

Assembly Bill 620

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Chapter 629

AN ACT to amend 100.30 (2) (a) to (i) and (3) to (6); and to create 100.30 (2) (k), (L) and (m) of the statutes, relating to the unfair sales act.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 100.30 (2) (a) to (i) of the statutes are amended to read:

100.30 (2) (a) "Cost to retailer" means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; ~~to which shall be added freight~~, 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, ~~and cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three fourths of one percent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup and to which shall be added a markup~~ to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth ~~after adding thereto freight charges and cartage but before adding thereto a markup.~~

(b) "Cost to the wholesaler" means the invoice cost of the merchandise to the wholesaler within 30 days prior to the date of sale, or the replacement cost of the merchandise to the wholesaler, whichever is lower; ~~and including any excise taxes imposed on such merchandise or the~~

sale thereof, less all trade discounts except customary discounts for cash, to which shall be added freight, 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, and cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage and markup, and to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 2 3% of the cost to the wholesaler as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(c) "Replacement cost" means the cost per unit computed as specified in par. (a) or (b) at which the merchandise sold or offered for sale could have been bought by the seller at any time within 30 days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise.

(d) "Cost to retailer" and "cost to wholesaler" as defined in pars. (a) and (b) of this section mean bona fide costs; and purchases made by retailers and wholesalers at prices which cannot be justified by prevailing market conditions within this state shall not be used in determining cost to the retailer and cost to the wholesaler. *Prices at which purchases of merchandise are made by retailers or wholesalers cannot be justified by prevailing market conditions in this state when they are below the lowest prices at which the manufacturer or producer of such merchandise sells to other retailers or wholesalers in this state.*

(e) "Sell at retail", "sales at retail", and "retail sale" mean and include any transfer for a valuable consideration, made in the ordinary course of trade or in the usual prosecution of the seller's business, of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. *The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.*

(f) "Sell at wholesale", "sales at wholesale" and "wholesale sales" mean and include any transfer for a valuable consideration made in ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. *The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price. In cases of sales by wholesalers and retailers under this section all fractions of a cent shall be carried to the next cent.*

(g) "Retailer" means and includes every person, partnership, corporation or association engaged in the business of making sales at retail within this state; *provided that but, in the case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business. The term "retailer" shall apply to manufacturers who sell to retailers and who own or operate retail stores or sell direct to the public, and for the purpose of this section the invoice price to the manufacturer's retail store shall be the wholesale charge invoiced to other retailers.*

(h) "Wholesaler" means and includes every person, partnership, corporation, or association engaged in the business of making sales at

wholesale within this state; ~~provided that~~ *but*, in the case of a person, partnership, corporation or association engaged in the business of making both sales at wholesale and sales at retail, such term shall be applied only to the wholesale portion of such business.

(i) ~~The term "Retailer" and the term "wholesaler" shall both be applied to all merchants buying any merchant who buys merchandise for resale at retail from the manufacturer any merchandise to be sold at retail by such merchants, and both the wholesale markup of 2 per cent to cover in part the cost of doing business, and the retail markup of 6 per cent to cover in part the cost of doing business, shall be added to the invoice cost on all such merchandise so purchased from the manufacturer or producer thereof and, as to such merchandise, the terms "cost to retailer" and "cost to wholesaler" as defined in pars. (a) and (b) shall both be applied, including the markup requirements.~~

SECTION 2. 100.30 (2) (k), (L) and (m) of the statutes are created to read:

100.30 (2) (k) "Sell", "sale" or "sold" includes any advertising or offer to sell or any transfer of merchandise where title is retained by the seller as security for the payment of the purchase price. In determining the selling price of merchandise by wholesalers and retailers under this section, all fractions of a cent shall be carried to the next full cent.

(L) The term "trade discount" shall not include advertising, display or promotional allowances in the absence of a statement in writing from the grantor that receipt of such allowance is not conditioned on the performance of any service or expenditure of any money for promotion, advertising or any other purpose.

(m) Any person who sells at retail and who also sells to other retailers shall use the invoice cost to other retailers in computing his selling price at retail under par. (a); and if such person is a manufacturer or producer, both pars. (a) and (b) shall be used in computing his selling price at retail. In the absence of sales to other retailers, the manufacturer's or producer's invoice cost to wholesalers shall be used in computing the manufacturer's or producer's selling price at retail as provided in pars. (a) and (b).

SECTION 3. 100.30 (3) to (6) of the statutes are amended to read as follows:

100.30 (3) Any ~~advertising, offer to sell, or~~ sale of any item of merchandise either by ~~retailers or wholesalers~~ *a retailer or wholesaler*, at less than cost as defined in this section 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. *Such sales are prohibited. Evidence of any sale of any item of merchandise by any retailer or 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.*

(4) Any retailer who, with the intent *or effect* of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, ~~shall advertise, offer to sell, or sell~~ *sells* at retail any item of merchandise at less than cost to the retailer as defined in this section; or any wholesaler who, with intent *or effect* of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, ~~shall advertise, offer to sell, or sell~~ *sells* at wholesale any item of merchandise at less than cost to the wholesaler as defined in this section, shall be fined not less than

\$50, nor more than \$500 for the first offense and not less than \$200 nor more than \$1,000 for the 2nd and each subsequent offense, or, for each offense, imprisoned not less than one month nor more than 6 months, or both. Evidence of any advertisement, offer to sell, or sale of any item of merchandise by any retailer or wholesaler at less than cost as defined in this section shall be prima facie evidence of intent to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

(5) In addition to the penalties provided, the courts of this state are invested with jurisdiction to prevent and restrain violations of this section, and under sub. (4):

(a) It shall be the duty of the several district attorneys to institute proceedings in equity to prevent and restrain violations of this section.

(b) The department may also bring an action to enjoin violations of this section. Such action may be commenced and prosecuted by the department in the name of the state in any court having equity jurisdiction, either in the county where the offense occurred or in Dane county, without being compelled to allege or prove that an adequate remedy at law does not exist.

(c) Any person damaged, or who is threatened with loss or injury, by reason of a violation of this section, shall be entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation hereof and, upon granting of such relief, the person initiating such action shall be entitled to recover all costs including a reasonable attorney's fee.

(6) (a) The provisions of this section shall not apply to sales at retail or sales at wholesale where:

(a) 1. Merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such;

(b) 2. Perishable merchandise must be sold promptly in order to forestall loss;

(c) 3. Merchandise is imperfect or damaged or is being discontinued and is advertised, marked and sold as such;

(d) 4. Merchandise is sold upon the final liquidation of any business and is advertised, marked, and sold as such;

(e) 5. Merchandise is sold for charitable purposes or to relief agencies;

(f) 6. Merchandise is sold on contract to departments of the government or governmental institutions;

(g) 7. The price of merchandise is made in good faith to meet competition, an existing price of a competitor and is based on evidence in the possession of the seller in the form of an advertisement, proof of sale or receipted purchase.

(8) 8. Merchandise is sold by any officer acting under the order or direction of any court.

(b) No person may claim the exemptions under par. (a) 1 to 4 if he limits or otherwise restricts the quantity of such merchandise which can be purchased by any buyer or if he fails to conspicuously disclose the reason for such sale in all advertisements relating thereto and on a label or tag on such merchandise or on a placard where the merchandise is displayed for sale.

Approved July 1, 1966.