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## Antibiotics giveaway may break state law

*Pharmacists ask if Publix offer is unfair sales tactic*

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A state law calls into question whether it is legal for Publix to give away antibiotics, although no one has filed a formal complaint.

The Unfair Sales Law, as it is known, is aimed at protecting businesses by prohibiting their competitors from selling products below cost. Publix Super Markets Inc. recently began giving away seven generic antibiotics.

Some pharmacists have questioned whether the grocery chain can legally do that.

Susan Niland, the director of communications for Davidson County's district attorney's office, said no one has looked into whether the Publix program breaks that law because the office hasn't received any complaints.

"Until we get complaints that would prompt us to research it, we don't feel comfortable speculating," Niland said.

Baeteena Black, the executive director of the Tennessee Pharmacists Association, said she's been contacted by a few pharmacists who would like to know the answer.

"They are concerned about unfair competition in the marketplace," Black said. "If this becomes a growing trend, it could hurt independent pharmacies. But right now, Publix has a small market penetration in Tennessee. It's having a limited impact.

"It appears to me that the law would not permit this practice, but I'm not an attorney."

Wal-Mart, Target and Kmart, among others, have recently begun offering generic drugs at reduced prices. But Florida-based Publix is giving the antibiotics to those who have prescriptions from their doctors.

Black noted that Wal-Mart's in Tennessee sell some of the drugs in its discount program for more than \$4 because of the law.

The generic antibiotics Publix is giving away are most commonly used to treat ailments such as bronchitis, urinary tract infections and strep throat. Customers can receive up to a 14-day supply free. And there is no limit on the number of prescriptions people can fill.

"We are looking further into Tennessee law in connection with Publix's free antibiotic program," said Anne Hendricks, a Publix spokeswoman. "Currently, we do not believe that the sales-at-less-than-cost statute applies to this program."

### **Intent must be proved**

David Raybin, a constitutional lawyer in Nashville, tends to agree with Publix.

Raybin said it's not enough to prove that a company is selling a product below cost. He said the courts have interpreted the law to mean that a plaintiff must prove intent to harm.

"Unless you can prove the intent to drive competition out of business, then it's probably not criminal," Raybin said, adding that intent is very difficult to prove.

He said Publix could easily argue that the give-away was set up to be a loss-leader, meant to draw shoppers in the store so they'll buy other things. Hendricks has said the program's goal is to help people.

The Publix program is limited. It offers relatively few drugs, and with only 17 locations in Tennessee, many residents don't live close enough to use the program.

However, the giveaway has been praised as a way to help poor people get drugs they need. Prior to the new program, Hendricks said, the medications ranged in price from \$10 to \$60 for Publix customers.

The free medications are amoxicillin, ampicillin, cephalexin, ciprofloxacin, erythromycin, sulfamethoxazole/trimethoprim and penicillin VK.

Hendricks said the seven antibiotics make up nearly 50 percent of the generic pediatric prescriptions filled at Publix stores.

Ferrell Haile, co-owner of Perkins Drugs in Gallatin, said he doesn't know whether giving away medication is legal, but he says the practice is bad for his business.

"I have a hard time competing against it," Haile said.

"This is a marketing ploy. They have figured out if they give away some low-cost prescriptions, they will sell more out front."