

Wisconsin's Anti-Bushing Law 218.01 (3) (a) (18)

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engaged not only in the defense of the rights of his individual client, but in the defense of the rights of each and every citizen of the land. If the courts can deprive even the most despised accused of his rights as a citizen then may it also deprive the bulk of the citizenry of the rights afforded them under the constitution. For such rights are worthless unless the courts will enforce them and the lawyers protect them.

IV. CONCLUSION

There is little question, if any, as to the right of an accused to a fair trial and assistance of counsel. The difficulty arises in the moral issues involved in the defense of one who has admitted his guilt. However personally repugnant the particular case may be to the individual attorney, it must always be remembered that even the most wayward of citizens have rights which must be protected. Chief among which are the right to a fair trial and "due process" of law. The protection of such rights is a moral act the accomplishment of which is an art peculiar to attorneys. It is not only the attorney's singular ability to protect such rights but also his duty as a member of a profession dedicated to justice. The attorney need feel no reluctance, on moral grounds, to undertake the defense of an accused; rather, he should undertake such a task in a spirit of service to his profession, his fellow citizens and his country.

JAMES T. BAYORGEON

Wisconsin's Anti-Bushing Law 218.01 (3) (a) 18 — The present capacity of our nation's automobile manufacturers to produce cars far exceeds the American public's ability to consume them.¹ This excess, coupled with the great number of dealers handling the same product in the same market area, has forced dealers into various unethical practices. Bushing² is but one of many such practices. However, it is also one of the most successful.

¹ On March 1, 1958 dealers had in stock a sixty-eight day supply of cars. This high inventory (thirty days is normal) had increased from February 1, 1958 despite factories working three or four day weeks instead of the usual five day week. *Automotive News*, March 1st, 1958, page 1.

² The "bush" as it is called is set up by another practice known as highballing. The highball was developed to get a buyer who is shopping to return to the bushing dealership before he purchases an automobile. The following is an example of how a highball followed by a bush enables a dealer to sell an automobile.

Mr. Smith is looking for a new car. He has decided to buy a certain make and model and knows the equipment he wants. Mr. Smith begins to shop around for the best price he can get. He wants to see how little a cash difference he can pay and still get the car of his choice. Mr. Smith first stops at the X Auto Company and receives a figure of \$2400.00 cash difference from a salesman there. From the X Auto Company, Mr. Smith proceeds to the Y Auto Company and by letting the figure of \$2400.00 cash difference slip out, gets the salesman at the Y Auto Company to agree to a cash difference of \$2350.00. By repeating this process at several more dealers, Mr. Smith manages to reduce the cash difference to \$2100.00 at the B Auto Company.

An attempt to control bushing was made by the Wisconsin Legislature in 1957. It added the following as one of the grounds for revocation of a dealer's license:

"Having accepted an order of purchase or a contract from a buyer which offer of purchase or contract is subject to subsequent acceptance by the licensee, if such arrangement results in the practice of bushing. For the purpose of this section bushing is defined as the practice of increasing the selling price of a car above that originally quoted the purchaser after the purchaser has made an initial payment either with money or trade-in and signed a purchase order or contract which is subject to subsequent acceptance by the licensee."³

Wisconsin is the only jurisdiction that has taken this step.

A study of this section brings several problems to light. The statute could refer to the dealer or his salesmen. If one of his salesmen, who normally has no authority to bind the dealer, accepts a deposit from a buyer and allows the buyer to sign an order, the dealer it appears, has only two choices if he wishes to keep his license. He can repudiate the contract and return the deposit which had been considered earnest money⁴ or he can elect to go through with the contract at the lower price.

Most of the dealers that Mr. Smith has seen are aware that he is shopping. Therefore, either because of active or passive dealer encouragement, their salesmen have given Mr. Smith a highball. Each salesman at each dealership knows that Mr. Smith will not buy on his first visit and hopes to assure himself that Mr. Smith will pay a return visit before buying.

Mr. Smith returns to the B Auto Company to purchase his car for the quoted \$2100.00 cash difference. But, the B Auto Company must draw at least \$2300.00 cash difference to break even and not actually lose money. The B Auto Company has two alternatives: it can honestly tell Mr. Smith they need at least \$2300.00 cash difference, or it can use the bushing method. The latter is done by writing a purchase order for \$2100.00 cash difference and thereby convincing Mr. Smith that he has bought a car. A deposit is usually taken to prevent Mr. Smith from further shopping. Now time is on the dealer's side. Mr. Smith, like any normal human being, will advertise his bargaining superiority to his friends and to the other dealers who continue to call him, telling them he has bought a car for that very low figure.

The B Auto Company will call Mr. Smith in a short time and ask him to stop in to pick up his new car. As Mr. Smith is admiring his shining purchase, the salesman mentions that the sales manager or dealer would like to talk to him. This is the first contact Mr. Smith has had with either of them. Their job is to elevate Mr. Smith to \$2400.00 cash difference to allow the B Auto Company to get its cost plus \$100.00 profit. They may do this by saying the salesman made a mistake in appraising Mr. Smith's trade-in, or that the market has dropped. There are literally hundreds of excuses, but the fact remains that Mr. Smith is being asked for \$300.00 more than he originally bargained for. The sad part is that nine out of ten Mr. Smiths will pay the \$300.00 rather than admit they have been outsmarted by a dealer. The buyer rarely makes a complaint because of his desire to retain his business reputation.

³ Wis. Stats. §218.01 (3) (a) (18) (1957).

⁴ "[I]n a case which is purely executory where the purchaser seeks damages only, and particularly if there is a restrictive clause in the contract of sale about approval, the Wisconsin Court might still deny relief in spite of existing decisions (*Voell v. Klein*, 184 Wis. 620, 200 N.W. 364, 1925). In the earlier cases there was presented the matter of imposing the burden of actual out of pocket loss upon either the employer or the customer, and the burden resulting

He has, however, lost his right to refuse the buyer's offer and to make the buyer a counter-offer. The idea of offer and counter-offer has been the heart of all automobile selling.⁵ To deny this right might raise a serious constitutional problem. The right to sell fairly at a negotiated price is a property right,⁶ and if it is unreasonably or arbitrarily limited,⁷ there is a deprivation of property without due process of law as is guaranteed by the Fourteenth Amendment of the United States Constitution. Under its police power, the state has a right to regulate for the health and welfare of its people.⁸ The problem is determining whether this is for the general welfare.⁹ Certainly the buyer is not harmed except for his pride because he can withdraw at anytime before the dealer accepts the offer.

If this method of offer and counter-offer can be regulated by the state for the welfare of its citizens, the prohibition against bushing should encompass all businesses using this type of transaction to avoid being classified as class legislation. Since the appliance field is operated in the same manner,¹⁰ why not include it too? This statute thus risks being held invalid as class legislation because it may deny equal protection of the law as guaranteed under the Fourteenth Amendment.

from the employer's misconduct was put upon the employer. Any sweeping language about common knowledge and scope of authority must be limited by these considerations." 21 Marq. L. Rev. 148, 149, (1937). Since 1937 the practice in the automobile retail industry has changed. The author feels that the court would have to take judicial notice of the fact that buyers now realize that a salesman's terms must be accepted by the dealer. Modern order forms include in big black type the words "for information only" behind the salesman's place to sign. Also buyers today have been repeatedly warned by dealers that an order must be accepted by the dealer to be valid.

⁵ The statute was aimed at preventing bushing, not bargaining. By giving a deposit as earnest money, the buyer is able to put more pressure on the dealer because the dealer knows that if he says yes, he has sold a car. The statute fails to make the distinction between bushing and bargaining. When a customer is bargaining, he knows he hasn't bought a car until the dealer accepts his offer, and in many dealerships, the salesmen tell the customer that they will try to get the dealer to accept his offer. This is not at all harmful, but it would seem that this new statute prevents this practice.

⁶ "The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of property itself, and as such, within the protection of the due process of the law clauses of the Fifth and Fourteenth Amendments." *Tyson & Bro. v. Banton*, 273 U. S. 418, 429 (1926).

⁷ "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928).

The courts have repeatedly said that the words unnecessarily and unreasonably are not capable of exact definition and thus in any particular case, the final reviewing court will have to use its own judgment as to what is reasonable and necessary under the particular facts of that case.

⁸ "The states have full power to regulate within their limits matters of internal police which includes whatever will promote the peace, comfort, convenience, and prosperity of their people." *Escanaba & L.M. Transport Co. v. Chicago*, 107 U. S. 678, 683 (1931).

⁹ *Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 121 (1928).

¹⁰ Bushing and highballing are both used quite extensively in the appliance field.

Regarding class legislation, the United States Supreme Court said:

“The ultimate test of validity is not whether the classes differ, but whether the differences between them are pertinent to the subject with respect to which classification is made.”¹¹

This creates the problem of proving these same practices in the appliance field are not pertinent to the subject of this statute. Yet, it would seem to this author that they are exactly the same.

Another loophole in the Wisconsin statute is an acceptance by a salesman of a signed order without any payment by the buyer.¹² However, since a dealer can exert more pressure on the buyer with a deposit, he might be able to take the buyer's title to his car. In Wisconsin, a title to a car does not prove ownership, but creates only a rebuttable presumption of it.¹³ The question is raised as to whether the Wisconsin Supreme Court would consider the title to a car as payment under this statute. It certainly isn't money, and it is difficult to see how it could be considered as a trade-in since the buyer still has control over his car. Therefore, it seems that the salesman can write an order and get the buyer's title to his present car as a deposit, thus circumventing the statute. It appears that the only thing a salesman can't do now that he could before this latest statute is take money, a bill of sale for the trade-in, or the trade-in itself as a deposit. Therefore, the author feels that even if the act were upheld as constitutional, the loopholes in it are too opportune, and that this statute will fail to force the automobile dealers and their salesmen to give up bushing which is the law's obvious objective.

The law previous to the enactment of this statute¹⁴ could be far more effective if diligently and vigorously enforced, as it gives as grounds for revocation of a dealer's license any fraud, subterfuge, or unconscionable practice relating to the business. It is felt that this would give the buyer ample protection: he may file a complaint¹⁵ with the Motor Vehicle Department or the Banking Commission and either can take action. A few cases handled in this fashion would put an abrupt halt to bushing.

However, if the need for a statute is felt, why not let it work on the principle of waiver of right to accept? The proposed law could be something similar to the following:

If within five days after the buyer signs an order the dealer has not notified the buyer of the dealer's acceptance of the offer, the order is voided.

¹¹ *Asbury Hospital v. Cass County*, 326 U.S. 207, 214 (1945).

¹² The statute requires the acceptance of a downpayment, see Note 3 *supra*.

¹³ *Kruse v. Weigund*, 204 Wis. 195, 235 N.W. 426, (1931).

¹⁴ Wis. Stats. §218.01(3)(a)(9), (11), (1955).

¹⁵ 27 Wis. Op. Atty. Gen. 90 (1938).

The use of this type of pocket-veto would not stop highballing, but it would curtail bushing to at the most five days.

The author is convinced that a renewed and zealous effort to enforce the previous laws, (supplemented by the above suggestion), would be more effective than this new bushing statute.

THOMAS SAWYER