



## 2007 ASSEMBLY BILL 820

February 19, 2008 – Introduced by Representatives KRAMER, VUKMIR, FIELDS, J. OTT, PRIDEMORE, JESKEWITZ, NASS, NEWCOMER, BIES, KLEEFISCH and WASSERMAN, cosponsored by Senators CARPENTER, LEHMAN and DARLING. Referred to Committee on Judiciary and Ethics.

1     **AN ACT** *to repeal* 20.115 (1) (r), 100.26 (9), 100.30 and 100.33 (1) (g); *to amend*  
2           100.201 (2) (h) 5., 100.264 (2) (intro.), 100.33 (1) (c), 100.33 (1) (h), 133.03 (1),  
3           133.03 (2), 133.03 (3), 133.04 (2), 133.04 (3), 133.05 (3), 133.05 (4), 134.04 (1),  
4           139.39 (3), 165.065, 814.04 (intro.) and 951.10 (2); and *to create* 100.301,  
5           100.33 (1) (eg), 100.33 (1) (er) and 100.33 (1) (i) of the statutes; **relating to:** the  
6           minimum price of merchandise sold at wholesale or retail, prohibiting  
7           anticompetitive pricing and pricing that injures competition, and granting  
8           rule-making authority.

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### *Analysis by the Legislative Reference Bureau*

Under current law, the Unfair Sales Act or “minimum markup” law prohibits “loss leaders,” or wholesale and retail sales of merchandise at a price below the cost of the merchandise to the seller. With respect to motor vehicle fuel, tobacco products, and alcoholic beverages, the current formulas for calculating cost add minimum markups from 3 to 9.18 percent to cover a portion of the seller’s cost of doing business.

This bill repeals the Unfair Sales Act and creates prohibitions against certain pricing practices by wholesale and retail sellers of goods. First, the bill prohibits anticompetitive pricing, which occurs when a seller sets a price lower than an appropriate measure of the seller’s cost and has a dangerous probability of recouping

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the seller's investment in below-cost pricing. Anticompetitive pricing, as defined in the bill, also violates a current provision that prohibits contracts, combinations, or conspiracies in restraint of trade or commerce. *See Conley Publishing Group v. Journal Communications, Inc.*, 2002 WI 121 (2002), *overruled in part on other grounds, Olstad v. Microsoft Corp.*, 2005 WI 121 (2005). Second, the bill prohibits pricing that injures competition, which occurs when a seller sets a price lower than an appropriate measure of the seller's cost and the price is likely to cause a direct, substantial, and reasonably foreseeable injury to consumers. A seller's pricing does not violate either prohibition unless all of the following apply: 1) the pricing causes, or is likely to cause, substantial injury to consumers; 2) the injury is not reasonably avoidable by consumers; and 3) the injury is not outweighed by countervailing benefits to consumers or competition.

Under the bill, the prohibitions are enforced concurrently and independently by the Department of Agriculture, Trade and Consumer Protection (DATCP), the Department of Justice (DOJ), and district attorneys as follows. If DATCP has reason to believe a seller has engaged in pricing that injures competition, DATCP may, after a hearing, issue an order requiring the seller to cease the violation. The order may require the violator to pay a forfeiture not more than \$500 for a first violation or \$2,500 for subsequent violations. An order issued by the department is reviewable by a court under procedures available under current law.

If DOJ has reason to believe a seller has engaged in pricing that injures competition, DOJ may bring an action seeking a court order requiring the seller to cease the violation. The court may require the violator to pay a forfeiture not more than \$500 for a first violation or \$2,500 for subsequent violations. If DOJ or a district attorney has reason to believe a seller has engaged in anticompetitive pricing, DOJ or the district attorney may commence an action against the seller under the current provision prohibiting contracts, combinations, or conspiracies in restraint of trade or commerce. In lieu of initiating an enforcement action, DOJ, DATCP, or a district attorney may accept an agreement by a seller to stop a pricing practice. Such an agreement may provide for payment by the seller of a reasonable forfeiture. If a seller violates the agreement, the seller may be required to pay a forfeiture up to \$25,000.

DATCP is authorized to promulgate rules administering or interpreting the prohibitions created by the bill. In doing so, DATCP must ensure that the rules are consistent with federal laws and regulations concerning anticompetitive pricing, request commentary on proposed rules from the federal trade commission, and consult and cooperate actively with DOJ.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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

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1           **SECTION 2.** 100.201 (2) (h) 5. of the statutes is amended to read:

2           100.201 (2) (h) 5. This paragraph shall also apply to any retailer who owns,  
3 operates, or otherwise contracts for, directly or indirectly, facilities for  
4 manufacturing or processing any selected dairy product, ~~and to the cost of a selected~~  
5 ~~dairy product, as defined in this paragraph, shall be added both the wholesale and~~  
6 ~~retail markup as provided in s. 100.30.~~

7           **SECTION 3.** 100.26 (9) of the statutes is repealed.

8           **SECTION 4.** 100.264 (2) (intro.) of the statutes is amended to read:

9           100.264 (2) SUPPLEMENTAL FORFEITURE. (intro.) If a fine or a forfeiture is  
10 imposed on a person for a violation under s. 100.16, 100.17, 100.18, 100.182, 100.183,  
11 100.20, 100.205, 100.207, 100.21, ~~100.30 (3)~~, 100.35, 100.44 or 100.46 or a rule  
12 promulgated under one of those sections, the person shall be subject to a  
13 supplemental forfeiture not to exceed \$10,000 for that violation if the conduct by the  
14 defendant, for which the violation was imposed, was perpetrated against an elderly  
15 person or disabled person and if the court finds that any of the following factors is  
16 present:

17           **SECTION 5.** 100.30 of the statutes is repealed.

18           **SECTION 6.** 100.301 of the statutes is created to read:

19           **100.301 Anticompetitive pricing, pricing that injures competition**  
20 **prohibited.** (1) DEFINITION. In this section, “seller” means retail sellers and  
21 wholesale sellers of tangible personal property.

22           (2) PROHIBITED PRICING. Subject to sub. (3), no seller may do any of the following:

23           (a) Engage in anticompetitive pricing.

24           1. For purposes of this paragraph, a seller’s pricing is anticompetitive if all of  
25 the following apply:

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1           a. The seller's price is less than an appropriate measure of the seller's cost.

2           b. The seller has a dangerous probability of recouping the seller's investment  
3 in below-cost pricing.

4           2. For purposes of this paragraph, a seller recoups the seller's investment if it  
5 can be shown that the seller raises and sustains prices above a competitive level and  
6 is likely to do so in a manner that is sufficient to compensate the seller for the losses  
7 the seller incurred by lowering the seller's price below an appropriate measure of the  
8 seller's cost. Evidence that a seller's price is less than an appropriate measure of the  
9 seller's cost is not sufficient to prove that the seller has a dangerous probability of  
10 recouping the seller's investment in below-cost pricing.

11           (b) Engage in pricing that injures competition. For purposes of this paragraph,  
12 a seller's pricing injures competition if all of the following apply:

13           1. The seller's price is less than an appropriate measure of the seller's cost.

14           2. The seller's price is likely to cause a direct, substantial, and reasonably  
15 foreseeable injury to consumers.

16           **(3) LIMITATION.** A seller's pricing does not violate this section unless all of the  
17 following apply:

18           (a) The seller's pricing causes or is likely to cause substantial injury to  
19 consumers.

20           (b) The injury to consumers is not reasonably avoidable by consumers.

21           (c) The injury to consumers is not outweighed by countervailing benefits to  
22 consumers or to competition.

23           **(4) RULE-MAKING.** (a) If the department proposes a rule administering or  
24 interpreting this section, the department shall do all of the following:

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1           1. Ensure that the rule is consistent with federal laws and regulations and with  
2 controlling legal precedent interpreting such laws and regulations.

3           2. Request commentary regarding the proposed rule from the federal trade  
4 commission. If the federal trade commission provides commentary, the department  
5 shall submit the commentary to the legislative reference bureau for publication in  
6 the administrative register.

7           3. Consult, and cooperate actively with, the department of justice.

8           (b) The department shall annually review any rules promulgated under this  
9 section to ensure that the rules remain consistent with federal laws and regulations.

10           **(5) ENFORCEMENT; DEPARTMENT.** (a) If the department has reason to believe that  
11 a seller has violated sub. (2) (b) and that action by the department is in the public  
12 interest, the department may serve the seller with a complaint stating the facts  
13 alleged by the department and giving the seller notice of a hearing that will be held  
14 at least 30 days after the department serves the complaint to the seller. The seller  
15 may appear at the hearing noticed in the complaint to show cause why the  
16 department should not issue an order requiring the seller to cease the violation  
17 alleged in the department's complaint. Any person may apply to intervene in a  
18 proceeding under this subsection for good cause shown. The testimony in a hearing  
19 under this subsection shall be transcribed and filed with the department.

20           (b) If, after a hearing, the department determines that the seller has violated  
21 sub. (2) (b), the department shall prepare written findings of fact, shall issue an order  
22 requiring the seller to cease the violation, and may require the seller to pay a  
23 forfeiture. A forfeiture under this paragraph may not exceed \$500 for a first violation  
24 or \$2,500 for each subsequent violation. An order under this paragraph shall be  
25 subject to judicial review under ch. 227. A violation of an order issued under this

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1 paragraph may be punished as contempt under ch. 785 in the manner provided for  
2 disobedience of a court order, if the department files an affidavit attesting to the  
3 violation in a court in the county where the violation occurred.

4 (c) The department may, after notice and opportunity for hearing, reopen and  
5 modify or set aside findings of fact or an order under this subsection, if the  
6 department determines that such action is appropriate because of changes in the law  
7 or facts underlying the findings of fact or order, or is in the public interest.

8 **(6) ENFORCEMENT; DEPARTMENT OF JUSTICE.** If the department of justice has  
9 reason to believe that a seller has violated sub. (2) (b) and that action by the  
10 department of justice is in the public interest, the department of justice may  
11 commence an action in circuit court in the name of the state to restrain the violation  
12 by temporary or permanent injunction. The department of justice may subpoena  
13 persons and require the production of books and other documents, and may request  
14 the department to exercise its authority under this section to aid in the investigation  
15 of alleged violations of this section. In an action under this subsection, if a court  
16 determines that a seller has violated sub. (2) (b), the court may impose on the seller  
17 a forfeiture not to exceed \$500 for a first violation or \$2,500 for each subsequent  
18 violation.

19 **(7) ENFORCEMENT; ANTITRUST ACTION.** If the department of justice or a district  
20 attorney has reason to believe a seller has violated sub. (2) (a) of this section, the  
21 department of justice, or, after consulting with the department of justice, a district  
22 attorney, may commence an action against the seller under s. 133.03.

23 **(8) ENFORCEMENT; AGREEMENT TO STOP PRICING PRACTICE.** Notwithstanding subs.  
24 (5) to (7), in lieu of instituting or continuing an action under subs. (5) to (7), the  
25 department, the department of justice, or a district attorney may accept a seller's

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1 written agreement to stop pricing alleged to violate this section. An agreement under  
2 this subsection may provide for the payment by the seller of a reasonable forfeiture.  
3 If a seller violates an agreement under this subsection, the seller may be required  
4 to pay a reasonable forfeiture not to exceed \$25,000. A seller's agreement under this  
5 subsection is not evidence that the seller violated this section.

6 **(9) OTHER PROVISIONS.** (a) This section shall be construed and applied  
7 consistent with federal laws and regulations concerning anticompetitive pricing.

8 (b) This section does not preempt the administration of ch. 133.

9 **SECTION 7.** 100.33 (1) (c) of the statutes is amended to read:

10 100.33 (1) (c) "Plastic container" means an individual, separate, rigid plastic  
11 bottle, can, jar or carton, except for a blister pack, that is originally used to contain  
12 a product that is the subject of a retail sale, ~~as defined under s. 100.30 (2) (h).~~

13 **SECTION 8.** 100.33 (1) (eg) of the statutes is created to read:

14 100.33 (1) (eg) "Retailer" includes a person engaged in the business of making  
15 sales at retail in this state, except that in the case of a person engaged in the business  
16 of selling both at retail and at wholesale, "retailer" applies only to the retail portion  
17 of that business.

18 **SECTION 9.** 100.33 (1) (er) of the statutes is created to read:

19 100.33 (1) (er) "Retail sale" and "sale at retail" mean a transfer for valuable  
20 consideration, made in the ordinary course of trade or in the usual conduct of a  
21 retailer's business, of title to tangible personal property to the purchaser for  
22 consumption or use other than resale or further processing or manufacturing.

23 **SECTION 10.** 100.33 (1) (g) of the statutes is repealed.

24 **SECTION 11.** 100.33 (1) (h) of the statutes is amended to read:

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1           100.33 (1) (h) “Sales at wholesale” ~~has the meaning given in s. 100.30 (2) (i)~~  
2           means a transfer for valuable consideration, made in the ordinary course of trade or  
3           in the usual conduct of a wholesaler’s business, of title to tangible personal property  
4           to the purchaser for purposes of resale or further processing or manufacturing.

5           **SECTION 12.** 100.33 (1) (i) of the statutes is created to read:

6           100.33 (1) (i) “Wholesaler” includes a person engaged in the business of making  
7           sales at wholesale within this state, except that in the case of a person engaged in  
8           the business of selling both at wholesale and at retail, “wholesaler” applies only to  
9           the wholesale portion of that business.

10          **SECTION 13.** 133.03 (1) of the statutes is amended to read:

11          133.03 (1) Every contract, combination in the form of trust or otherwise, or  
12          conspiracy, in restraint of trade or commerce is illegal. Every person who makes any  
13          contract or engages in any combination or conspiracy in restraint of trade or  
14          commerce is guilty of a Class H felony, except that, notwithstanding the maximum  
15          fine specified in s. 939.50 (3) (h), the person may be fined not more than \$100,000  
16          \$1,000,000 if a corporation, or, if any other person, may be fined not more than  
17          \$50,000 \$250,000.

18          **SECTION 14.** 133.03 (2) of the statutes is amended to read:

19          133.03 (2) Every person who monopolizes, or attempts to monopolize, or  
20          combines or conspires with any other person or persons to monopolize any part of  
21          trade or commerce is guilty of a Class H felony, except that, notwithstanding the  
22          maximum fine specified in s. 939.50 (3) (h), the person may be fined not more than  
23          \$100,000 \$1,000,000 if a corporation, or, if any other person, may be fined not more  
24          than \$50,000 \$250,000.

25          **SECTION 15.** 133.03 (3) of the statutes is amended to read:

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1           133.03 (3) As an alternative to the criminal penalties for violation of this  
2 section, the department of justice or district attorney may bring an action for a civil  
3 forfeiture. In an action for a civil forfeiture under this subsection a corporation may  
4 be required to forfeit not more than ~~\$100,000~~ \$1,000,000 and any other person may  
5 be required to forfeit not more than ~~\$50,000~~ \$250,000.

6           **SECTION 16.** 133.04 (2) of the statutes is amended to read:

7           133.04 (2) Any person violating this section may be fined not more than  
8 ~~\$25,000~~ \$50,000 or imprisoned in the county jail for not more than one year or both.

9           **SECTION 17.** 133.04 (3) of the statutes is amended to read:

10          133.04 (3) As an alternative to the criminal penalty for violation of this section,  
11 the department of justice or district attorney may bring an action for a civil forfeiture.  
12 In an action for a civil forfeiture under this subsection a person who violates this  
13 section may be required to forfeit not more than ~~\$25,000~~ \$50,000.

14          **SECTION 18.** 133.05 (3) of the statutes is amended to read:

15          133.05 (3) Any person knowingly violating this section may be fined not more  
16 than ~~\$25,000~~ \$50,000 or imprisoned in the county jail for not more than one year or  
17 both.

18          **SECTION 19.** 133.05 (4) of the statutes is amended to read:

19          133.05 (4) As an alternative to the criminal penalty for violation of this section,  
20 the department of justice or district attorney may bring an action for a civil forfeiture.  
21 In an action for a civil forfeiture under this subsection a person who violates this  
22 section may be required to forfeit not more than ~~\$25,000~~ \$50,000.

23          **SECTION 20.** 134.04 (1) of the statutes is amended to read:

24          134.04 (1) No person, firm or corporation engaged in any enterprise in this  
25 state shall by any method or procedure directly or indirectly by itself or through a

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1 subsidiary agency owned or controlled in whole or in part by such person, firm or  
2 corporation, sell or procure for sale or have in its possession or under its control for  
3 sale to its employees or any person any article, material, product or merchandise of  
4 whatsoever nature not of the person's, firm's or corporation's production or not  
5 handled in the person's, firm's or corporation's regular course of trade, excepting  
6 meals, candy bars, cigarettes and tobacco for the exclusive use and consumption of  
7 such employees of the employer, and excepting tools used by employees in said  
8 enterprise and such specialized appliances and paraphernalia as may be required in  
9 said enterprise for the employees' safety or health and articles used by employees or  
10 other persons which insure better sanitary conditions and quality in the  
11 manufacture of food or food products. The provisions of this subsection shall not  
12 apply to lumber producers, loggers and dealers nor to any cooperative association  
13 organized under ch. 185 or 193. ~~This section shall not be construed as authorizing~~  
14 ~~the sale of any merchandise at less than cost as defined in s. 100.30.~~

15 **SECTION 21.** 139.39 (3) of the statutes is amended to read:

16 139.39 (3) The secretary may suspend or revoke the permit of any permittee  
17 who violates ss. ~~100.30 or~~ 139.30 to 139.44 or any rules adopted under sub. (1). The  
18 secretary shall revoke the permit of any permittee who violates s. ~~100.30 3 or more~~  
19 ~~times within a 5-year period.~~

20 **SECTION 22.** 165.065 of the statutes is amended to read:

21 **165.065 Assistant attorney generals; antitrust. (1)** At least one assistant  
22 attorney general shall be assigned to the investigation and prosecution of violations  
23 arising under s. 100.301 and ch. 133 and shall carry out the duties imposed on the  
24 attorney general by s. 100.301 and ch. 133. All apparent violations of s. 100.301 and  
25 ch. 133 which come to the attention of any officer or agency of state government shall

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1 be reported to one of such assistant attorneys general. All officers and agencies shall  
2 cooperate with and assist the department of justice in the investigation and  
3 prosecution of such apparent violations.

4 (2) The assistant attorney general in charge of antitrust investigations and  
5 prosecutions is to cooperate actively with the antitrust division of the U.S.  
6 department of justice in everything that concerns monopolistic practices in  
7 Wisconsin, and also to cooperate actively with the department of agriculture, trade  
8 and consumer protection in the work which this agency is carrying on under s. 100.20  
9 of the marketing law with regard to monopolistic practices in the field of agriculture,  
10 under s. 100.301 with regard to prohibited pricing, and with the federal trade  
11 commission on matters arising in or affecting Wisconsin which pertain to its  
12 jurisdiction.

13 **SECTION 23.** 814.04 (intro.) of the statutes, as affected by 2005 Wisconsin Act  
14 458, is amended to read:

15 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, 100.195 (5m)  
16 (b), ~~100.30 (5m)~~, 106.50 (6) (i) and (6m) (a), 115.80 (9), 281.36 (2) (b) 1., 767.553 (4)  
17 (d), 769.313, ~~814.025~~, 802.05, 814.245, 895.035 (4), 895.506, 895.443 (3), 895.444 (2),  
18 895.445 (3), 895.446 (3), 943.212 (2) (b), 943.245 (2) (d), 943.51 (2) (b), and 995.10 (3),  
19 when allowed costs shall be as follows:

20 **SECTION 24.** 951.10 (2) of the statutes is amended to read:

21 951.10 (2) No retailer, as defined in s. ~~100.30 (2) (e)~~ 100.33 (1) (eg), may sell,  
22 offer for sale, barter, or give away living baby rabbits, baby chicks, ducklings, or other  
23 fowl under 2 months of age in any quantity less than 6 unless in the business of  
24 selling these animals for agricultural, wildlife, or scientific purposes.

25 (END)