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A WPRI Special Report:

Fault lines in the business battle over

Wisconsin's minimum markup law

Supporters cite protection for small businesses; opponents say the free market benefits consumers

Wisconsin's minimum markup law, officially the Unfair Sales Act, was enacted on June 3, 1939, as a way to help stem a flood of small-business bankruptcies during the Great Depression.

The original law required a 2% markup at wholesale and a 6% markup at retail on all merchandise sold in Wisconsin (the wholesale markup was later boosted

By Tom Tolan

Tom Lynn photo

MINIMUM MARKUP LAW

**“You repeal this law, you are going to have price wars.
You repeal this law, you are going to have collateral damage.”**

— **Brandon Scholz**, president and CEO of the Wisconsin Grocers Association, which supports the minimum markup law

to 3%). There was a fear that large retailers could employ “predatory pricing” to drive down prices until they ran smaller competitors out of business and then raise prices again. Requiring the markups was intended to prevent this practice, which the law still calls “a form of deceptive advertising and an unfair method of competition in commerce.”

The Unfair Sales Act underwent minor legislative changes several times over the years — and a major change in 1986. That year, the Legislature removed most merchandise from the markup provisions.

Markup provisions were kept in place, though, for motor vehicle fuel, tobacco and alcohol — and the markup on gasoline was tweaked in 1997 to essentially be 9.18% above the “average posted terminal price,” something a federal judge once called a “proxy for wholesale costs.”

The result is that today, general merchandise cannot be sold below cost by retailers or wholesalers in the Badger State without violating the law. Gas, tobacco and alcohol must be marked up to amounts specified by formulas in state statute.

Plenty of businesses — though not all — have lined up in favor of the law mandating that both they and their competitors charge a government-determined minimum price that allows everyone to make a profit on certain commodities.

‘Devastation’ predicted

Brandon Scholz, president and CEO of the Wisconsin Gro-

cers Association, says that without the minimum markup law, there would be more price-slashing by national chains, undercutting the prices of the local grocery store. When the local store closes because of lost business, the national chain would then boost its prices — the “predatory pricing” scenario. That would hurt, not help, consumers, Scholz says.

“You repeal this law, you are going to have price wars. You repeal this law, you are going to have collateral damage. This isn’t the Yellow Brick Road here. This is devastation in the marketplace.”

Matt Hauser, president of the Wisconsin Petroleum Marketers & Convenience Store Association, makes a similar argument. “Critics of the law are looking for a solution to a problem that doesn’t exist” and the law “preserves competition” that benefits the consumer, he says.

Wal-Mart is among the businesses that have long been on the other side of the issue.

The retail giant, wanting to install gas pumps at its stores back in 2001, tried to get legislatures to repeal markup laws in seven states that year, including Wisconsin.

Wal-Mart seemed to get a leg up when then-Senate Majority Leader Chuck Chvala, a Democrat, tacked repeal onto that year’s state budget bill, according to a 2001 article in the Wall Street Journal that described a bipartisan repeal effort. But lobbying from independent stations and the Petroleum Marketers group — much better known in Madison than Wal-Mart’s lobbyists — got it removed, the Journal reported.

The Petroleum Marketers association remains very active on the issue today.

Denise Thomas, who with her husband, Steve, owns two

The Unfair Sales Act

- ▶ **General merchandise** may not be sold below cost by wholesalers or retailers.
- ▶ **Alcohol and tobacco** products may not be sold below cost. The definition of “cost” includes a presumptive 3% markup by wholesalers and 6% markup by retailers.
- ▶ **Motor vehicle fuel** must be marked up 9.18% above the “average posted terminal price.”
- ▶ **Exceptions** are made for matching a competitor’s price, clearance and liquidation sales and sale of perishables and damaged goods.
- ▶ The law does not apply to **services**.

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



Tom Lynn photo

Motorists fill up their tanks in Wauwatosa. In Wisconsin, motor vehicle fuel must be marked up 9.18% above the "average posted terminal price."

convenience stores in the Manitowoc area and who is board treasurer of the group, tells of a competitor who sold gas below cost a few years ago and drove a rival convenience store out of business.

"I have been defending the Unfair Sales Act since we went into business" in 1997, she says, "because I strongly believe it's there for a reason." That reason? "To protect the consumer by giving them a choice of where to buy their fuel from and to protect independent owners."

Scholz points to the Daniels Foods Sentry in Whitewater that closed last year, putting more than 50 people out of work. Store officials blamed the decision on being unable to compete with a nearby Wal-Mart. Such situations would happen more if minimum markup is repealed, he says.

While the law protects at least some business owners from their competitors who want a market free from government price regulation, many disagree with the claim that it protects consumers. The Federal Trade Commission has repeatedly determined that minimum markup laws — and

"Ultimately these sorts of laws are protecting retailers, to the detriment of consumers."

— **Lisa Nelson**,
in-house lobbyist for Wal-Mart, which opposes the minimum markup law

Wisconsin's, in particular — do just the opposite. (See story on *FTC opinions on Page 18.*)

Consumers lose out

Wal-Mart, which continues to support repeal of the law, agrees that such mandates are not only unusual, they are ultimately harmful to consumers.

Lisa Nelson, an in-house lobbyist for Wal-Mart, points out that consumers in Illinois get better deals on Black Friday and during back-to-school sales than do Wisconsin consumers — all because of

the Unfair Sales Act. "Ultimately these sorts of laws are protecting retailers, to the detriment of consumers," she says.

Some portray the fight in the business sector as a battle between smaller, independent businesses and big-box retailers. But some of the independents that support the law are fairly large, and some of the opponents are relatively small.

Take TEAM Oil Travel Center in Spring Valley, which Tony Huppert owns with his wife, son and daughter-in-law. The

MINIMUM MARKUP LAW



Tom Lynn photo

business includes eight BP pumps and a convenience store, along with an automated car wash, a credit union, a Subway sandwich shop, a liquor store and a culvert business. It employs 35 people in 1,300-population Spring Valley in northwestern Wisconsin, Huppert says.

He favors the minimum markup law. When the Legislature talks about repealing the law, it stresses him out. "Every time the law comes up, I go to Madison, and all the way down there I've got chest pains," he says.

Kwik Trip, which has hundreds of locations in Wisconsin, is also a supporter of the law.

Meanwhile, there have long been smaller Wisconsin businesses that favor repeal.

In a 2007 case involving a Merrill gas station owner in northern Wisconsin, state Department of Agriculture, Trade and Consumer Protection officials informed the station that competitors were complaining about his two-cent-per-gallon discount to senior citizens and a three-cent-per-gallon discount to local sports boosters.

Facing a possible fine of as much as \$2,500 for every gallon of gas sold below the minimum markup, the station owner, Raj Bhandari, stopped offering the discounts. He then sued, unsuccessfully arguing that the minimum markup law was unconstitutional.

Price war disputed

One of the 16 co-sponsors of a current bill to repeal mini-

mum markup has, in fact, been a small business owner himself. Rep. David Murphy (R-Greenville) says he has firsthand experience to dispute the argument that national chains swoop in and close local stores.

He ran a feed and grain business. When a national firm opened near his, he feared a price war would develop to push him out of business. It never happened.

"Large national businesses don't cherry-pick locations," Murphy says. "It's a mentality of big corporations that they don't give up profit margins. Every location they have is a profit center. Shareholders look at this. They don't want locations that are losing money."

Murphy acknowledges a concern of the Grocers Association's Scholz, who worries that companies have built a business model on a law that has been around since 1939.

"Truthfully, it's their best argument," Murphy says. "You have to weigh that against personal freedom and the rights of the consumer."

About the only thing both sides can agree on: If the minimum markup law is to be repealed, it's clear now that it won't be done by judges. Legislators will have to change it at the state Capitol.

Tom Tolan is a Milwaukee freelance writer. He was a reporter and editor at The Milwaukee Journal and the Milwaukee Journal Sentinel for 24 years. Greg Pearson, a freelance writer and former Milwaukee Journal Sentinel copy editor, contributed to this story.