

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 9

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SPECIAL SESSION, 2005

AN ACT

RELATING TO BUSINESS; ENACTING THE EMERGENCY ANTI-PRICE-GOUGING ACT; PROVIDING PENALTIES; MAKING AN APPROPRIATION; DECLARING AN EMERGENCY.

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

Section 1. SHORT TITLE.--This act may be cited as the "Emergency Anti-Price-Gouging Act".

Section 2. LEGISLATIVE INTENT.--It is the intent of the legislature in enacting the Emergency Anti-Price-Gouging Act to protect consumers from excessive and unjustified increases in the prices charged, during or immediately after a declared state of emergency or disaster, for goods or services that are vital and necessary for the health, safety and welfare of consumers.

Section 3. DEFINITIONS.--As used in the Emergency Anti-
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underscored material = new
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1 Price-Gouging Act:

2 A. "abnormal market disruption" means any change in
3 the market proximately caused by an emergency or disaster where
4 market forces are or appear likely to be insufficient to ensure
5 reasonably stable prices of goods or services;

6 B. "essential goods or services" means any goods or
7 services necessary to preserve, protect or sustain the life,
8 health or safety of persons or their property; and

9 C. "person" means an individual, corporation,
10 business trust, estate, trust, partnership, limited liability
11 company, association, joint venture or any legal or commercial
12 entity, including any individual or entity within the chain of
13 distribution of goods or services such as a manufacturer,
14 supplier, wholesaler, distributor or retail seller, but not
15 including the state or its political subdivisions.

16 Section 4. PROHIBITED PRACTICES. --

17 A. Upon any federal or state declaration of
18 emergency or disaster and a determination by the governor in
19 executive order that the emergency or disaster has caused or
20 appears likely to cause an abnormal market disruption within
21 the state, it is a violation of the Emergency Anti-Price-
22 Gouging Act for any person to sell, rent or lease, or to offer
23 to sell, rent or lease, essential goods or services for an
24 unconscionable price.

25 B. In an executive order determining an abnormal

1 market disruption issued pursuant to Subsection A of this
2 section, the governor shall specify:

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

5 (2) the geographic regions within which the
6 restrictions imposed by this section apply; and

7 (3) with particularity, those categories of
8 essential goods and services to which the restrictions imposed
9 by this section apply.

10 C. The period of time during which the restrictions
11 imposed by Subsection A of this section are in effect is from
12 the issuance by the governor of an executive order that an
13 abnormal market disruption exists within the state until the
14 date that the governor determines by executive order that the
15 abnormal market disruption has ceased, but such time period
16 shall not exceed thirty days. The governor may extend that
17 period of time through the issuance of not more than one
18 additional executive order extending that time period for not
19 more than thirty additional days for each declared federal or
20 state emergency or disaster.

21 D. Notwithstanding the provisions of Subsection C
22 of this section, the period of time during which the
23 restrictions imposed by Subsection A of this section are in
24 effect may be extended or terminated by a joint resolution of
25 the legislature.

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1 Section 5. EXEMPTIONS. --

2 A. A person subject to the restrictions imposed by
3 Subsection A of Section 4 of the Emergency Anti-Price-Gouging
4 Act may file a petition for an exemption to those restrictions
5 in the first judicial district court or in any district court
6 in a county included within the geographic scope of an
7 executive order issued pursuant to Subsection A of Section 4 of
8 that act. Notice of a petition for an exemption shall be
9 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 Subsection A of Section 4 of the Emergency
15 Anti-Price-Gouging Act could result in a catastrophic loss of
16 life or property; or

17 (2) the petitioner shows that due to certain
18 circumstances the petitioner is unable to comply with the
19 restrictions of Subsection A of Section 4 of the Emergency
20 Anti-Price-Gouging Act without suffering undue hardship beyond
21 the hardship suffered by persons generally subject to those
22 restrictions.

23 Section 6. UNCONSCIONABLE PRICE. --

24 A. In any proceeding brought pursuant to the
25 Emergency Anti-Price-Gouging Act, evidence that the amount

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1 charged by the alleged violator was more than fifteen percent
2 above the average price charged by the alleged violator at the
3 same location during the twenty days prior to the issuance of
4 an executive order pursuant to Subsection A of Section 4 of
5 that act shall constitute prima facie evidence that the price
6 was unconscionable and constituted a violation of Section 4 of
7 that act.

8 B. In determining whether a price is
9 unconscionable, the finder of fact shall take into
10 consideration the totality of the circumstances, including, but
11 not limited to, the following factors:

12 (1) whether and when the alleged violator had
13 actual or constructive notice of the issuance of an executive
14 order pursuant to Subsection A of Section 4 of the Emergency
15 Anti-Price-Gouging Act;

16 (2) the timing, frequency and extent of
17 increases in price by the alleged violator;

18 (3) whether there was an exercise of unfair
19 economic or other advantage by the alleged violator;

20 (4) a comparison between the price sought for
21 the essential goods or services by the alleged violator and the
22 average price of those same or similar essential goods or
23 services in the same market area during the twenty days prior
24 to the issuance of an executive order pursuant to Subsection A
25 of Section 4 of the Emergency Anti-Price-Gouging Act;

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

4 (6) whether the price sought by the alleged
5 violator was a result of historical seasonal price changes; and

6 (7) whether an increase in local prices is
7 attributable to regional, national or international trends,
8 indices and postings.

9 C. An increase in the price sought for essential
10 goods or services shall not be deemed unconscionable to the
11 extent that:

12 (1) the increase is directly attributable to
13 actual costs imposed by a supplier of essential goods or
14 services or other costs of providing goods or services,
15 including additional costs for labor, transportation or
16 materials used to provide essential goods or services; or

17 (2) the increase in price was necessary to
18 prevent a catastrophic loss of life or property.

19 Section 7. PENALTIES, REMEDIES AND ENFORCEMENT. --

20 A. Each instance of selling, renting or leasing
21 essential goods or services at a price that violates the
22 restrictions set forth in Section 4 of the Emergency Anti-
23 Price-Gouging Act constitutes a separate violation of that act.

24 B. Upon a finding by a court that a person has
25 engaged in continuous and willful violations of the Emergency

1 Anti-Price-Gouging Act, the court may suspend or revoke any
 2 license or certificate authorizing that person to engage in
 3 business in the state or may enjoin that person from engaging
 4 in that business in the state.

5 C. Where a person is found to have charged an
 6 unconscionable price in violation of the Emergency Anti-Price-
 7 Gouging Act, the court may require that person to disgorge
 8 profits realized as a result of such violations.

9 Section 8. APPLICATION OF UNFAIR PRACTICES

10 ACT.--A violation of the Emergency Anti-Price-Gouging Act
 11 constitutes an unfair or deceptive trade practice and an
 12 unconscionable trade practice pursuant to the Unfair Practices
 13 Act and is subject to all of the provisions and remedies of
 14 that act.

15 Section 9. EMERGENCY CIVIL INVESTIGATIVE DEMANDS.--In
 16 addition to any other authority given to the attorney general
 17 to investigate alleged violations of the Emergency Anti-Price-
 18 Gouging Act, when the governor has issued an executive order
 19 pursuant to Subsection A of Section 4 of that act, the attorney
 20 general may serve a civil investigative demand pursuant to
 21 Section 57-12-12 NMSA 1978 and may require the person to whom
 22 the demand is directed to respond within three business days.

23 Section 10. NOTICE PROVISIONS.--Upon the governor's
 24 issuance of an executive order regarding an abnormal market
 25 disruption pursuant to Subsection A of Section 4 of the

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1 Emergency Anti-Price-Gouging Act, the office of the governor
2 shall immediately notify the public and those registered with
3 that office for the purpose of receiving notice of the issuance
4 of such an executive order. That office shall notify the
5 public by any means available, including the office's web site,
6 news media and electronic mail. Any person may register with
7 that office for the purpose of receiving such notification.

8 Section 11. ANTI-PRICE-GOUGING FUND CREATED--
9 APPROPRIATION.--

10 A. The "anti-price-gouging fund" is created in the
11 state treasury and shall be administered by the attorney
12 general. The fund shall consist of money transferred from the
13 general fund operating reserve pursuant to Section 12 of the
14 Emergency Anti-Price-Gouging Act and any other appropriations,
15 gifts, grants or donations.

16 B. Money in the fund is appropriated to the
17 attorney general for the investigation and prosecution of
18 alleged violations of the Emergency Anti-Price-Gouging Act,
19 including expenses of other state agencies involved in such
20 investigations. Money in the fund shall not revert at the end
21 of a fiscal year but shall remain to the credit of the fund
22 until such time as the attorney general determines that the
23 investigation and prosecution of alleged violations of the
24 Emergency Anti-Price-Gouging Act have been completed.

25 C. In the event there is a transfer of funds to the

1 anti-price-gouging fund pursuant to Section 12 of the Emergency
 2 Anti-Price-Gouging Act, on or before the first day of a regular
 3 legislative session that convenes at least one hundred twenty
 4 days after the issuance of an executive order pursuant to
 5 Subsection A of Section 4 of that act, the attorney general
 6 shall report to the legislature regarding the following:

7 (1) the amount of funds that have been
 8 expended from the anti-price-gouging fund through December 31
 9 of the calendar year prior to the legislative session and the
 10 purposes for which those funds have been expended;

11 (2) the amount of funds the attorney general
 12 anticipates spending from the anti-price-gouging fund during
 13 the calendar year in which the legislative session has convened
 14 and the purposes for which those funds may be expended; and

15 (3) whether the attorney general anticipates
 16 that the funds remaining in the anti-price-gouging fund will be
 17 sufficient to complete investigations and prosecutions
 18 regarding alleged violations of the Emergency Anti-Price-
 19 Gouging Act during an abnormal market disruption set forth in
 20 an executive order issued pursuant to Subsection A of Section 4
 21 of that act.

22 Section 12. EMERGENCY TRANSFER OF FUNDS.--In the event
 23 the governor issues an executive order pursuant to Subsection A
 24 of Section 4 of the Emergency Anti-Price-Gouging Act, the
 25 governor, with state board of finance approval, may immediately

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1 transfer from the general fund operating reserve to the anti-
2 price-gouging fund the amount necessary, in a total not to
3 exceed one million dollars (\$1,000,000) for a single abnormal
4 market disruption resulting from a single cause, for the
5 investigation and prosecution of alleged violations of that
6 act.

7 Section 13. SEVERABILITY.--If any part or application of
8 the Emergency Anti-Price-Gouging Act is held invalid, the
9 remainder or its application to other situations or persons
10 shall not be affected.

11 Section 14. EMERGENCY.--It is necessary for the public
12 peace, health and safety that this act take effect immediately.