

Wisconsin does little to enforce markup law

Complaints number in the thousands, but the state only issues dozens of warnings

By Dave Daley

For critics of Wisconsin’s minimum markup law, the good news is that the state has assigned only the equivalent of two employees to enforce the law and does little more than fire off warning letters when violations occur.

Over the past two decades, the state has adopted, in effect, a go-easy, look-the-other-way approach to violations, the available evidence shows. In fact, over the past 10 years, the state has not referred a single case to local prosecutors to take to court to win fines against violators.

That go-easy approach undoubtedly reflects the unpopularity of the markup law in many quarters, with politicians from both sides of the aisle pushing in recent years to repeal a law that critics say is obsolete and punishes consumers.

Seven years ago, the law almost slipped into a quiet grave when a federal judge declared unconstitutional the part of the law dealing with minimum markups on gasoline. Both then-Gov. Jim Doyle, a Democrat, and then-Wisconsin Attorney General J.B. Van Hollen, a Republican, declined to appeal. “It’s an outdated law,” Doyle said at the time.

Pointedly, the Wisconsin Department of Agriculture, Trade

and Consumer Protection, in charge of enforcing the law, also declined to appeal. But a Wisconsin trade group representing petroleum marketers and convenience stores pushed its own appeal and won, resurrecting the law.

State enforcement of the law is anything but aggressive,

though. State regulators do not actively look for violators but act only when someone — generally a competitor — files a complaint with the state.

“Investigations are complaint-driven,” says DATCP spokesman Bill Cosh.

“We have a multi-step enforcement approach,” Cosh explains. “The first step is education, usually by issuing an informational letter with a packet of information about the law.”

If violations continue, the state then issues a warning letter. Through the first half of 2015, DATCP sent 17 warning letters — 14 over below-cost sales of gasoline, two over tobacco and one over alcohol.

Last year, the state issued 61 warning letters, all but one involving gasoline. In 2013, 27 warnings were sent — 25 over fuel — and in 2012, 50 warning letters were issued, 41 over fuel.

“Most of the time, a warning letter is sufficient to gain compliance,” Cosh says. “Other tools available to us if (and) when necessary, include voluntary assurance of compliance, special administrative orders and referral for prosecution.”

Complaints vs. Enforcement

From 2012-2014, the state averaged 1,300 complaints annually about minimum markup law violations. The average number of enforcement actions annually was 46.

NUMBER OF CASES OPENED IN WISCONSIN		2012	2013	2014	2015 (thru June)
 Alcohol	COMPLAINTS	18	24	9	2
	WARNINGS	3	1	1	1
 Goods	COMPLAINTS	10	15	1	3
	WARNINGS	4	0	0	0
 Motor Fuel	COMPLAINTS	643	783	2,361*	428
	WARNINGS	41	25	60	14
 Tobacco	COMPLAINTS	4	2	2	3
	WARNINGS	2	1	0	2
Total		675	824	2,373*	436
		50	27	61	17

*These numbers differ slightly from the totals the state provided. WPRI tallied the complaints from data the state supplied.

Source: Wisconsin Department of Agriculture, Trade and Consumer Protection

Few referrals, prosecutions

Since 2012, the state has settled only six cases — all involving motor vehicle fuel — using the voluntary compliance process. And since April 2005 — more than 10 years — the state has not referred any cases to local prosecutors to pursue civil forfeitures in court, according to DATCP records.

That followed three years — from January 2002 to March 2005 — in which local prosecutors declined to prosecute any of the cases referred by the state. Four of those eight cases involved K-Mart, and two involved Marathon gas dealers operating at the Wind Point Quick Mart.

The state's go-easy approach goes back years.

Eleven years ago, in a 2005 analysis of 4,000 minimum markup complaints involving gasoline sales, the Appleton Post-Crescent found that enforcing the law had become less of a priority for state regulators, that more than 1,000 complaints were never investigated and that fines were rarely assessed against alleged violators.

A trade practice analyst said at the time that DATCP had de-emphasized going after fines for violators after an amendment to the law took effect in 1998 that allowed gas station owners to sue competitors for damages if they were found violating the law.

Grocery chains battle

Confusion over the law's legal status and the uneven enforcement of the law was underscored by the tussle last summer between Janesville-based Woodman's Markets grocery chain and Meijer Inc., a Grand Rapids, Mich.-based grocery and discount store chain that moved into Wisconsin in June.

Meijer opened stores in Kenosha and Grafton, offering grand opening discount prices on items such as milk at \$1.99 a gallon and bananas at 28 cents a pound as a way to attract shoppers. With more than 200 stores in six states, Meijer opened four more stores in the Milwaukee area in August and says it hopes to have a dozen stores in Wisconsin by the end of 2019, part of a \$750 million expansion by the chain.

Meijer's entry into the Wisconsin market sent rivals scrambling. Seven complaints against Meijer were quickly filed with DATCP, including one by the much smaller Woodman's chain,

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- Frank Guglielmi, Meijer Inc. spokesman

with 16 stores in Wisconsin and northern Illinois.

In its complaint, Woodman's alleged that Meijer was selling 37 products at prices lower than cost, including Kellogg's pop tarts for \$1.50 a box, 12-packs of Pepsi for \$3 and a five-pound bag of russet potatoes for 99 cents.

In complaints filed by Milwaukee attorney Jerry Gonzalez last summer, Gonzalez alleged that Meijer was selling "well below cost to attract patronage to new store openings." He added, "My client sells many of the same items Meijer is selling below cost and, consequently, is well aware of the costs associated with these products."

"My client's main concern is that they don't want to be in the position where other competitors can ignore (the minimum markup law) and they have to abide by it," Gonzalez was quoted as saying in a Milwaukee Business Journal article. "It puts them at a disadvantage."

Meijer Inc. acknowledged offering products at those prices. "Those prices were for our grand opening promotions, which are consistent with the promotional prices we used when we opened (Michigan stores)," Meijer's spokesman Frank Guglielmi said at the time.

"This is a bit peculiar for us," he said in a statement. "We are not accustomed to regulations that limit our customers' ability to save money when they shop with us"

Ironically, 10 years ago, Woodman's was a sharp critic of the minimum markup law that it is now using to whack Meijer. The La Crosse Tribune reported in 2005 that owner Phil Woodman was pushing for the law's repeal, arguing that his grocery stores — which feature adjacent gas stations — could then sell gas 30 cents

per gallon less than what the minimum markup law forced him to charge.

Cosh of DATCP says that at the time the state received a complaint from Woodman's over Meijer's prices, the agency

The minimum markup law's enforcement provisions

- Investigations into potential violations are generally prompted by written complaints by retailers or consumers.
- Staff reviews complaints and prioritizes investigations based on potential market harm. Investigations can consist of interviews with witnesses and a review of financial documents.
- Investigators then summarize their findings and recommend case disposition. Recommendations may be reviewed by a supervisor and returned to the investigator for follow-up.
- Follow-up may consist of warning letters, special orders, court-ordered civil forfeitures or closing the case with no violation.
- Fines of \$50 to \$500 for the first violation and \$200 to \$2,500 for each subsequent violation may be issued.

Source: Wisconsin Department of Agriculture, Trade and Consumer Protection website

was already investigating Meijer, a probe apparently sparked by a separate complaint from another Wisconsin business.

“When that investigation was closed, we closed the Woodman’s complaint along with all other complaints against Meijer we received while the investigation was ongoing,” Cosh says.

Woodman’s has a history of opposition to the law but is essentially arguing that, if the law is going to exist, everyone should abide by it. The difficulty, of course, is that the state for decades has had little appetite for enforcement of a law that many consumers don’t like.

Dave Daley, a journalist for 30 years, covered the Capitol for The Milwaukee Journal and legal affairs for the Milwaukee Journal Sentinel.

Minnesota goes easy, too

Two nearby states, Minnesota and North Dakota, have minimum markup laws similar to Wisconsin’s. Minnesota appears to have adopted the same go-slow approach as in Wisconsin, rarely taking any action over alleged violations, the Rochester Post-Bulletin has reported.

Noting the loopholes and exceptions in Minnesota’s complicated law — a station, for example, can sell gas below cost as part of a promotion three days a year — the newspaper said “penalties are up for grabs” and joked that the definition of cost “requires a Ph.D. to understand.”

No winners in gas station clashes

By Ken Wysocky

Skirmishes among competing gas stations flare up regularly across Wisconsin — the fallout from the state’s minimum markup law. In most cases, it’s a never-ending battle, where no one wins because enforcement of the law is minimal, observers say.

Take three competitors in the Racine area: the Durand Express Mart, owned by Jesse Gill; the Open Pantry Food Mart, owned by Open Pantry; and Andy’s on Durand, owned by Andy Khullar.

In 2014 — the latest year for which statistics were made available — data from the state Department of Agriculture, Trade and Consumer Protection shows that the three businesses periodically sparred over alleged violations of the law, which requires retailers to mark up their gas prices.

Open Pantry filed 39 complaints against Andy’s and four against Durand Express Mart. Andy’s filed no complaints against Open Pantry and 23 against Durand Express Mart. Durand Express Mart filed no complaints against the other two.

Gill, who has owned his station since 2010, says he supports the law because it protects merchants like him who own just one station and find it difficult to compete with larger-volume businesses. One problem, though: Virtually no one obeys the law and it’s rarely enforced, he says.

“The state doesn’t enforce the law at all,” he says. “We can complain all we want, but all they do is send a letter (to alleged

violators) that says they’re under the minimum markup, and that’s as far as they go.”

Gill says that even though he’s been the subject of complaints, he’s never been fined by DATCP. He also says he’s stopped filing complaints, because it “just requires extra paperwork. You just keep going in circles — nothing ever happens.”

Being able to compete on fuel prices is critical to gas stations, Gill says, because it draws in customers who spend money on more profitable items such as snacks and beverages.

Khullar declined to comment for this story, and Open Pantry officials did not respond to requests for an interview.

One station owner in the Marinette area — a longtime veteran in the industry who requested anonymity for fear of repercussions — agreed with Gill that few station owners follow the law and that state enforcement is lax. “I don’t think the state enforces it at all,” he says. “I can’t tell you how many stations violate that law every day.

“Everyone drops their prices to match the competition,” he adds. “We wouldn’t last long if we didn’t, because if people see you’re priced higher on gas, they assume you’re higher priced on everything else you sell, too.”

The owner says he agrees with the law in principle because it helps keep mom-and-pop operations in business. “I just wish they would enforce it,” he says.

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— Jesse Gill, owner of Durand Express Mart

Ken Wysocky of Whitefish Bay is a veteran freelance journalist and editor.