires otherwise:

(a) "Selected dairy products" means: 1. milk, skim milk, fortified milk, flavored milk, flavored skim milk, buttermilk, cream, sour cream, half and half, whipping cream, whipped cream and cottage cheese; and 2. ice cream, ice milk, sherbet, custard, water ices, quiescently frozen ices and frozen dessert novelties manufactured from any such products. The department may by rule after hearing designate as selected dairy products such other products derived in whole or in part from milk as it finds necessary to effectuate the purposes of this section; but in no event shall there be designated as selected dairy products any of the following: powdered dry milk or powdered dry cream, condensed, concentrated or evaporated milk in hermetically sealed containers, butter or cheese, other than cottage cheese.

(b) "Sell at retail," "sales at retail" and "retail sales" include any transfer for a valuable consideration made in the course of trade or conduct of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing, and include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(c) "Sell at wholesale," "sales at wholesale" and "wholesale sales" include any transfer for a valuable consideration made in the course of trade or conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing, and include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(d) "Retailer" means every person making any sale of selected dairy products at retail within this state unless otherwise excepted; provided, that in the case of a person making both sales at retail and sales at whole-

sale such term shall apply only to the retail portion of such sales. "Retailer" does not include the United States, the state, any municipality as defined in s. 345.05 (1) (a), or any religious, charitable or educational organization or institution, but does include any other person engaged in the business of making retail sales wholly or in part for his own profit at an institution operated by such an exempt party.

(e) "Wholesaler" means every person making sales of selected dairy products at wholesale within this state, unless otherwise excepted; provided, that in the case of a person making both sales at retail and sales at wholesale such term shall apply only to the wholesale portion of such business.

(f) "Broker" means any person engaged in negotiating sales or purchases of selected dairy products for or on behalf of a retailer or wholesaler or both.

(2) PROHIBITIONS. Each of the practices described in this subsection is declared to be an unfair trade practice. It is unlawful for any person to be engaged in such practices. No wholesaler shall:

(a) 1. Give or extend discounts or rebates, directly or indirectly, to retailers or other wholesalers on selected dairy products or give or extend to such purchasers any services connected with the delivery, handling or stocking of such products except in accordance with published price lists. A wholesaler may sell selected dairy products at a price different from or with services less than or additional to those in said published price list in order to meet a bona fide offer by a competitor to a particular retailer or wholesaler, but such discount, rebate or service shall not be given until the wholesaler first makes a written record of the date of such competitive offer, the terms thereof, the name of the retailer or wholesaler to whom made and the name of the competitor by whom made. Such record shall be available within this state for inspection and copying by any retailer or wholesaler upon his written request therefor. It is the duty of every wholesaler under this subsection to prepare and publish as hereinafter provided current price lists giving the prices of all selected dairy products sold by him at wholesale, directly or indirectly, to retailers or other wholesalers, including all discounts, rebates and services connected with the delivery, handling or stocking of such products, giving the effective dates of such prices, and giving the amount paid or anything of value given or granted by him for such sales made through a broker as commission, brokerage, allowance or other compensation. Such price lists shall be available within this state for inspection and copying by any retailer or wholesaler upon his written request therefor.

2. Every wholesaler shall file with the department the address of his principal business office in this state, if any. If a wholesaler has such a principal business address in this state written request for any record or price list required to be made available under this subsection shall be sent to such business office and the information requested shall be made available there. A wholesaler having no principal business office within this state shall file with the department or a designated agent approved by the department such current records or price lists required to be made available under this subsection. Such current records or price lists shall be available for inspection and copying by any retailer or wholesaler upon his written request therefor. The failure or refusal of any wholesaler to make available for inspection and copying any record or price list required to be made available under this subsection within 24 hours after a request has been received or to file with the department current records or price lists as required shall be prima facie evidence of a violation of this subsection.

3. In case of the failure or refusal of any wholesaler to make available or file any record or price list as required by this subsection, any court of record of competent jurisdiction shall, upon a showing of such failure or refusal, and upon notice, order said wholesaler to give to the retailer or

wholesaler so requesting, within a specified time, an inspection thereof, with permission to make a copy therefrom, or to file such information with the department.

(b) Discriminate in price, directly or indirectly, between different purchasers of selected dairy products of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. Proof made at any proceeding under this paragraph that there has been discrimination in price shall be prima facie evidence of the truth of such charges. The burden of rebutting such prima facie evidence by a showing of justification shall be upon the person charged with the violation. Nothing in this paragraph shall prevent any person charged with a violation of this paragraph from rebutting such prima facie evidence by showing that his lower price was made in good faith to meet an equally low price of a competitor. Nothing in this paragraph shall be construed to apply to the submission of bids to or sales to the United States, the state, any municipality as defined in s. 345.05 (1) (a), or any religious, charitable or educational organization or institution. Nothing in this paragraph shall prevent:

1. Price differentials which merely allow for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such selected dairy products are sold or delivered to such purchasers.

2. Persons engaged in selling selected dairy products from selecting their own customers in bona fide transactions and not in restraint of trade.

3. Price changes from time to time resulting from changing conditions affecting the market for or the marketability of the selected dairy products concerned, including but not limited to actual or imminent deterioration, obsolescence, distress sales under court process, or sales in good faith in discontinuance of business in the selected dairy products concerned.

(c) Furnish, give, lend, sell or rent any advertising signs of a permanent nature except such signs advertising the wholesaler's own products, providing that not more than one-third of the space or cost in such advertising signs may be used to identify the retailer.

(d) Make payments of money, credit, gifts or loans to retailers as rental for the storage or display of selected dairy products on the premises where they are offered for sale by the retailer.

(e) Make or underwrite loans to retailer or become bound in any manner for the financial obligation of any retailer except that a wholesaler may lend money to a retailer for the purchase of equipment for the storage, transportation and display of selected dairy products, provided the loan is for not more than 90 per cent of the purchase price, bears at least a 5 per cent annual interest rate, is payable in equal monthly instalments over a period of not more than 48 months, and is secured by a chattel mortgage specifying all payments by the retailer duly filed by the wholesaler within 10 days after the making or underwriting of said loan in the office of the register of deeds of the county in which the retailer is located, as provided in s. 241.10.

(f) Furnish, sell, give, lend or rent any equipment to a retailer except:

1. The wholesaler, under a bill of sale or conditional sales contract describing the property sold and specifying the price and terms of sale duly filed by him in the office of the register of deeds in the county in which the retailer is located within 10 days after delivery of the equipment described therein, may sell equipment for the storage, transportation and display of selected dairy products to the retailer but the selling price shall be not less than the cost to the wholesaler, less 10 per cent per year depreciation, plus transportation and installation costs, plus at least 6 per cent, but in no

event shall it be less than \$100 per unit. In filing bills of sale under this section, the register of deeds shall follow the procedure provided in s. 122.10 for the filing of conditional sales contracts. If the wholesaler makes said sale under a conditional sales contract, the terms of sale shall be no more favorable to the retailer than those provided in par. (e).

2. The wholesaler may provide without restriction coin-vending machines from which the product vended is consumed on the premises.

3. The wholesaler may furnish equipment to retailers for the storage, transportation or display of selected dairy products for one period of not longer than 10 consecutive days a year to any one retailer for use at a fair, exhibition, exposition or other promotional event for agricultural, industrial, charitable, educational, religious or recreational purposes.

4. A wholesaler who furnishes, lends or rents the use of equipment for the storage or display of selected dairy products to any person exempt under sub. (1) (d) shall not sell selected dairy products which will be stored or displayed in such equipment to any retailer using the equipment on the premises of such exempt person unless such retailer purchases said equipment in accordance with this paragraph or par. (e). Nothing in this paragraph shall limit sales of selected dairy products to retailers in conjunction with equipment furnished under subd. 3.

(g) Maintain or make repairs of any equipment owned by a retailer except those used exclusively for selected dairy products. On such repairs the wholesaler shall make charges for the service and parts at the same prices as are charged by third persons rendering such service in the community where the retailer is located but in no event shall the charges be less than the cost thereof to the wholesaler plus a reasonable margin of profit.

(h) Extend or give credit to any retailer in excess of 30 days payable 15 days thereafter.

(i) Give, offer to give, furnish, finance, or otherwise make available any free goods to any person, directly or indirectly, in connection with the sale of selected dairy products to such person or to any other person doing business with such person, or give, offer to give, furnish, finance, or otherwise make available any payments, gifts, or grants of anything of value to any retailer. Nothing in this paragraph shall prevent as to transactions with retailers any of the following:

1. The furnishing of point of sale advertising material that remains inside retailer locations made of paper, cardboard or other material not of a permanent nature for use in the promotion of the products of such wholesaler.
2. The furnishing of hostesses or demonstrators at any retailer's location to promote the products of the wholesaler.
3. The advertising by a wholesaler of his own products through any advertising media he selects which does not involve allowances, payments, or the furnishing of other property to persons purchasing such products in a manner prohibited by this section.
4. Advertising allowances which do no more than reimburse a retailer for his costs in advertising the wholesaler's selected dairy products.
5. Price reductions which are not in violation of par. (b).
6. Conduct otherwise permitted by this section.

(j) 1. Sell or offer to sell, directly or indirectly, any selected dairy product at less than cost with the purpose or intent of injuring, destroying or eliminating competition or a competitor or creating a monopoly, or where the effect may be any of the same.

2. "Cost" of a selected dairy product to a wholesaler means that portion of all of the cost of raw product plus all costs of manufacturing, processing, packaging, handling, sale, delivery and overhead of such wholesaler which, under a system of accounting in accordance with sound ac-

counting principles and reasonably adapted to the business of such wholesaler; is fairly allocable to such selected dairy product and the sale thereof to its customers or to a particular class thereof. Such cost shall include, but not be limited to, all expenses for labor, salaries, bonuses, fringe benefits, administration, rent, interest, depreciation, power, raw and processed ingredients, materials, packaging, supplies, maintenance of equipment, selling, advertising, transportation, delivery, credit losses, license and other fees, taxes, insurance, and other fixed and incidental operating expenses and costs of doing business.

3. The department may by rule after hearing adopt a uniform system of accounting to be used by the department in determining the cost of a selected dairy product and to require wholesalers to file reports of such cost based upon such adopted system of accounting.

4. Proof made at any proceeding under this paragraph of a sale or offer to sell, directly or indirectly, any selected dairy product at less than cost as determined by department rule, if adopted, shall be prima facie evidence that it was made with the purpose or intent of injuring, destroying or eliminating competition or a competitor or creating a monopoly and that the effect may be any of the same. The burden of rebutting such prima facie evidence shall be upon the person charged with a violation of this paragraph. Nothing in this paragraph shall prevent any person charged with a violation of this paragraph from rebutting such prima facie evidence by showing that his sale or offer to sell was made in good faith to meet an equally low price of a competitor.

(3) OPERATION OF RETAIL OUTLET BY WHOLESALER. Nothing in this section shall be interpreted to prohibit the operation of a retail outlet by a wholesaler for retail sales or to prohibit the use by him in such retail outlet any equipment or advertising or miscellaneous matter owned by him provided that such retail outlet is under direct control and management of the wholesaler.

(4) GIVING AWAY MERCHANDISE. Nothing in this section shall be interpreted to prohibit the giving away of merchandise to be consumed on the premises.

(5) PERSONS DEEMED WHOLESALERS OF SELECTED DAIRY PRODUCTS. For the purpose of this section any subsidiary or affiliate corporation, co-operative, officer, director or partner of a corporation, co-operative, or partnership which is a wholesaler of selected dairy products is deemed to be a wholesaler of selected dairy products.

(6) UNLAWFUL ACTS OF RETAILERS. It is unlawful for any retailer to solicit or receive, directly or indirectly, from or through a wholesaler or broker, any discount, rebate, allowance, service, price discrimination, advertising material, loan, equipment, payment or other thing which is prohibited by sub. (2), where such retailer, or any officer or agent thereof, knows or should know that the same is prohibited.

(7) UNLAWFUL ACTS OF BROKERS. (a) It is unlawful for a broker, or any officer or agent thereof, to participate, directly or indirectly, in any unfair trade practice described in sub. (2).

(b) It is unlawful for a wholesaler to engage or offer to engage in any unfair trade practice described in sub. (2), directly or indirectly, through a broker.

(8) FEE ON DAIRY PRODUCTS. (a) For the purpose of administering and enforcing this section the first person who processes or manufactures any selected dairy product for sale at wholesaler or sale at retail (except sales at retail by counter freezer operators licensed under s. 97.05) within this state, or the wholesaler who first receives any such product already processed from outside the state for sale within the state, shall pay to the department on or before the twenty-fifth day of each month following the month in which such wholesaler receives, processes or sells such selected dairy products, a fee as determined by the department, but not to exceed 3 mills

per hundredweight of 3.5 per cent butterfat raw milk equivalent on all milk, cream (whether fresh, sour or storage), aerated or whipping cream, half and half, buttermilk, flavored milk or milk drink, vitamin fortified milk and skim milk sold within the state in final consumer package or container to retailers or consumers or sold in such packages or containers to other wholesalers of selected dairy products for further sale within the state to retailers or consumers, and not to exceed 2 mills per gallon on all ice cream mix and ice milk mix made for freezing into ice cream and ice milk and ultimately sold within the state, whether in the form of mix or finished ice cream and ice milk. Products upon which fees have been paid shall be exempt from further fees in successive transactions. Any person claiming that products sold by him are not subject to assessment under any provision of this subsection by reason of the fact that they were not sold or resold within the state shall have the burden of so proving, and shall be obligated to pay assessment on such products unless and until he produces records satisfying the department that such products are not subject to assessment.

(b) A failure on the part of any person to pay on demand any assessments due hereunder shall be punishable as a violation of this section. The department may, by appropriate proceedings in any court of competent jurisdiction, recover the amount of any assessments due hereunder, together with interest at the rate of 2 per cent per month, for each month such payments are delinquent.

(9) **APPLICABILITY.** The provisions of ss. 133.17 and 133.185 shall not apply to any conduct either permitted, required or prohibited under this section.

(10) **ENFORCEMENT.** It is the duty of the department to investigate, ascertain and determine whether this section or lawful orders issued hereunder are being violated and for such purposes the department shall have all the powers conferred by ch. 93.

(11) **PENALTIES.** (a) Any person violating any of the provisions of this section shall be fined not less than \$100 nor more than \$5,000 for each offense.

(b) The department, after public hearing held pursuant to s. 93.18, may issue a special order against any person requiring such person to cease and desist from acts, practices or omissions determined by the department to violate this section. Such orders shall be subject to judicial review under ch. 227. Any person violating any special order issued hereunder shall be fined not less than \$100 nor more than \$5,000.

(c) The department, in addition to or in lieu of any other remedies herein provided, may apply to a circuit court for a temporary or permanent injunction to prevent, restrain or enjoin any person from violating this section or any special order of the department issued hereunder, without being compelled to allege or prove that an adequate remedy at law does not exist.

(d) The provisions of s. 93.06 (7) shall be applicable to violations of this section insofar as permits, certificates, registrations or licenses issued by the department for the manufacture, distribution, and sale of selected dairy products are concerned, provided that any suspension or revocation thereof pursuant to s. 93.06 (7) can be ordered only for failure to comply with any special order issued pursuant to par. (b) or with any permanent injunction issued pursuant to par. (c), should such failure continue after such order or such injunction becomes final on the completion of any review proceedings. In such proceedings the department shall follow the hearing procedure set forth in s. 93.18 for special orders. Judicial review shall be as provided in ch. 227.

(e) Any person suffering pecuniary loss because of any violation of this section may sue for damages therefor in any court of competent jur-

isdiction and shall recover treble the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

(f) Any retailer or wholesaler may file a written verified complaint with the department alleging facts which, if proved, would support a charge that a person named therein is engaging in unfair trade practices as defined in this section. Whenever such a complaint is filed it is the duty of the department to proceed to hearing and adjudication as provided in par. (b).

(12) REMOVAL OR SALE OF EQUIPMENT. Any equipment furnished by wholesalers to retailers prior to the effective date of this section (1963) shall be removed from the retailers' premises or sold pursuant to sub. (2) (e) or (f) by January 1, 1964. The minimum selling price of such equipment, if fully depreciated in accordance with the provisions of sub. (2) (f), shall not be less than \$10 per unit.

Approved August 12, 1963.

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