

Liberty Briefs

Wisconsin Grand *Sons of Liberty*

Minimum Markup Law

1/19/2019

Overview:

Wisconsin's Minimum Mark-Up Law (MML) is a Depression-era scheme to provide uniform retail merchandizing competition. Due to a widespread effort at repeal, by the 1960's only 15 other states had MML's and those states limited it to alcohol beverages, tobacco, and gasoline.

There are no Depression-era prevailing conditions anymore. Today, Wisconsin is the world's only sovereign entity having retail MML. It's time to end this failed protectionist practice of business welfare.

The Basics Flaws of Minimum Markup:

Protectionism for the merchandiser and retailer resulting in artificially higher costs to consumers. Simply stated, the laws prevented any product sold to consumers from being sold at a competitive price or at a loss in cost. The law requires total Merchandisers, or wholesalers, had to "pad" their cost by adding 3% to the cost to retailers, then the retailers added another 6% to the customer prices. Any merchandiser doing retail sales had to have a 9.18% bump for cost to customers.

Another tangible loss resulting from Minimum Markup is the inability to attract border state customers with competitive prices in Wisconsin. Wisconsin shares over 700 miles of state borders, MML reverses business competitiveness with our neighboring states of Illinois, Iowa, Minnesota, and Upper Michigan. Eliminating this artificial and inflationary practice is the only viable means to grow cross border business.

The Federal Trade Commission has argued state MML laws needlessly duplicate federal laws prohibiting predatory pricing schemes and it would actively pursue the Sherman Act, the Clayton Act, and others laws that are applicable. Also, they have failed to find any justification for the percentages mandated within the law. Thus, it is arbitrary and without foundation.

Because MML is bad for consumers, Legislatures created retail sales tax exemptions for food, prescription drugs, medical devices, burial caskets, modular and manufactured homes, certain agricultural items, and even "sales tax holidays" to reduce the inflationary impact of MML. Removing the markup will boost consumer buying power, spur economic growth plus reduce costs to the state by reducing the tax burden to the consumers for maintaining the offices, staff, and equipment to enforce MML requirements.

It's time to sunset the inflationary and protectionist practices of the Minimum Markup Law.

The Difficulty:

Resistance to change. Anyone defending the MML practice invariably it reduces to "because we've always done it this way." For 80 years, Wisconsinites have not known any other way to conduct business. The days of having customers drive to the stores are going fast with the advent in internet sales, home shopping-delivery services, and same-day delivery.

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Wisconsin Court Rulings:

- 2006 Flying J case - Judge Randa "the minimum markup law infringed the federal Sherman Act."
- 2007 Judge Wm Callaha dismissed the case saying Wisconsin was not actively supervising MML.
- 2009 Judge Randa rules that the MML violated the federal Sherman Act.
- 2010 appeals court reinstated the MML.
- 2015 Woodman versus Meijers: because coffee priced lower than MML allowed.

Existing Law:

- Wisconsin's Unfair Sales Act (100.30) enacted in 1939 (Senate Bill 197) and based on the Model State Unfair Sales Act, prepared by the National Food and Grocery Conference Committee and comprised of leading associations in the retail, wholesale and manufacturing branches of the food and grocery trade. (source: Google Books Part II, Legislative History)
- Under the ACT, neither a retailer nor wholesaler may sell any item of merchandise at less than cost with the "intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor." (source: Google Books Part II, Legislative History)
- The 1939 ACT was amended several times but the Unfair Sales ACT remains relatively unchanged from its initial provisions. (source: Google Books Part II, Legislative History)
- Federal Trade Commission ACT: Prohibits unfair methods of competition, and unfair or deceptive acts or practices. FTC has been involved in "below-cost" pricing issues and has expressed opposition to anticompetitive state and federal pricing legislation. (source April 22, 1987 Letter to John Norquist from the FTE/Chicago Regional Office)

Recent Legislation:

- 1987 Senate Bill 140 failed to repeal Wisconsin's Unfair Sales Act
- 2003 Shirley Krug Letter to FTC: asked four questions,
 - Does the law harm consumers by significantly raising prices to consumers?
 - Does current WI law duplicate existing protections against predatory pricing in federal antitrust law?
 - Does the current WI law discourage or encourage competitive pricing?
 - Any scholarly studies or court decisions addressing below-cost pricing in the creation of monopolies?"
- Repeal attempted in 2015 with LRB 3145/1 ACT

Needed improvement:

The time has come for Wisconsin to step into the 21st century by terminating its archaic and cumbersome MML that has outlived its usefulness. WGOL will actively and fully support repealing Wisconsin's MML in the next legislative session. It is the right thing to do.