

2001 ASSEMBLY BILL 891

March 4, 2002 – Introduced by Representatives KRUG, PLALE, RILEY, TURNER, CARPENTER, J. LEHMAN, RICHARDS and COLON, cosponsored by Senator KANAVAS. Referred to Committee on Small Business and Consumer Affairs.

1 **AN ACT to repeal** 100.26 (9), 100.30 (2) (a), 100.30 (2) (am) 1m., 100.30 (2) (c) 1g.,
2 100.30 (2) (c) 1r., 100.30 (2) (cg), 100.30 (2) (cL), 100.30 (2) (cm), 100.30 (2) (j),
3 100.30 (2) (m), 100.30 (2m) (c), 100.30 (5m), 100.30 (6) (a) 9. and 100.30 (7); **to**
4 **renumber and amend** 100.30 (2) (c) 1. a. and 100.30 (2) (c) 1. b.; and **to amend**
5 100.30 (2) (am) 2., 100.30 (2) (b), 100.30 (2) (c) 2., 100.30 (2) (cj), 100.30 (2) (d),
6 100.30 (2) (f), 100.30 (2) (g), 100.30 (2) (L) (intro.), 100.30 (2m) (b), 100.30 (3),
7 100.30 (5) (a), 100.30 (6) (a) 7. and 814.04 (intro.) of the statutes; **relating to:**
8 regulation of the sale of motor vehicle fuel below cost.

Analysis by the Legislative Reference Bureau

Under current law, the state unfair sales act or “minimum markup” law requires a wholesaler of motor vehicle fuel or 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. Currently, a retailer of tobacco products or alcohol beverages is required to sell those items for a price that is at least 6% more than the 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. Current 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.

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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, 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.

This bill eliminates the special provisions for motor vehicle fuel resulting in the sale of motor vehicle fuel being treated like the sale of merchandise in general.

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.** 100.26 (9) of the statutes is repealed.

2 **SECTION 2.** 100.30 (2) (a) of the statutes is repealed.

3 **SECTION 3.** 100.30 (2) (am) 1m. of the statutes is repealed.

4 **SECTION 4.** 100.30 (2) (am) 2. of the statutes is amended to read:

5 100.30 **(2)** (am) 2. With respect to the sale of merchandise other than cigarettes
6 or other tobacco products, fermented malt beverages, or intoxicating liquor or wine,
7 ~~or motor vehicle fuel~~, “cost to retailer” means the invoice cost of the merchandise to
8 the retailer, or replacement cost of the merchandise to the retailer, whichever is
9 lower, less all trade discounts except customary discounts for cash, plus any excise
10 taxes imposed on such merchandise or the sale thereof other than excise taxes
11 collected by the retailer, and any cost incurred for transportation and any other
12 charges not otherwise included in the invoice cost or the replacement cost of the
13 merchandise as herein set forth.

14 **SECTION 5.** 100.30 (2) (b) of the statutes is amended to read:

15 100.30 **(2)** (b) “Cost to retailer” and “cost to wholesaler” as defined in pars. (am)
16 and (c) mean bona fide costs; and purchases made by retailers, or wholesalers;

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

11 **SECTION 6.** 100.30 (2) (c) 1. a. of the statutes is renumbered 100.30 (2) (c) 1. and
12 amended to read:

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

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

3 100.30 **(2)** (c) 1m. For every person holding a permit as a distributor as defined
4 in s. 139.30 (3) or as a multiple retailer as defined in s. 139.30 (8), with respect to that
5 portion of the person’s business which involves the purchase and sale of cigarettes
6 “cost to wholesaler” means the cost charged by the cigarette manufacturer,
7 disregarding any manufacturer’s discount or any discount under s. 139.32 (5), plus
8 the amount of tax imposed under s. 139.31. Except for a sale at wholesale between
9 wholesalers, a markup to cover a proportionate part of the cost of doing business shall
10 be added to the cost to wholesaler. In the absence of proof of a lesser cost, this markup
11 shall be 3% of the cost to wholesaler as set forth in this ~~subd. 1. b~~ subdivision.

12 **SECTION 8.** 100.30 (2) (c) 1g. of the statutes is repealed.

13 **SECTION 9.** 100.30 (2) (c) 1r. of the statutes is repealed.

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

15 100.30 **(2)** (c) 2. With respect to the sale of merchandise other than cigarettes
16 or other tobacco products, fermented malt beverages, or intoxicating liquor or wine,
17 ~~or motor vehicle fuel~~, “cost to wholesaler” means the invoice cost of the merchandise
18 to the wholesaler, or the replacement cost of the merchandise to the wholesaler,
19 whichever is lower, less all trade discounts except customary discounts for cash, plus
20 any excise taxes imposed on the sale thereof prior to the sale at retail, and any cost
21 incurred for transportation and any other charges not otherwise included in the
22 invoice cost or the replacement cost of the merchandise as herein set forth.

23 **SECTION 11.** 100.30 (2) (cg) of the statutes is repealed.

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

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1 100.30 (2) (cj) “Existing price of a competitor” means a price being
2 simultaneously offered to a buyer for merchandise of like quality and quantity by a
3 person who is a direct competitor of the retailer, or wholesaler, ~~wholesaler of motor~~
4 ~~vehicle fuel or refiner~~ and from whom the buyer can practicably purchase the
5 merchandise.

6 **SECTION 13.** 100.30 (2) (cL) of the statutes is repealed.

7 **SECTION 14.** 100.30 (2) (cm) of the statutes is repealed.

8 **SECTION 15.** 100.30 (2) (d) of the statutes is amended to read:

9 100.30 (2) (d) “Replacement cost” means the cost computed as specified in par.
10 (am) or (c) at which the merchandise sold could have been bought by the retailer, or
11 ~~wholesaler or wholesaler of motor vehicle fuel~~ at any time if bought in the same
12 quantity as the retailer’s, or wholesaler’s ~~or wholesaler of motor vehicle fuel’s~~ last
13 purchase of the said merchandise.

14 **SECTION 16.** 100.30 (2) (f) of the statutes is amended to read:

15 100.30 (2) (f) ~~With respect to the sale of merchandise other than motor vehicle~~
16 ~~fuel, “retailer”~~ “Retailer” and “wholesaler” shall both be applied to any merchant who
17 buys merchandise for resale at retail from the manufacturer or producer thereof and
18 to any wholesaler under par. (L) 2. and, as to that merchandise or that wholesaler,
19 the terms “cost to retailer” and “cost to wholesaler” as defined in pars. (am) and (c)
20 shall both be applied, including the markup requirements.

21 **SECTION 17.** 100.30 (2) (g) of the statutes is amended to read:

22 100.30 (2) (g) “Sell₁,” “sale₁,” or “sold” includes any advertising or offer to sell
23 or any transfer of merchandise where title is retained by the retailer, or wholesaler,
24 ~~wholesaler of motor vehicle fuel or refiner~~ as security for the payment of the purchase
25 price. In determining the selling price of merchandise by wholesalers, ~~wholesalers~~

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1 ~~of motor vehicle fuel, and~~ retailers and refiners under this section, all fractions of a
2 cent shall be carried to the next full cent.

3 **SECTION 18.** 100.30 (2) (j) of the statutes is repealed.

4 **SECTION 19.** 100.30 (2) (L) (intro.) of the statutes is amended to read:

5 100.30 (2) (L) (intro.) “Wholesaler” includes every person holding a permit as
6 a multiple retailer under s. 139.30 (8) and every person engaged in the business of
7 making sales at wholesale, ~~other than sales of motor vehicle fuel at wholesale,~~ within
8 this state except as follows:

9 **SECTION 20.** 100.30 (2) (m) of the statutes is repealed.

10 **SECTION 21.** 100.30 (2m) (b) of the statutes is amended to read:

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

19 **SECTION 22.** 100.30 (2m) (c) of the statutes is repealed.

20 **SECTION 23.** 100.30 (3) of the statutes is amended to read:

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

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1 contrary to public policy and the policy of this section. Such sales are prohibited.
2 Evidence of any sale of any item of merchandise by any retailer, or wholesaler,
3 ~~wholesaler of motor vehicle fuel or refiner~~ at less than cost as defined in this section
4 shall be prima facie evidence of intent or effect to induce the purchase of other
5 merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a
6 competitor.

7 **SECTION 24.** 100.30 (5) (a) of the statutes is amended to read:

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

16 **SECTION 25.** 100.30 (5m) of the statutes is repealed

17 **SECTION 26.** 100.30 (6) (a) 7. of the statutes is amended to read:

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

24 **SECTION 27.** 100.30 (6) (a) 9. of the statutes is repealed

25 **SECTION 28.** 100.30 (7) of the statutes is repealed.

