

Wisconsin Grand*Sons of Liberty* Position  
REPEALING WISCONSIN'S ANTIQUATED  
MINIMUM MARK-UP LAW FOR THE CITIZENS

1. Only 18% of Wisconsin businesses are applicable to Minimum Mark-Up Law (MML) and this select group burdens the other 82% of businesses, non-profit organizations, religious entities, and every day consumers to force their guaranteed profit margins. Does the MML affect non-profit stores or are they exempt? If they sell anything to anyone, they also have to conform to MML.
2. Wisconsin MML has state government agencies picking winners and losers in retail sales markets that should have free market pricing....why not? Other states that repealed their law appear to have businesses working well enough without this additional interference in the free market.
3. Only Wisconsin has all retail sales subject to MML. Why? IF MML is SO good, why did most other states do away with their MML laws? Why don't other states or federal agencies have them?
4. Where is legitimacy and authority for Wisconsin government and agencies to determine ANY costs and prices? Is Wisconsin government responsible to their citizens or to select businesses? This law is not in our State Constitution, and if this law is so good, why not amend our State Constitution?
5. FTC declared several times that depression-era MMLs are no longer needed, since current federal laws and agency regulations prevent predatory pricing and protect small Mom and Pop stores. Does it still protect the small and startup businesses? Is MML still needed? No it does not, nor is it needed, but it sure pads Big Box profit lines and reduces competition.
6. Since 1939 when MML was created in Wisconsin, everything in supply and business models has come into the 21st century to timely provide products at lowest costs. Nationwide trucking deliveries to the door, product promotions, financing, customer support, mail-order, internet sales and volume purchasing were never imagined by lawmakers in 1939 for fair-market competition today.
7. The only reasons for retail businesses, especially Main Street ones, to support MML is "because we have always done it this way" and resistance to modernization and change. Main Street stores formed an organization in order to compete with the Big Box stores. If they no longer had the law, they would resourcefully go on their own and compete with new businesses. Special interests formed alliances with the Big Box stores to prevent 'new' competition and now do not want to give up their advantage.
8. Why do Wisconsin legislators so ardently claim to be against Wisconsin's MML, but now are also unwilling to support a vote for its repeal? What legislator today would even propose and sponsor such a law? Where is the continuity on this archaic law?
9. If gasoline in Wisconsin is \$2.25 per gallon, there is a mandatory 9.18% increase over surrounding border state's gasoline prices, thus 20 cents in difference when other states are at \$2.05 per gallon. Investigation found that other state's sales along the border are currently about \$2.19. This causes Wisconsin drivers to crossover and save 6 cents a gallon. That station operator now gains 14 cents more in profit from Wisconsin drivers alone, and that is about THREE times the net profit from their own state buyers! The border counties are at a great disadvantage with our MML by not being able to directly compete with bordering state stations.
10. People plan on buying when Menard's has a 11% sale for a week and they daily fill their parking lots, especially for costly items. Would the same people want an every day 9% sale without MML?

## Summary of Events

Wisconsin created its MML in 1939 as a reaction to prevailing business practices conducted in the depression era. It was based on the State Unfair Sales Act, which was prepared by the National Food and Grocery Conference Committee. The Act provides that neither the wholesaler nor retailer can sell merchandise below their accumulated cost for the product to induce purchasing other merchandise or divert trade from a competitor. Further, it arbitrarily established a 2% cost increase for wholesalers and 6% increase for retailers as a guaranteed profit for small businesses. A few years later the wholesaler's cost increase became 3%, and any wholesaler acting as a retailer would now have a 9.18% cost increase and that is now the current margin.

In 1987 state legislator John Norquist (D) sent a questioning letter to the FTC, as did state legislator Shirley Krug (D) in a 2003 questioning follow-up letter. The FTC replies include; that pricing restraints should be removed to enable customers to benefit from lower and more competitive prices; Wisconsin's MML does not protect the consumer; the agency believes Wisconsin has the steepest MML for retail stores, thus highest costs for consumers; that Federal anti-trust laws and related agency rulings prevent predatory pricing and make MML unnecessary; they emphasized that federal agencies, state attorney general, and private parties all have the ability to overcome predatory pricing in lieu of MML; and that they questioned the unsupported logic in having a 9.18% mark-up and in their opinion, a completely arbitrary number without evidential formula involved. They urged that Wisconsin repeal MML and that doing so would continue the state's progressive consumer legislation and tradition.

Merchandizing has completely changed from depression era practices in every concept involved with a product. Other than piggy-back semi-trailers carried on trains, they are no longer involved. Products are delivered nationwide to the sales floor, more efficient material handling and product protection prevents damage. Enormous quantities, product promotions, customer support, abundant choices, and streamlined financing all contribute to lowest possible costs for highest quality products. And now with runaway mail-order and internet product sales increasing yearly, the consumer has choices in competition as well as product alternatives. So how does a MML improve upon all this?

The Department of Agriculture, Trade, and Consumer Protection (DATCP) operates Wisconsin's MML and currently has a \$290,000 budget for two employees in a small office with typical equipment to reign over the whole state's retail business. Gasoline retailers are the overwhelming users of MML complaint process with a 99.5% frequency. Of the 2,361 complaints filed last year, this department sent out only 60 warning letters in being 2.54% effective and no prosecutions. In fact, in the past ten years not a single case has been referred to any prosecutor for court action to secure established fines. This has been allowed to happen because of competition exemption filings by the gasoline retailers around the state on a daily basis as gasoline prices change.

Wisconsin gasoline stations are supposed to sell their fuels 9.18% above average terminal cost to customers. But the issue soon becomes a "border war" with Illinois when Wisconsin stations are selling at \$2.25 per gallon, for example. That 9.18% is almost 20 cents a gallon more. So Illinois border stations are typically selling 5-6 cents a gallon less to gain Wisconsin drivers crossing over to save on tankfuls. The border Illinois stations may not be selling to their local drivers, but they are making 14-15 cents a gallon more than local profit when selling to Wisconsin drivers, which often is a 300+% profit increase! And of course, there are no sales taxes going to Wisconsin. The war happens when a Wisconsin border station finds the Illinois posted price and completes a Competition Exemption form and files with DATCP in Madison, usually by fax. This simple action allows the Wisconsin station to meet the Illinois station price without violating the Wisconsin MML. Now the next Wisconsin station sees this and does the same for his market and protection. This continues going northward throughout the state within 1 day. Then starts all over again the next day. Thousands of people are paid to seek lower price stations and file exemptions every day, and the grand result is millions of dollars in cost for doing business in Wisconsin. Who pays for that?

## Liberal View

Businesses need constant government oversight, especially in providing stable prices for common products and like alternatives. This allows the customer more choices and fairness for all.

Because we have always done MML this way for over 75 years, and have had few complaints, why shouldn't we continue the practice? It works for everyone involved.

This method provides stable business environment that maintains local economy in keeping the money flowing within the area and increases the need for local workers to earn stable income. Anything different upsets the stability and flow that will eventually cause collateral employment damage.

## Conservative View

There is no logical reason for government to be involved with basic business decisions, especially in determining costs and retail pricing. Governments exhibit poor decision making in controlling their own costs, so why should they be involved with consumer prices?

When governments or special interests determine prices, it is the slippery-slope for anything else that would be generated by a central committee, the consumers are no longer in a freedom based nation.

If this is the Land of Opportunities, then government should not, with their laws and regulations, arbitrarily pick winners and losers. Just as good or better products for the same or less cost is the purchasing value basis for Free Market Trade in America.

Consumer service companies, dental and medical entities, and manufacturers all operate and profit from their efforts without a MML, so why should a select group of product retailers need one?

Businesses operating under a MML have artificially inflated prices that allow them not to have any incentive to seek and devise means for lower prices to their customers.

## Pro MML Repeal

Eliminate the guaranteed profits scheme for select businesses and be competitive among neighboring states.

Federal laws and agency regulations already cover and prohibit predatory pricing practices and protect businesses and consumers, so don't burden state consumers with penalizing and needless cost drivers.

The state's duty and responsibility is to its citizens in providing the best opportunities and conditions, not to select businesses to profit and maintain their economic control.

## Con MML Repeal

MML earnestly protect and support small business retailers, Main Street Business, from regional and national Big Box operators that take money out of the local economy.

MML prevents losing supporting businesses, retail and service, from the area and maintains stable environment for all businesses and consumers. Keep Main Street activities alive and active.

Wisconsin has long exhibited stable prices and competitive environment with its MML, so why risk venturing into price-gouging practices to consumers and business scheming against competition?

## Current MML

Wisconsin requires businesses that sell products to impose the wholesaler a 3% cost increase to the retailer, and the retailer in turn a 6% cost increase to consumers. Any wholesaler acting as a retailer, such as gasoline stations, are required a 9.18% cost increase. For apparel, hardware, furniture, and the like retail stores, this creates a “floor” that businesses cannot sell product below that cost. This prevents a store from selling a “loss leader” item below cost to encourage customers, especially for new businesses wanting to enter the marketplace, to enter and purchase other items at greater margins.

About 15 other states have specific product MML that are usually limited to alcohol, tobacco, and gasoline individually or collectively to some determined percentage. All other retail products are sold at fair market prices. Wisconsin borders Illinois, Iowa, Minnesota, and Upper Michigan for about 2,000 miles. When Back to School, Black Friday, and the like sales happen, Wisconsin consumers exodus the state for purchasing at significantly lower prices. And again, there are no sales taxes going to Wisconsin.

The federal government has several laws that condition businesses and practices as well as agency administrative laws for operation and has enforced them for decades. However, they uniformly mandate that like businesses provide required conditions at the business’s own cost and not establish any arbitrary blanket cost or percentage for doing so.

## MML Repeal Attempts

There have been several Wisconsin legislative attempts to repeal when consumerism struck the country in the early 70’s in wanting more of anything for less money or investment. This continued into the 80’s and 90’s a few times, and each time there was not enough legislative concern to pass repeal, yet no legislator wanted to sponsor or support any additional MML requirements.

The 1995 budget and appropriations act, AB 150, applied to MML as a means in defunding the office, thus making it ineffective in operations and applications to retailers. It was later removed and replaced with AB 558 that called for the actual repeal of MML in Wisconsin. Further, it amended and recreated related paragraphs and definitions in the statute. Running parallel to it was AB 616 that modified existing MML to have different seller requirements, definitions, and injuries addressed. Both bills were subjected to modified session schedule that prevented any action within remaining time.

AB 820 was presented in 2008 to again repeal MML, prohibiting anticompetitive pricing, and injuring competition. These prohibitions would be enforced by existing DATCP, the DOJ, and local DAs. Also, DATCP must ensure that rules are consistent with related FTC regulations and consult with DOJ. It was referred to Justice and Ethics Committee and failed to come to the floor in time.

In 2015 AB 452 and SB 371 were proposed and Senator Leah Vukmir and Representative Jim Ott spearheaded a combined effort to actively repeal MML and adjust other related issues. Although both committees had Republican majorities, the bills languished and were not supported to timely come to the floors for voting on them.

This inability to act caused extreme disappointment among the vast majority of consumer groups and propelled numerous talk-radio discussions. Senator Leah Vukmir and Representative Jim Ott have resolved to again actively pursue passage in the 2017 session.

## Court Actions

In late 2006 Lotus Business Group in Kenosha filed a complaint in Milwaukee County Circuit Court against Flying J Inc., a Utah based business, that operated several stations in Wisconsin. The complaint claimed that Flying J sold fuels below MML requirements on several occasions in 2006. Flying J argued that the burden on interstate commerce is excessive in that companies are forced to surrender competitive advantages, and that MML provisions are not linked to actual costs and create high profits for inefficient gasoline retailers. In October 2007 US District Magistrate Judge William Callahan dismissed the Lotus complaint because the State of Wisconsin was not actively supervising its MML.

DATCP quickly initiated enforcement against Flying J for violating the MML and sued the state to stop any action. Flying J filed a lawsuit in January 2008 stating the threat of state enforcement of the statute against Flying J, yet also the threat of additional lawsuits by private parties alleging violations under the statute, has created a chilling effect on competition in pricing motor fuels in Wisconsin. On 11 February 2009, Federal Judge Rudolph Randa ruled in Flying J's favor that the MML violated the Sherman Act, an antitrust act aimed at enhancing competitiveness. Attorney General J.B. Van Hollen (R) nor Governor Doyle (D), a long-time MML opponent, decided not to appeal the ruling.

The Wisconsin Petroleum Marketers & Convenience Store Association asked to intervene and was granted by the US Court of Appeals for the Seventh Circuit. On 3 September 2010 the appeals court overturned Randa's decision and reinstated Wisconsin's MML.

Although the Supreme Court of The United States has not directly interacted with Wisconsin's MML, it has voiced opinions on some state MMLs. They contend that predatory pricing schemes are rarely tried and more rarely successful. If any predatory pricing did occur, it would be timely attacked by the FTC implementing the Sherman Act, the Clayton Act, and any other applicable acts and regulations.

## Wisconsin's MML Constitutionality

Until recently, there has not been a challenge the state Constitutionality for MML. On 23 August 2016 the Wisconsin Institute for Law & Liberty (WILL) filed a lawsuit in Vilas County Circuit Court for plaintiffs Krist Oil and Robert Lotto challenging the constitutionality and legality on Wisconsin's MML. This trial will force Wisconsin to prove that it has a reasonable and compelling interest to impede commerce and protect the state's consumers from low product prices. This effectively forces the state to stand-up and argue publicly how Wisconsin's constitutional guarantee to earn a living is secondary to protecting special interests not having to be subjected to competition and that consumers should have to pay higher prices than market forces would prevail. WILL declares that the legislature has the duty and capability to repeal the inhibiting law, but that law violates the fundamental rights of Wisconsin businesses and consumers and should be summarily declared unconstitutional.

Krist is a Michigan-based gasoline retailer with over 70 stations in Wisconsin and Upper Michigan. He believes business objectives are best achieved in providing the best products at lowest cost to local consumers. His company is able to freely pursue this concept in Upper Michigan, where there are no price controls, but he cannot in Wisconsin.

Robert Lotto is a Green Bay resident that purchases gasoline locally from various local retailers, and as anyone else desires purchasing fuel at least cost. He is harmed by the Wisconsin MML, as it requires him to substantially pay more for gasoline and other products than competitive market pricing, especially if he were in Michigan.

WILL asserts that its focus is that MML unlawfully restricts the economic liberty and right to earn a living guaranteed by Wisconsin Constitution without any government interest or inhibition.

## Effect on Residents

Because of the Wisconsin MML and surrounding 4 states, residents are truly held captive with price and cost controls that provide no benefit to them or businesses, except the select retailers. The state MML prevents and prohibits active free-market retail competition, and yet this law compels small businesses to engage costly price surveillance on local competitors and across the border in an effort to become competitive wherever and whenever possible. The residents are being harmed daily by having higher product costs than surrounding states, loss in opportunities to achieve product value, and traveling costs over the border to acquire products at significantly lower cost. The only consumer alternative is to engage mail-order or internet product sales that further harm local businesses and eliminate collecting any state sales tax for buying the products. One can readily and logically envision and understand this is a no-win situation for anyone in the whole state, yet it is allowed to prevail.

## Effect on Legislators

The long prevailing fact is that the higher the representative office, the easier it is to get financial funding for the office. State offices are in the middle and adequate funding for them is provided by special interest lobbyists. Retail businesses have several lobbyists that visit legislators frequently to encourage and influence participation on their behalf. There is not one existing for residents.

Legislators justify their accepting the direct or indirect support in that apparently residents are comfortable with past and current MML practices and procedures, or they would with enough voice complain. The problem is that the resident majority has grown-up thru the years conditioned to these practices and rarely exposed to any logical alternative. In the current decade people are starting to pay attention to all cost drivers because of a much slower economy and greater unemployment.

## WGOL Position Statement

Wisconsin government's primary duty is to represent its residents. All other issues are secondary. There are numerous state and federal laws that condition business practices for fairness among them, and few for anyone purchasing. New business models abound taking all into consideration to provide the best possible value to consumers while providing reasonable returns to businesses, employees, and stockholders. Over 80% of all businesses are successfully operating and employing people without MML encumbrances. Thus, there is no logical reason retail businesses cannot do the same.

The time has come for Wisconsin to actively join the 21st century by terminating an archaic and cumbersome MML derived in the late 1930's that no longer applies to any current business model. The only entity it provides for is retailers, a very select business group.

WGOL will actively and fully promote and support repealing Wisconsin's MML during the current legislative session.