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SENATE BILL 445

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

INTRODUCED BY

John T. L. Grubescic

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,

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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

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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

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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

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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

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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

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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 period of time when a declaration of a state of
11 emergency or disaster by the president of the United States or
12 the governor is in effect or thirty days after the occurrence
13 of the event that constitutes the emergency or disaster,
14 whichever is longer.

15 B. It is an unconscionable trade practice pursuant
16 to the Unfair Practices Act for any person to profiteer during
17 a state of emergency or disaster as declared by the president
18 of the United States or the governor.

19 Section 3. 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

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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 4. [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.

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