

1999 ASSEMBLY BILL 126

February 16, 1999 – Introduced by Representatives JENSEN, KRUG, PLALE, COLON, GOETSCH, CARPENTER, WASSERMAN and GUNDRUM, cosponsored by Senator DARLING. Referred to Committee on Assembly Organization.

1 **AN ACT to repeal** 20.115 (1) (r), 100.201 (2) (h) 5., 100.26 (9), 100.30 (2) (a), 100.30
2 (2) (am) 1m., 100.30 (2) (am) 2., 100.30 (2) (c) 1g., 100.30 (2) (c) 1r., 100.30 (2)
3 (c) 2., 100.30 (2) (cg), 100.30 (2) (cL), 100.30 (2) (cm), 100.30 (2) (j), 100.30 (2) (m),
4 100.30 (2m) (c), 100.30 (5m), 100.30 (6) (a) 9. and 100.30 (7); **to renumber and**
5 **amend** 100.30 (2) (am) 1., 100.30 (2) (c) 1. a. and 100.30 (2) (c) 1. b.; **to amend**
6 20.115 (8) (k), 93.60, 100.30 (1), 100.30 (2) (b), 100.30 (2) (cj), 100.30 (2) (d),
7 100.30 (2) (f), 100.30 (2) (g), 100.30 (2) (L) (intro.), 100.30 (2m) (a), 100.30 (2m)
8 (b), 100.30 (3), 100.30 (5) (a), 100.30 (6) (a) 7. and 814.04 (intro.); and **to create**
9 100.30 (2) (ac) and 100.30 (2) (ck) of the statutes; **relating to:** the regulation
10 of the sale of merchandise below cost.

Analysis by the Legislative Reference Bureau

Currently, the state unfair sales act or “minimum markup” law requires a wholesaler of motor vehicle fuel, tobacco products or fermented malt beverages, liquor or wine (alcohol beverages) to sell those items for at least 3% more than the cost of the items to the wholesaler. The law requires a retailer of tobacco products or alcohol beverages to sell those items for a price that is at least 6% more than the

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cost of the items to the retailer. For motor vehicle fuel sold at retail, the percentage varies depending on whether the fuel is sold from a retail station. The law requires a wholesaler or retailer to sell any other type of merchandise for a price that is at least the wholesaler's or retailer's cost.

Current law provides specific methods for determining the cost to the wholesaler or the retailer. For merchandise other than motor vehicle fuel, basically the cost is computed as the lesser of the invoice cost or replacement cost of the merchandise, plus taxes and certain overhead costs and minus certain trade discounts (computed cost). For motor vehicle fuel, the cost is the greater of the computed cost or the average posted terminal price, which is an average price at which motor vehicle fuel is offered on a specific date plus excise taxes and certain overhead costs.

The minimum markup requirements under the act do not apply to merchandise that is sold in clearance sales, damaged merchandise and merchandise at risk of spoiling. The requirements also do not apply if merchandise is priced in good faith to meet the existing price of a competitor.

The act also prohibits offering loss leaders. A loss leader is the sale of an item of merchandise at less than cost in order to induce the purchase of other merchandise or to divert trade unfairly from a competitor.

This bill narrows the scope of the act. Under the bill only tobacco products and alcohol beverages are subject to the minimum markup requirements and the prohibition against loss leaders.

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

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

1 **SECTION 1.** 20.115 (1) (r) of the statutes is repealed.

2 **SECTION 2.** 20.115 (8) (k) of the statutes is amended to read:

3 20.115 **(8)** (k) *Computer system equipment, staff and services.* The amounts in
4 the schedule for the costs of computer system equipment, staff and services. All
5 moneys transferred for this purpose from pars. (ga), (gm), (h), (ha), (i), (kp), (ks), (m)
6 and (pz) and subs. (1) (g), (gb), (gh), (gm), (hm), (j), (jm), (m), ~~(r)~~ and (s), (2) (g), (ha),
7 (j), (k) and (m), (3) (g), (h), (i), (j), (ja), (L) and (m) and (7) (g), (ga), (gm), (k) and (m)
8 shall be credited to this appropriation account.

9 **SECTION 3.** 93.60 of the statutes is amended to read:

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1 **93.60 Computer system equipment, staff and services transfers.** The
2 department may transfer to the appropriation account under s. 20.115 (8) (k) in each
3 fiscal year an amount from the appropriation accounts under s. 20.115 (1) (g), (gb),
4 (gh), (gm), (hm), (j), (jm), (m), ~~(r)~~ and (s), (2) (g), (ha), (j), (k) and (m), (3) (g), (h), (i),
5 (j), (ja), (L) and (m), (7) (g), (ga), (gm), (k) and (m) and (8) (ga), (gm), (h), (ha), (i), (kp),
6 (ks), (m) and (pz). The total amount that the department transfers in each fiscal year
7 from these appropriation accounts to the appropriation account under s. 20.115 (8)
8 (k) may not exceed the amount specified in the schedule under s. 20.115 (8) (k) for
9 each fiscal year. The amounts transferred from each appropriation account shall be
10 based on the actual costs incurred by the department for computer system
11 equipment, staff and services provided for the purpose of that appropriation account.

12 **SECTION 4.** 100.201 (2) (h) 5. of the statutes is repealed.

13 **SECTION 5.** 100.26 (9) of the statutes is repealed.

14 **SECTION 6.** 100.30 (1) of the statutes is amended to read:

15 100.30 **(1)** POLICY. The practice of selling certain items ~~of merchandise~~
16 cigarettes, other tobacco products and alcohol beverages below cost in order to attract
17 patronage is generally a form of deceptive advertising and an unfair method of
18 competition in commerce. Such practice causes commercial dislocations, misleads
19 the consumer, works back against the farmer, directly burdens and obstructs
20 commerce, and diverts business from dealers who maintain a fair price policy.
21 Bankruptcies among merchants who fail because of the competition of those who use
22 such methods result in unemployment, disruption of leases, and nonpayment of
23 taxes and loans, and contribute to an inevitable train of undesirable consequences,
24 including economic depression.

25 **SECTION 7.** 100.30 (2) (a) of the statutes is repealed.

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1 **SECTION 8.** 100.30 (2) (ac) of the statutes is created to read:

2 100.30 **(2)** (ac) “Alcohol beverage” means a fermented malt beverage,
3 intoxicating liquor or intoxicating wine.

4 **SECTION 9.** 100.30 (2) (am) 1. of the statutes is renumbered 100.30 (2) (am) and
5 amended to read:

6 100.30 **(2)** (am) ~~With respect to the sale of cigarettes or other tobacco products,~~
7 ~~fermented malt beverages or intoxicating liquor or wine,~~ “cost “Cost to retailer”
8 means the invoice cost of the merchandise to the retailer within 30 days prior to the
9 date of sale, or replacement cost of the merchandise to the retailer, whichever is
10 lower, less all trade discounts except customary discounts for cash, plus any excise
11 taxes imposed on such merchandise or the sale thereof other than excise taxes
12 collected by the retailer, and any cost incurred for transportation and any other
13 charges not otherwise included in the invoice cost or the replacement cost of the
14 merchandise as herein set forth, to which shall be added a markup to cover a
15 proportionate part of the cost of doing business, which markup, in the absence of
16 proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth.

17 **SECTION 10.** 100.30 (2) (am) 1m. of the statutes is repealed.

18 **SECTION 11.** 100.30 (2) (am) 2. of the statutes is repealed.

19 **SECTION 12.** 100.30 (2) (b) of the statutes is amended to read:

20 100.30 **(2)** (b) “Cost to retailer” and “cost to wholesaler” as defined in pars. (am)
21 and (c) mean bona fide costs; and purchases made by retailers, and wholesalers,
22 ~~wholesalers of motor vehicle fuel and refiners~~ at prices which cannot be justified by
23 prevailing market conditions within this state shall not be used in determining cost
24 to the retailer and cost to the wholesaler. Prices at which purchases of merchandise
25 ~~other than motor vehicle fuel~~ are made by retailers or wholesalers cannot be justified

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1 by prevailing market conditions in this state when they are below the lowest prices
2 at which the manufacturer or producer of such merchandise sells to other retailers
3 or wholesalers in this state. ~~Prices at which sales of motor vehicle fuel are made by~~
4 ~~retailers, wholesalers, wholesalers of motor vehicle fuel and refiners cannot be~~
5 ~~justified by prevailing market conditions in this state when they are below the~~
6 ~~applicable cost to retailers and cost to wholesalers specified under pars. (am) and (c).~~

7 **SECTION 13.** 100.30 (2) (c) 1. a. of the statutes is renumbered 100.30 (2) (c) 1.
8 and amended to read:

9 100.30 (2) (c) 1. ~~With respect to the sale of cigarettes or other tobacco products,~~
10 ~~fermented malt beverages or intoxicating liquor or wine, “cost “Cost to wholesaler”~~
11 ~~means, except as provided in subd. 1. b. 2m., the invoice cost of the merchandise to~~
12 ~~the wholesaler within 30 days prior to the date of sale, or the replacement cost of the~~
13 ~~merchandise to the wholesaler, whichever is lower, less all trade discounts except~~
14 ~~customary discounts for cash, plus any excise taxes imposed on the sale thereof prior~~
15 ~~to the sale at retail, and any cost incurred for transportation and any other charges~~
16 ~~not otherwise included in the invoice cost or the replacement cost of the merchandise~~
17 ~~as herein set forth, to which shall be added, except for sales at wholesale between~~
18 ~~wholesalers, a markup to cover a proportionate part of the cost of doing business,~~
19 ~~which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the~~
20 ~~wholesaler as herein set forth.~~

21 **SECTION 14.** 100.30 (2) (c) 1. b. of the statutes is renumbered 100.30 (2) (c) 2m.
22 and amended to read:

23 100.30 (2) (c) 2m. For every person holding a permit as a distributor as defined
24 in s. 139.30 (3) or as a multiple retailer as defined in s. 139.30 (8), with respect to that
25 portion of the person’s business which involves the purchase and sale of cigarettes

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1 “cost to wholesaler” means the cost charged by the cigarette manufacturer,
2 disregarding any manufacturer’s discount or any discount under s. 139.32 (5), plus
3 the amount of tax imposed under s. 139.31. Except for a sale at wholesale between
4 wholesalers, a markup to cover a proportionate part of the cost of doing business shall
5 be added to the cost to wholesaler. In the absence of proof of a lesser cost, this markup
6 shall be 3% of the cost to wholesaler as set forth in this ~~subd. 1. b.~~ subdivision.

7 **SECTION 15.** 100.30 (2) (c) 1g. of the statutes is repealed.

8 **SECTION 16.** 100.30 (2) (c) 1r. of the statutes is repealed.

9 **SECTION 17.** 100.30 (2) (c) 2. of the statutes is repealed.

10 **SECTION 18.** 100.30 (2) (cg) of the statutes is repealed.

11 **SECTION 19.** 100.30 (2) (cj) of the statutes is amended to read:

12 100.30 (2) (cj) “Existing price of a competitor” means a price being
13 simultaneously offered to a buyer for merchandise of like quality and quantity by a
14 person who is a direct competitor of the retailer, or wholesaler, ~~wholesaler of motor~~
15 ~~vehicle fuel or refiner~~ and from whom the buyer can practicably purchase the
16 merchandise.

17 **SECTION 20.** 100.30 (2) (ck) of the statutes is created to read:

18 100.30 (2) (ck) “Merchandise” means, cigarettes, other tobacco products and
19 alcohol beverages.

20 **SECTION 21.** 100.30 (2) (cL) of the statutes is repealed.

21 **SECTION 22.** 100.30 (2) (cm) of the statutes is repealed.

22 **SECTION 23.** 100.30 (2) (d) of the statutes is amended to read:

23 100.30 (2) (d) “Replacement cost” means the cost computed as specified in par.
24 (am) or (c) at which the merchandise sold could have been bought by the retailer, or
25 wholesaler ~~or wholesaler of motor vehicle fuel~~ at any time if bought in the same

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1 quantity as the retailer's, or wholesaler's ~~or wholesaler of motor vehicle fuel's~~ last
2 purchase of the said merchandise.

3 **SECTION 24.** 100.30 (2) (f) of the statutes is amended to read:

4 100.30 (2) (f) ~~With respect to the sale of merchandise other than motor vehicle~~
5 ~~fuel, "retailer"~~ "Retailer" and "wholesaler" shall both be applied to any merchant who
6 buys merchandise for resale at retail from the manufacturer or producer thereof and
7 to any wholesaler under par. (L) 2. and, as to that merchandise or that wholesaler,
8 the terms "cost to retailer" and "cost to wholesaler" as defined in pars. (am) and (c)
9 shall both be applied, including the markup requirements.

10 **SECTION 25.** 100.30 (2) (g) of the statutes is amended to read:

11 100.30 (2) (g) "Sell", "sale" or "sold" includes any advertising or offer to sell or
12 any transfer of merchandise where title is retained by the retailer, or wholesaler,
13 ~~wholesaler of motor vehicle fuel or refiner~~ as security for the payment of the purchase
14 price. In determining the selling price of merchandise by wholesalers, ~~wholesalers~~
15 ~~of motor vehicle fuel,~~ and retailers and refiners under this section, all fractions of a
16 cent shall be carried to the next full cent.

17 **SECTION 26.** 100.30 (2) (j) of the statutes is repealed.

18 **SECTION 27.** 100.30 (2) (L) (intro.) of the statutes is amended to read:

19 100.30 (2) (L) (intro.) "Wholesaler" includes every person holding a permit as
20 a multiple retailer under s. 139.30 (8) and every person engaged in the business of
21 making sales at wholesale, ~~other than sales of motor vehicle fuel at wholesale,~~ within
22 this state except as follows:

23 **SECTION 28.** 100.30 (2) (m) of the statutes is repealed.

24 **SECTION 29.** 100.30 (2m) (a) of the statutes is amended to read:

ASSEMBLY BILL 126**SECTION 29**

1 100.30 **(2m)** (a) When one or more items of merchandise are furnished or sold
2 in combination with or on condition of the purchase of one or more other items of
3 merchandise or of other goods, or are so advertised, all items of merchandise shall
4 be included in determining cost under sub. (2) (am) or (c); and if any of the items
5 included therein are separately priced, such separate price shall be subject to the
6 requirements of this section.

7 **SECTION 30.** 100.30 (2m) (b) of the statutes is amended to read:

8 100.30 **(2m)** (b) ~~With respect to the sale of merchandise other than motor~~
9 ~~vehicle fuel, any~~ Any retailer who also sells to other retailers shall use the invoice
10 cost to other retailers in computing the selling price at retail under sub. (2) (am); and
11 if that retailer is a manufacturer or producer, both sub. (2) (am) and (c) shall be used
12 in computing the selling price at retail. In the absence of sales to other retailers, the
13 manufacturer's or producer's invoice cost to wholesalers shall be used in computing
14 the manufacturer's or producer's selling price at retail as provided in sub. (2) (am)
15 and (c).

16 **SECTION 31.** 100.30 (2m) (c) of the statutes is repealed.

17 **SECTION 32.** 100.30 (3) of the statutes is amended to read:

18 100.30 **(3)** **ILLEGALITY OF LOSS LEADERS.** Any sale of any item of merchandise
19 either by a retailer, or wholesaler, ~~wholesaler of motor vehicle fuel or refiner~~, at less
20 than cost as defined in this section with the intent or effect of inducing the purchase
21 of other merchandise or other goods or of unfairly diverting trade from a competitor,
22 impairs and prevents fair competition, injures public welfare and is unfair
23 competition and contrary to public policy and the policy of this section. Such sales
24 are prohibited. Evidence of any sale of any item of merchandise by any retailer, or
25 ~~wholesaler, wholesaler of motor vehicle fuel or refiner~~ at less than cost as defined in

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1 this section shall be prima facie evidence of intent or effect to induce the purchase
2 of other merchandise or other goods, or to unfairly divert trade from a competitor, or
3 to otherwise injure a competitor.

4 **SECTION 33.** 100.30 (5) (a) of the statutes is amended to read:

5 100.30 (5) (a) The department may issue a special order as provided in s. 93.18
6 against a retailer, or wholesaler, ~~wholesaler of motor vehicle fuel or refiner~~ requiring
7 the person to cease and desist from violating this section ~~in the sale of cigarettes or~~
8 ~~other tobacco products, fermented malt beverages, intoxicating liquor or wine or~~
9 ~~motor vehicle fuel~~. The department or a district attorney may commence an action
10 on behalf of the state against a retailer, or wholesaler, ~~wholesaler of motor vehicle~~
11 ~~fuel or refiner~~ who violates a special order issued under this paragraph to recover a
12 forfeiture of not less than \$200 nor more than \$5,000 for each violation.

13 **SECTION 34.** 100.30 (5m) of the statutes is repealed.

14 **SECTION 35.** 100.30 (6) (a) 7. of the statutes is amended to read:

15 100.30 (6) (a) 7. The price of merchandise is made in good faith to meet an
16 existing price of a competitor and is based on evidence in the possession of the
17 retailer, or wholesaler, ~~wholesaler of motor vehicle fuel or refiner~~ in the form of an
18 advertisement, proof of sale or receipted purchase, price survey or other business
19 record maintained by the retailer, or wholesaler, ~~wholesaler of motor vehicle fuel or~~
20 ~~refiner~~ in the ordinary course of trade or the usual conduct of business.

21 **SECTION 36.** 100.30 (6) (a) 9. of the statutes is repealed.

22 **SECTION 37.** 100.30 (7) of the statutes is repealed.

23 **SECTION 38.** 814.04 (intro.) of the statutes is amended to read:

24 **814.04 Items of costs.** (intro.) Except as provided in ss. 93.20, ~~100.30 (5m)~~,
25 106.04 (6) (i) and (6m) (a), 115.80 (9), 769.313, 814.025, 814.245, 895.035 (4), 895.75

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1 (3), 895.77 (2), 895.79 (3), 895.80 (3), 943.212 (2) (b), 943.245 (2) (d) and 943.51 (2)

2 (b), when allowed costs shall be as follows:

3 (END)