



MYTH BUSTERS: UNDERSTANDING WISCONSIN'S UNFAIR SALES ACT

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Claim: The Unfair Sales Act is still necessary today to prevent predatory business practices and monopoly markets.

The Unfair Sales Act was enacted in 1939, during the Great Depression, to prevent unfair business practices and protect consumers. Today this antiquated law has been proven to have no impact on the success of small businesses and hurts consumers by artificially increasing prices and decreasing competition.

- States without a minimum markup law do not have fewer smaller businesses than states with a law.ⁱ As of 2017, there were 20 states with a universal minimum markup law and four states with a gas-specific minimum markup law.ⁱⁱ
- The Federal Trade Commission has stated that this law is unnecessary to prevent market monopolies due to federal anti-trust laws in place.ⁱⁱⁱ
- In 2007, a federal court refused to enforce Wisconsin's Unfair Sales Act due to it being unconstitutional.^{iv}
- There have been multiple bills attempting to fully or partially repeal which have failed despite a majority of Wisconsin voters supporting a repeal.^v Governor Evers also proposed a partial repeal of the law for gas in his 2019 budget proposal.^{vi}
- The minimum markup law requires a 9.18% minimum increase in gas, prevents prescription medications from being sold below cost, and on-sale products have a higher price in Wisconsin compared to surrounding states, such as school supplies.^{vii}

Claim: Larger businesses will use predatory pricing to force smaller businesses to close. Once there is no competition, larger businesses will charge higher monopoly prices on consumers.

If this were true, we would expect that there would be fewer small businesses in states that do not have a similar minimum markup law. Research has shown that this is not the case. When controlling for variables such as the health of the economy and demand for gasoline, there is nothing to suggest that states with a minimum markup law have fewer small businesses or gas stations. This is because the scheme of predatory pricing is not

even worthwhile for larger businesses. While predatory pricing could cause some small businesses to close, there is nothing they can do to prevent new small businesses from taking their place. Without high barriers to market entry, price gouging does little to increase profits or benefit from monopoly pricing.

In 2003, the Federal Trade Commission (FTC) wrote a letter addressing concerns about Wisconsin's Unfair Sales Act.^{ix} They stated that the law "most likely" hurts consumers by artificially raising prices and preventing more efficient competition that could offer lower prices. This problem is worse in Wisconsin because our law has "one of the steepest minimum markups on retail fuel sales in the country." The letter also states that this law not only duplicates but exceeds federal anti-trust laws in ways that do not benefit consumers.

Claim: Sellers will use tobacco, alcohol, and prescription drugs as a loss leader. Customers will come in for the cheaper products, and then end up buying other items with a higher profit margin which ultimately hurts consumers.

While this is considered a predatory practice, there is little to suggest that this truly harms consumers. One concern is that this may force small businesses to shut down and create a monopoly, which has already been established as false. The other concern is that customers may end up spending more money on items they did not initially intend to buy.^x While impulsive in the moment, these tend to be items that the customer would have likely purchased anyway. For example, a customer may enter a pharmacy to get cheaper medications but will also see paper towels and remember they need those too.

This may be harmful to consumers if those other items are priced higher than they otherwise would be but that is not typical practice. Consumers are likely to notice the higher prices and, unless it is an urgent need, would buy those items elsewhere. If the sales of other products do not increase, then the purpose of having a loss leader is defeated. Consumers are rational actors and react to market forces. Government regulation is not necessary to protect them from lower prices.

Claim: The Unfair Sales Act is necessary to ensure that there is fair competition in the motor fuel market and prevent a monopoly.

Given that there is little risk of larger businesses crowding out smaller ones, repealing this law would be a huge benefit for consumers—especially at the gas pump. Families are still feeling the effects of high inflation over the past two years and in October of 2023, inflation was still at 3.2%. The Unfair Sales Act imposes a 9.18% markup on gas prices in the state, one of the steepest minimum markups in the country. Minnesota repealed its minimum markup on gas in May of 2023, which was just eight cents above cost, and only 8 states remain with a markup on gas.^{xi} In Wisconsin, repealing this could decrease the price of a gallon of gas from \$3 to \$2.75, for example.

Claim: Allowing prescription drugs to be sold below cost would not have a significant impact on lowering prices, especially for those prescription drugs that people struggle to pay for the most.

This would not be a silver bullet for lowering drug prices in Wisconsin, but with anti-trust practices not being a concern, the government should not be limiting consumer options for affordable medications. In 2019, Wisconsinites spent \$1.3 billion on prescription medications and any little bit can help.^{xii} Currently, prescription medications are required to be priced at the cost of the drug to the business. While selling below cost may not be the right decision for every business or every drug, it gives businesses more flexibility to pass on savings to patients. For example, Walmart offers multiple prescription options at much more affordable prices for the most common medical issues such as diabetes, mental health, and pain management. Some of these are offered for as low as \$4. In 2010, a proposal to exempt prescription drugs from the Unfair Sales Act would have allowed Walmart to include an additional 56 medications at more affordable prices in the state.^{xiii}

Claim: Allowing prescription drugs to be sold below cost would encourage pharmacy hopping for the best price, risking the health of patients as their doctors and pharmacists would not have a complete medication history.

Wisconsin has had a system in place to prevent this for a decade. The Prescription Drug Monitoring Program launched in 2013 and enables doctors and pharmacists to see the prescription history of their patients. This program shows how many doctors and pharmacies a patient uses, detects when a patient may be using a dangerous combination of drugs, and tracks when prescriptions have been filled. Both doctors and pharmacists are required to check this program before they prescribe or fill a medication to prevent any risks posed to their patients.^{xiv}

i <https://www.jsonline.com/story/opinion/2017/05/21/flanders-brannon-repeal-minimum-markup-law/101983328/>
ii <https://will-law.org/wp-content/uploads/2021/01/2017-MML-Final.pdf>
iii https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-honorable-shirley-krug-concerning-wisconsin-unfair-sales-act-applied-gasoline/031015wisconsinunfairsalesact.pdf
iv <https://ij.org/press-release/fighting-wisconsins-ban-on-cheap-gas-release-10-17-07/>
v <https://www.maciverinstitute.com/2015/11/poll-majority-of-voters-support-repealing-minimum-markup-law/>
vi https://www.wqow.com/news/how-would-repealing-the-minimum-markup-law-impact-gas-prices/article_26181ce4-ed06-5032-818c-gf7136e92d94.html
vii <https://www.maciverinstitute.com/2017/08/back-to-school-shopping-more-expensive-in-wisconsin-thanks-to-minimum-markup-law/>
viii *ibid.*
ix *ibid.*
x <https://www.aeaweb.org/research/loss-leading-bans-retail-competition>
xi <https://ij.org/press-release/new-minnesota-laws-allow-retailers-to-offer-discounts-on-gasoline-and-dairy-sales/>
xii <https://www.protectourcare.org/wp-content/uploads/2021/05/Wisconsin-Drug-Pricing-Facts-.pdf>
xiii <https://archive.jsonline.com/news/opinion/90284832.html/>
xiv <https://www.fox6now.com/news/monitoring-your-medications-when-you-get-a-prescription-who-can-see-it>