

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HOUSE BILL 392

**47TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2006**

INTRODUCED BY

Hector H. Balderas

AN ACT

RELATING TO BUSINESS; PROHIBITING PROFITEERING DURING AN  
EMERGENCY OR DISASTER; PROVIDING PENALTIES; CREATING A FUND;  
AMENDING AND ENACTING SECTIONS OF THE UNFAIR PRACTICES ACT;  
MAKING APPROPRIATIONS; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 57-12-2 NMSA 1978 (being Laws 1967,  
Chapter 268, Section 2, as amended) is amended to read:

"57-12-2. DEFINITIONS.--As used in the Unfair Practices  
Act:

A. "person" means, where applicable, natural  
persons, corporations, trusts, partnerships, associations,  
cooperative associations, clubs, companies, firms, joint  
ventures or syndicates;

B. "seller-initiated telephone sale" means a sale,

underscored material = new  
[bracketed material] = delete

1 lease or rental of goods or services in which the seller or  
2 [~~his~~] the seller's representative solicits the sale by  
3 telephoning the prospective purchaser and in which the sale is  
4 consummated entirely by telephone or mail, but does not include  
5 a transaction:

6 (1) in which a person solicits a sale from a  
7 prospective purchaser who has previously made an authorized  
8 purchase from the seller's business; or

9 (2) in which the purchaser is accorded the  
10 right of rescission by the provisions of the federal Consumer  
11 Credit Protection Act, 15 U.S.C. 1635 or regulations issued  
12 pursuant thereto;

13 C. "trade" or "commerce" includes the advertising,  
14 offering for sale or distribution of any services and any  
15 property and any other article, commodity or thing of value,  
16 including any trade or commerce directly or indirectly  
17 affecting the people of this state;

18 D. "unfair or deceptive trade practice" means an  
19 act specifically declared unlawful pursuant to the Unfair  
20 Practices Act, a false or misleading oral or written statement,  
21 visual description or other representation of any kind  
22 knowingly made in connection with the sale, lease, rental or  
23 loan of goods or services or in the extension of credit or in  
24 the collection of debts by a person in the regular course of  
25 [~~his~~] the person's trade or commerce, which may, tends to or

.160089.4GR

underscored material = new  
[bracketed material] = delete

1 does deceive or mislead any person and includes:

2 (1) representing goods or services as those of  
3 another when the goods or services are not the goods or  
4 services of another;

5 (2) causing confusion or misunderstanding as  
6 to the source, sponsorship, approval or certification of goods  
7 or services;

8 (3) causing confusion or misunderstanding as  
9 to affiliation, connection or association with or certification  
10 by another;

11 (4) using deceptive representations or  
12 designations of geographic origin in connection with goods or  
13 services;

14 (5) representing that goods or services have  
15 sponsorship, approval, characteristics, ingredients, uses,  
16 benefits or quantities that they do not have or that a person  
17 has a sponsorship, approval, status, affiliation or connection  
18 that [~~he~~] the person does not have;

19 (6) representing that goods are original or  
20 new if they are deteriorated, altered, reconditioned,  
21 reclaimed, used or secondhand;

22 (7) representing that goods or services are of  
23 a particular standard, quality or grade or that goods are of a  
24 particular style or model if they are of another;

25 (8) disparaging the goods, services or

.160089.4GR

underscoring material = new  
[bracketed material] = delete

1 business of another by false or misleading representations;

2 (9) offering goods or services with intent not  
3 to supply them in the quantity requested by the prospective  
4 buyer to the extent of the stock available, unless the  
5 purchaser is purchasing for resale;

6 (10) offering goods or services with intent  
7 not to supply reasonable expectable public demand;

8 (11) making false or misleading statements of  
9 fact concerning the price of goods or services, the prices of  
10 competitors or one's own price at a past or future time or the  
11 reasons for, existence of or amounts of price reduction;

12 (12) making false or misleading statements of  
13 fact for the purpose of obtaining appointments for the  
14 demonstration, exhibition or other sales presentation of goods  
15 or services;

16 (13) packaging goods for sale in a container  
17 that bears a trademark or trade name identified with goods  
18 formerly packaged in the container, without authorization,  
19 unless the container is labeled or marked to disclaim a  
20 connection between the contents and the trademark or trade  
21 name;

22 (14) using exaggeration, innuendo or ambiguity  
23 as to a material fact or failing to state a material fact if  
24 doing so deceives or tends to deceive;

25 (15) stating that a transaction involves

.160089.4GR

underscored material = new  
[bracketed material] = delete

1 rights, remedies or obligations that it does not involve;

2 (16) stating that services, replacements or  
3 repairs are needed if they are not needed; or

4 (17) [~~failure~~] failing to deliver the quality  
5 or quantity of goods or services contracted for; and

6 E. "unconscionable trade practice" means an act or  
7 practice in connection with the sale, lease, rental or loan, or  
8 in connection with the offering for sale, lease, rental or  
9 loan, of any goods or services, including services provided by  
10 licensed professionals, or in the extension of credit or in the  
11 collection of debts which to a person's detriment:

12 (1) takes advantage of the lack of knowledge,  
13 ability, experience or capacity of a person to a grossly unfair  
14 degree; [~~or~~]

15 (2) results in a gross disparity between the  
16 value received by a person and the price paid; or

17 (3) results in a price that grossly exceeds  
18 the price at which similar goods or services were readily  
19 obtainable in similar transactions by similar persons."

20 Section 2. A new section of the Unfair Practices Act is  
21 enacted to read:

22 "[NEW MATERIAL] PROFITEERING DURING A STATE OF EMERGENCY  
23 OR DISASTER.--

24 A. As used in this section:

25 (1) "disaster" means natural or man-made

.160089.4GR

underscoring material = new  
[bracketed material] = delete

1 events, including, but not limited to, tornado or other severe  
2 storm, earthquake, flood, fire, riot, act of war, terrorism,  
3 civil disorder or other extraordinary adverse circumstance.

4 The court shall find that an event constitutes a disaster if  
5 the event results in the declaration of a state of emergency or  
6 disaster by the president of the United States or the governor.

7 The court may find that an event constitutes a disaster in the  
8 absence of a declared state of emergency;

9 (2) "necessary property or service" means any  
10 necessary property or service for which consumer demand does,  
11 or is likely to, increase as a consequence of the emergency or  
12 disaster and includes, but is not limited to, consumer food  
13 items or property, property or services for emergency cleanup,  
14 emergency supplies, communication supplies and services,  
15 medical supplies and services, home heating fuel, building  
16 materials and services, freight, storage services, housing,  
17 lodging, transportation and motor fuels;

18 (3) "profiteer during a state of emergency or  
19 disaster" means unjustifiably increasing during a time of a  
20 state of emergency or disaster the price at which any necessary  
21 property or service is offered for sale to consumers. Actual  
22 sales at the increased price shall not be required for the  
23 increase to be considered unconscionable. In determining  
24 whether the price increase described in this subsection is  
25 unjustified, the court shall consider all relevant

.160089.4GR

underscoring material = new  
[bracketed material] = delete

1 circumstances, including the following:

2 (a) whether the price charged by the  
3 alleged profiteer during the time of a state of emergency or  
4 disaster grossly exceeded the average price charged by the  
5 alleged profiteer for similar property or services at the same  
6 location during the twenty days prior to the state of emergency  
7 or disaster, and an increase of more than twenty percent shall  
8 be prima facie evidence of gross excess;

9 (b) whether the amount charged by the  
10 alleged profiteer during the time of a state of emergency or  
11 disaster grossly exceeded the average price at which the same  
12 or similar property or services were readily obtainable by  
13 other consumers in the trade area at the same location during  
14 the twenty days prior to the state of emergency or disaster,  
15 and a price difference of more than twenty percent shall be  
16 prima facie evidence of gross excess;

17 (c) whether the increase in the amount  
18 charged by the alleged profiteer during the time of a state of  
19 emergency or disaster was attributable to additional costs  
20 incurred by the alleged profiteer in connection with the sale  
21 of the product or service, and proof the alleged profiteer  
22 incurred such additional costs shall be prima facie evidence  
23 that the price increase was justified when such additional  
24 costs were actually incurred by the alleged profiteer during  
25 the period in which the substantially increased price was being

.160089.4GR

underscoring material = new  
[bracketed material] = delete

1 charged;

2 (d) whether the price sought by the  
3 alleged profiteer would have resulted in a profit margin  
4 greater than the alleged profiteer's usual and customary profit  
5 margin; and

6 (e) whether the price sought by the  
7 alleged profiteer was a result of historical seasonal price  
8 changes; and

9 (4) "time of a state of emergency or disaster"  
10 means the time period specified in an order declaring an  
11 abnormal market condition, but such time shall not exceed  
12 thirty days. The governor or court may extend that period of  
13 time through the issuance of not more than one additional order  
14 for not more than thirty additional days for each declared  
15 emergency or disaster. Notwithstanding the provisions of this  
16 paragraph, the period of time during which the restrictions  
17 imposed by this section are in effect may be extended or  
18 terminated by a joint resolution of the legislature.

19 B. It is an unconscionable trade practice pursuant  
20 to the Unfair Practices Act for any person to profiteer during  
21 a state of emergency or disaster as declared by the president  
22 of the United States or the governor; provided that the  
23 governor or, upon a petition by the attorney general, the  
24 district court in a county affected by an emergency or disaster  
25 issues an order declaring that the emergency or disaster has

.160089.4GR



underscored material = new  
[bracketed material] = delete

1 caused or appears likely to cause an abnormal market disruption  
2 within the state. In an order declaring an abnormal market  
3 condition, the governor or court shall specify:

4 (1) the cause of the abnormal market  
5 disruption;

6 (2) the geographic area to which the abnormal  
7 market disruption applies; and

8 (3) with particularity, those categories of  
9 necessary property or services to which the restriction set  
10 forth in this subsection shall apply."

11 Section 3. A new section of the Unfair Practices Act is  
12 enacted to read:

13 "[NEW MATERIAL] NOTICE PROVISIONS.--Upon the governor's  
14 issuance of an executive order regarding an abnormal market  
15 disruption pursuant to Paragraph (4) of Subsection A of Section  
16 2 of this 2006 act, the office of the governor shall  
17 immediately notify the public and those registered with that  
18 office for the purpose of receiving notice of the issuance of  
19 such an executive order. That office shall notify the public  
20 by any means available, including the office's web site, news  
21 media and electronic mail. Any person may register with that  
22 office for the purpose of receiving such notification."

23 Section 4. A new section of the Unfair Practices Act is  
24 enacted to read:

25 "[NEW MATERIAL] EXEMPTIONS.--

.160089.4GR

underscored material = new  
[bracketed material] = delete

1           A. A person subject to the restrictions imposed by  
2 Section 2 of the this 2006 act may file a petition for an  
3 exemption to those restrictions in the first judicial district  
4 court or in any district court in a county included within the  
5 geographic scope of an executive or court order issued  
6 declaring an abnormal market disruption. Notice of a petition  
7 for an exemption shall be served upon the attorney general.

8           B. The court shall act upon a petition for  
9 exemption pursuant to Rule of Civil Procedure 1-066 NMRA. The  
10 court may grant the exemption if:

11                   (1) the court determines that enforcement of  
12 the restrictions of Section 2 of this 2006 act could result in  
13 a catastrophic loss of life or property; or

14                   (2) the petitioner shows that due to certain  
15 circumstances the petitioner is unable to comply with the  
16 restrictions of Section 2 of this 2006 act without suffering  
17 undue hardship beyond the hardship suffered by persons  
18 generally subject to those restrictions."

19           Section 5. A new section of the Unfair Practices Act is  
20 enacted to read:

21                   "[NEW MATERIAL] PENALTIES, REMEDIES AND ENFORCEMENT.--

22                   A. Upon an entry of judgment or decree for a  
23 violation of the prohibition against profiteering during a  
24 state of emergency or disaster, a court shall impose a civil  
25 penalty not to exceed one thousand dollars (\$1,000) per

underscoring material = new  
[bracketed material] = delete

1 violation with an aggregate total not to exceed twenty-five  
2 thousand dollars (\$25,000) for any twenty-four-hour period.

3 B. Upon a showing to a court by the office of the  
4 attorney general that a person has engaged in continuous and  
5 willful violations of the prohibition against profiteering  
6 during a state of emergency or disaster, the court may suspend  
7 or revoke any license or certificate authorizing that person to  
8 engage in business in this state or the court may enjoin any  
9 person from engaging in business in this state."

10 Section 6. [NEW MATERIAL] ANTIPROFITEERING FUND  
11 CREATED.--

12 A. The "antiprofitteering fund" is created in the  
13 state treasury and consists of appropriations, gifts, grants or  
14 donations. All income received from investments of the fund  
15 shall be credited to the fund.

16 B. Money in the fund shall be administered by the  
17 office of the attorney general and is appropriated to the  
18 office of the attorney general for the investigation and  
19 prosecution of alleged violations of Section 2 of this 2006  
20 act, including expenses of other state agencies involved in  
21 such investigations. Disbursements from the fund shall be made  
22 on warrants of the secretary of finance and administration  
23 pursuant to vouchers signed by the attorney general or an  
24 authorized representative of the attorney general. Money in  
25 the fund shall not revert at the end of a fiscal year.

.160089.4GR

1           Section 7. APPROPRIATION.--One million dollars  
2           (\$1,000,000) is appropriated from the general fund to the  
3           antiprofitteering fund for expenditure in fiscal year 2006 and  
4           subsequent fiscal years to carry out the purposes of the fund.  
5           Any unexpended or unencumbered balance remaining at the end of  
6           a fiscal year shall not revert to the general fund.

7           Section 8. SEVERABILITY.--If any part or application of  
8           this act is held invalid, the remainder or its application to  
9           other situations or persons shall not be affected.

10          Section 9. EMERGENCY.--It is necessary for the public  
11          peace, health and safety that this act take effect immediately.