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Wisconsin's "Minimum Markup" Law: Down for the Count or Simply Down for This Round?

Supporters and opponents of Wisconsin's "minimum markup" law on retail gas sales have continuously debated the law, resulting in round after round of lawsuits. Now, a recent case might end the fight for good. The federal district court in *Flying J, Inc. v. J.B. Van Hollen*, Case No. 08 C 110 (E.D. Wis. Feb. 11, 2009) held that the law is unenforceable. Whether you buy motor vehicle fuel or own a gas station, take note because *Flying J* has potential important implications on both sides' bottom lines.

The "minimum markup" law is part of the Wisconsin Unfair Sales Act, which bars sellers from cutting prices below cost to drive out competition and then raise prices. For most merchandise covered under the Act, "below cost" means below wholesale cost. But for gas and diesel fuel, "below cost" meant cost plus an additional mark up of 6% over what the station paid, or 9.18% over the average wholesale price of the fuel, whichever was higher. This meant that gas stations had to add this minimum markup to their prices—whether they wanted to or not.

The law was intended to prevent large companies from dropping gas prices and running smaller stations out of business. Proponents also argue that the "minimum markup" helps smaller gas stations survive by providing a guaranteed profit margin. They say that this promotes competition because it guarantees that there will be more competitors in the retail fuel market.

Opponents of the "minimum markup" law argue that the mandatory profit margin for fuel is a form of price fixing that keeps fuel costs artificially high. Opponents had been unsuccessful with their constitutional challenges . . . until *Flying J*. The attack in *Flying J* combined the price fixing and constitutional arguments and succeeded where prior challengers had failed. The combination of these two arguments provided a one, two federal law punch that sent the "minimum markup" law to the proverbial ground.

The court looked to the Constitution's Supremacy Clause, which provides that federal law preempts state law when a conflicting state law would interfere with Congressional goals. According to the court, the central issue was whether Wisconsin's mandatory markup law conflicted with the federal antitrust law prohibiting price fixing. The court held that the minimum markup law at least facilitated "parallel pricing" among competitors and therefore conflicted with the

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antitrust law. The court held that Wisconsin's minimum markup law "compels retailers to follow a parallel price policy, demand[ing] conduct which the Sherman Act forbids." Because it found the law unconstitutional, the court permanently prohibited the State from enforcing it.

Both supporters and opponents question what the *Flying J* case means for the future of the minimum markup provisions of the Unfair Sales Act. Is *Flying J* a knockout that will keep the law "down for the count"? Or does *Flying J* mean that the law could be down for this round, but survive to fight future rounds? What might these future "rounds" be? For starters, new rounds may include an appeal to the Seventh Circuit Court of Appeals or the introduction of an amendment undoing *Flying J*'s result. But the future of the law remains unclear. The Wisconsin Attorney General announced that he would not appeal the decision, but the Petroleum Marketers & Convenience Store Association has asked to intervene in the case so that it can challenge the ruling. State representatives have not yet acted, but may do so soon.

Whether *Flying J* is the final round for the "minimum markup" law or whether there will be future rounds, one thing is for sure: *Flying J* adds an interesting chapter to this controversial law's history.

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