



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR KATHLEEN VINEHOUT

FROM: Scott Grosz, Staff Attorney

RE: Wisconsin Unfair Sales Act

DATE: April 2, 2010

Wisconsin's Unfair Sales Act (the Act) generally prohibits sales below cost, known as "loss leader sales," for all merchandise. [s. 100.30 (3), Stats.] While certain definitions of "cost" specifically apply to sales of gasoline, alcohol, and tobacco, and have given rise to references to the Act as a "Minimum Mark-Up" law, the Act prohibits loss leader sales for general merchandise without specifying a minimum mark-up.

Background

The Act outlines the policy underlying this prohibition: support of fair competition promotes stability, prevents disruption, and creates consumer benefit through sustained long-term competition. [s. 100.30 (1), Stats.] Under the Act, loss leader sales are a form of unfair competition. The Act prohibits loss leader sales made with the intent or effect to induce the purchase of other merchandise, divert trade, or otherwise injure a competitor. [s. 100.30 (3), Stats.] A classic loss leader strategy would be to attempt to force a competitor out of business through near-term below cost sales in order to create and take advantage of a less competitive long-term market.

Loss Leader Sales

For general merchandise, any sale of any item of merchandise either by a "retailer" or "wholesaler" at less than "cost" is prohibited, if the sale is made with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor, impairs and prevents fair competition, injures public welfare and is unfair competition and contrary to public policy and the policy of this section. [s. 100.30 (3), Stats.]

Under s. 100.30, (3), Stats., "*evidence of any sale* of any item of merchandise by any retailer, wholesaler...at less than cost as defined in this section *shall be prima facie evidence* of intent or effect

to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.” (Emphasis added.)

Definition of “Cost”

As related to sales of general merchandise, the Act applies to sales at both the retail and wholesale levels, and defines “cost to a retailer” as:

[T]he invoice cost of the merchandise to the retailer, or replacement cost of the merchandise to the retailer, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on such merchandise or the sale thereof other than excise taxes collected by the retailer, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth. [s. 100.30 (2) (am) 2., Stats.]

Similarly, for general merchandise, the Act defines “cost to a wholesaler” as:

[T]he invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on the sale thereof prior to the sale at retail, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth. [s. 100.30 (2) (c) 2., Stats.]

Subject to certain exceptions, the Act prohibits sales below cost as described above. Unlike definitions applicable to gasoline, alcohol, and tobacco, the definitions of “cost” for general merchandise do not specify minimum mark-ups.

Exceptions

Exceptions to the Act allow for matching a competitor’s price, clearance and final liquidation sales, sales of damaged merchandise and perishables, contracted governmental institution sales, sales pursuant to judicial order, and for merchandise sold for charitable purposes or relief to agencies. [s. 100.30 (6), Stats.]

Penalties

With regard to sales below-cost of general merchandise, the Department of Agriculture, Trade and Consumer Protection or a district attorney may commence an action on behalf of the state to recover a forfeiture of not less than \$50 nor more than \$500 for a first violation and not less than \$200 nor more than \$2,500 for each subsequent violation. [s. 100.30 (4), Stats.]

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

SG:ty