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

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.

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

SECTION 1. 20.115 (1) (r) of the statutes is repealed.
**SECTION 2.** 100.201 (2) (h) 5. of the statutes is amended to read:

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

**SECTION 3.** 100.26 (9) of the statutes is repealed.

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

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

**SECTION 5.** 100.30 of the statutes is repealed.

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

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

(2) **Prohibited Pricing.** Subject to sub. (3), no seller may do any of the following:

(a) Engage in anticompetitive pricing.

1. For purposes of this paragraph, a seller's pricing is anticompetitive if all of the following apply:
a. The seller’s price is less than an appropriate measure of the seller’s cost.

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

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

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

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

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

3. LIMITATION. A seller’s pricing does not violate this section unless all of the following apply:

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

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

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

4. RULE-MAKING. (a) If the department proposes a rule administering or interpreting this section, the department shall do all of the following:
1. Ensure that the rule is consistent with federal laws and regulations and with controlling legal precedent interpreting such laws and regulations.

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

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

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

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

(b) If, after a hearing, the department determines that the seller has violated sub. (2) (b), the department shall prepare written findings of fact, shall issue an order requiring the seller to cease the violation, and may require the seller to pay a forfeiture. A forfeiture under this paragraph may not exceed $500 for a first violation or $2,500 for each subsequent violation. An order under this paragraph shall be subject to judicial review under ch. 227. A violation of an order issued under this
paragraph may be punished as contempt under ch. 785 in the manner provided for
disobedience of a court order, if the department files an affidavit attesting to the
violation in a court in the county where the violation occurred.

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

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

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

(8) ENFORCEMENT; AGREEMENT TO STOP PRICING PRACTICE. Notwithstanding subs.
(5) to (7), in lieu of instituting or continuing an action under subs. (5) to (7), the
department, the department of justice, or a district attorney may accept a seller’s
written agreement to stop pricing alleged to violate this section. An agreement under this subsection may provide for the payment by the seller of a reasonable forfeiture. If a seller violates an agreement under this subsection, the seller may be required to pay a reasonable forfeiture not to exceed $25,000. A seller’s agreement under this subsection is not evidence that the seller violated this section.

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

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

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

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

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

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

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

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

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

SECTION 11. 100.33 (1) (h) of the statutes is amended to read:
100.33 (1) (h) “Sales at wholesale” means a transfer for valuable consideration, made in the ordinary course of trade or in the usual conduct of a wholesaler’s business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing.

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

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

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

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

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

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

SECTION 15. 133.03 (3) of the statutes is amended to read:
133.03 (3) As an alternative to the criminal penalties for violation of this section, the department of justice or district attorney may bring an action for a civil forfeiture. In an action for a civil forfeiture under this subsection a corporation may be required to forfeit not more than $100,000 $1,000,000 and any other person may be required to forfeit not more than $50,000 $250,000.

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

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

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

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

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

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

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

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

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

134.04 (1) No person, firm or corporation engaged in any enterprise in this state shall by any method or procedure directly or indirectly by itself or through a
subsidiary agency owned or controlled in whole or in part by such person, firm or corporation, sell or procure for sale or have in its possession or under its control for sale to its employees or any person any article, material, product or merchandise of whatsoever nature not of the person’s, firm’s or corporation’s production or not handled in the person’s, firm’s or corporation’s regular course of trade, excepting meals, candy bars, cigarettes and tobacco for the exclusive use and consumption of such employees of the employer, and excepting tools used by employees in said enterprise and such specialized appliances and paraphernalia as may be required in said enterprise for the employees’ safety or health and articles used by employees or other persons which insure better sanitary conditions and quality in the manufacture of food or food products. The provisions of this subsection shall not apply to lumber producers, loggers and dealers nor to any cooperative association organized under ch. 185 or 193. This section shall not be construed as authorizing the sale of any merchandise at less than cost as defined in s. 100.30.

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

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

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

165.065 Assistant attorney generals; antitrust. (1) At least one assistant attorney general shall be assigned to the investigation and prosecution of violations arising under s. 100.301 and ch. 133 and shall carry out the duties imposed on the attorney general by s. 100.301 and ch. 133. All apparent violations of s. 100.301 and ch. 133 which come to the attention of any officer or agency of state government shall
be reported to one of such assistant attorneys general. All officers and agencies shall
cooperate with and assist the department of justice in the investigation and
prosecution of such apparent violations.

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

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

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

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

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

(END)