

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR  
HOUSE BILL 392

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

AN ACT

RELATING TO BUSINESS; PROHIBITING PROFITEERING DURING AN  
EMERGENCY OR DISASTER; PROVIDING PENALTIES; AMENDING AND  
ENACTING SECTIONS OF THE UNFAIR PRACTICES ACT; 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,

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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

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

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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

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."

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

19 "[NEW MATERIAL] PROFITEERING DURING A STATE OF EMERGENCY  
20 OR DISASTER.--

21 A. As used in this section:

22 (1) "abnormal market disruption" means any  
23 change in the market proximately caused by an emergency or  
24 disaster where market forces are or appear likely to be  
25 insufficient to ensure reasonably stable prices of necessary

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1 property or services;

2 (2) "disaster" means a natural or man-made  
3 event, including, but not limited to, a tornado or other severe  
4 storm, earthquake, flood, fire, riot, act of war, terrorism or  
5 civil disorder. The court shall find that an event constitutes  
6 a disaster if the event results in the declaration of a state  
7 of emergency or disaster by the president of the United States  
8 or the governor;

9 (3) "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 (4) "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. In  
22 determining whether the price increase described in this  
23 subsection is unjustified, the court shall consider all  
24 relevant circumstances, including the following:

25 (a) whether the price charged by the

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

7 (b) whether the price charged by the  
8 alleged profiteer during the time of a state of emergency or  
9 disaster grossly exceeded the average price at which the same  
10 or similar property or services were readily obtainable by  
11 other consumers in the trade area at the same location during  
12 the twenty days prior to the state of emergency or disaster;

13 (c) whether the price sought by the  
14 alleged profiteer would have resulted in a profit margin  
15 greater than the alleged profiteer's usual and customary profit  
16 margin;

17 (d) whether the price sought by the  
18 alleged profiteer was a result of historical seasonal price  
19 changes; and

20 (e) whether the increase in the price  
21 charged by the alleged profiteer during the time of a state of  
22 emergency or disaster was directly attributable to additional  
23 costs incurred by the alleged profiteer; proof the alleged  
24 profiteer incurred such additional costs shall constitute a  
25 justifiable price increase that shall not be deemed

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1 unconscionable; and

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

14 B. It is an unconscionable trade practice pursuant  
15 to the Unfair Practices Act for any person to profiteer during  
16 a state of emergency or disaster as declared by the president  
17 of the United States or the governor; provided that the  
18 governor or, upon a petition by the attorney general, the  
19 district court in a county affected by an emergency or disaster  
20 issues an order declaring that the emergency or disaster has  
21 caused or appears likely to cause an abnormal market disruption  
22 within the state. In an order declaring an abnormal market  
23 condition, the governor or court shall specify:

24 (1) the cause of the abnormal market  
25 disruption;

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

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

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

8 "[NEW MATERIAL] NOTICE PROVISIONS.--

9 A. Upon the governor's issuance of an executive  
10 order regarding an abnormal market disruption pursuant to  
11 Paragraph (5) of Subsection A of Section 2 of this 2006 act,  
12 the office of the governor shall immediately notify the public  
13 and those registered with that office for the purpose of  
14 receiving notice of the issuance of such an executive order.  
15 That office shall notify the public by any means available,  
16 including the office's web site, news media and electronic  
17 mail. Any person may register with that office for the purpose  
18 of receiving such notification.

19 B. Upon the issuance by a district court of an  
20 order pursuant to Paragraph (5) of Subsection A of Section 2 of  
21 this 2006 act, the district court shall order the office of the  
22 attorney general to notify the public by any means available,  
23 including the office of the attorney general's web site, the  
24 news media and electronic mail."

25 Section 4. A new section of the Unfair Practices Act is

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1 enacted to read:

2 "[NEW MATERIAL] EXEMPTIONS.--

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

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

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

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

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

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

24 A. In an action brought by the office of the  
25 attorney general, upon an entry of judgment or decree for a

1 willful violation of the prohibition against profiteering  
2 during a state of emergency or disaster, a court may impose a  
3 civil penalty not to exceed one thousand dollars (\$1,000) per  
4 violation with an aggregate total not to exceed twenty-five  
5 thousand dollars (\$25,000) for any twenty-four-hour period.

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

13 C. The remedies provided in this section are in  
14 addition to any available remedies otherwise provided by law."

15 Section 6. SEVERABILITY.--If any part or application of  
16 this act is held invalid, the remainder or its application to  
17 other situations or persons shall not be affected.

18 Section 7. EMERGENCY.--It is necessary for the public  
19 peace, health and safety that this act take effect immediately.

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