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# COMMERCE AND TRADE Selling and Other Trade Practices: Allow Price Controls During a State of Emergency; Provide for Exceptions; Permit County and Municipal Authorities to Require Registration of Certain Businesses During a State of Emergency

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## COMMERCE AND TRADE

### *Selling and Other Trade Practices: Allow Price Controls During a State of Emergency; Provide for Exceptions; Permit County and Municipal Authorities to Require Registration of Certain Businesses During a State of Emergency*

CODE SECTIONS: O.C.G.A. §§ 10-1-393.4 (new), -397 (amended), 38-3-56 (new)

BILL NUMBER: HB 283

ACT NUMBER: 504

GEORGIA LAWS: 1995 Ga. Laws 1362

SUMMARY: The Act prohibits the raising of prices on any goods or services necessary to preserve, protect, or sustain the life, health, or safety of persons or their property during a declared state of emergency. The Act allows certain exceptions for the increased cost of such goods or services to the seller. The Act also provides an exception for suppliers or installers of lumber, plywood, or lumber products. The Act allows the Administrator of the Governor's Office of Consumer Affairs to sanction violators, but does not create new sanctions beyond those already established by Georgia's Fair Business Practices Act. The Act provides for a program of compulsory registration of businesses operating in areas subject to a state of emergency.

EFFECTIVE DATE: July 1, 1995

#### *History*

In the spring of 1994, northern Georgia was ravaged by tornados, prompting a declaration of emergency by Governor Zell Miller.<sup>1</sup> In July 1994, severe flooding in Albany, Georgia and the surrounding region prompted Governor Miller to declare a state

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1. GOVERNOR'S OFFICE OF CONSUMER AFFAIRS, 1994 ANNUAL REPORT, at 7 (1995) [hereinafter ANNUAL REPORT].

of emergency for the area.<sup>2</sup> In October 1994, Savannah also experienced flooding severe enough to prompt a declaration of emergency.<sup>3</sup>

During the Albany-area flooding, the Governor's Office of Consumer Affairs (OCA),<sup>4</sup> charged with enforcement of Georgia's Fair Business Practices Act,<sup>5</sup> received fifty-seven complaints of price gouging.<sup>6</sup> In its annual report for 1994, the OCA suggested

2. *Id.* at 13. The flood was described as "the worst natural disaster in the history of the state"; it "affected one out of every three Georgians." *Lawmakers '95* (GPTV broadcast, Sept. 9, 1994) (remarks of Governor Zell Miller) (videotape available in Georgia State University College of Law Library).

3. ANNUAL REPORT, *supra* note 1, at 10; Interview with James S. Hurt, Executive Director of the Governor's Office of Consumer Affairs (Apr. 14, 1995) [hereinafter Hurt Interview].

4. During the flooding crisis, the OCA was part of a multi-agency fraud task force composed of members of the Georgia Bureau of Investigation, the Department of Natural Resources, the Georgia Residential Finance Authority, and others, under the direction of the Governor. ANNUAL REPORT, *supra* note 1, at 10. The task force "was formed to prevent financial abuse of the flood victims." ANNUAL REPORT, *supra* note 1, at 10. Its chief targets were "[p]rice gouging, rent gouging, and transient [or] suspicious repairment [sic]." ANNUAL REPORT, *supra* note 1, at 10. The task force was also concerned with shoddy home repairs by out-of-state, nonprofessional builders and carpenters without Georgia business licenses. Interview with Jack Littleton, Deputy Legislative Counsel (Apr. 5, 1995).

5. 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-395 (1994)).

6. Hurt Interview, *supra* note 3. Sixty-five percent (thirty-seven complaints) were housing related, including hotels/motels, rental property (raising rent), and mobile homes; sixteen percent (nine complaints) involved groceries; nine percent (five complaints) were miscellaneous; seven percent (four complaints) involved price gouging on construction repair; three percent (two complaints) involved appliances. Hurt Interview, *supra* note 3. According to Mr. Hurt, there may be more complaints over time as flood repairs often do not reveal their defects until at least six months after the fact. Hurt Interview, *supra* note 3. The number of complaints in Georgia during the Albany-area flooding was only one-tenth the expected number because the OCA benefitted from its sister organizations' experience in the Midwest flooding the previous year. ANNUAL REPORT, *supra* note 1, at 13, 14. The OCA was able to anticipate problems and mount an effective educational effort via televised consumer advice immediately after the flooding. ANNUAL REPORT, *supra* note 1, at 13-14. Mr. Hurt explained that price gouging is especially a problem with an immobilized population that has little or no opportunity to go elsewhere. Hurt Interview, *supra* note 3. The Georgia disaster situation did not involve such immobilization because streets were cleared relatively quickly. Hurt Interview, *supra* note 3. This

that “[s]ome definitive language in the Georgia Code regarding price-gouging in emergency situations would be very helpful.”<sup>7</sup> It also found that, with regard to an emergency licensure program, “[i]t would be good to have such a business licensing system already in place in the Georgia Code so that local governments in emergency areas could simply ‘opt-in’ during the emergency situation, rather than have to create solutions out of ‘whole cloth’ during a very stressful time.”<sup>8</sup>

In response to the 1994 disasters, the House formed an Emergency Management Study Committee, chaired by Representative Mike Snow, to investigate problems associated with natural disasters.<sup>9</sup> After holding public hearings at four locations around the state,<sup>10</sup> the Committee recommended “legislation preventing price gouging and fraud during and in the aftermath of a disaster.”<sup>11</sup>

HB 283 was introduced to prevent price gouging in goods and services related to consumers’ immediate needs during a declared state of emergency and a three-month recovery period thereafter.<sup>12</sup> While no other state has enacted a similar statute,

factor also lowered the number of complaints. Hurt Interview, *supra* note 3. Mr. Hurt noted that, with a mobile disaster population, “people tend to panic and buy as much as they can.” Hurt Interview, *supra* note 3.

7. ANNUAL REPORT, *supra* note 1, at 7.

8. ANNUAL REPORT, *supra* note 1, at 8.

9. Telephone Interview with Rep. Mike Snow, House District No. 2 (June 2, 1995) [hereinafter Snow Interview].

10. REPORT OF THE HOUSE EMERGENCY MANAGEMENT STUDY COMMITTEE, at 1 (1995) [hereinafter HOUSE REPORT]. Hearings in Savannah and Jekyll Island focused on hurricane disasters; a hearing in Americus focused on flooding; a Gainesville hearing focused on tornado disasters. HOUSE REPORT, *supra*, at 1. The OCA was asked to participate in the Gainesville hearing because it had provided staff for the Disaster Action Committees (DACs) set up by the Georgia Emergency Management Agency (GEMA) and its federal counterpart, the Federal Emergency Management Agency (FEMA), to educate consumers about possible consumer-related issues arising during the Albany flooding. Hurt Interview, *supra* note 3.

11. HOUSE REPORT, *supra* note 10, at 2.

12. Snow Interview, *supra* note 9; Telephone Interview with Rep. Dorothy B. Pelote, House District No. 149 (June 2, 1995) [hereinafter Pelote Interview]; Hurt Interview, *supra* note 3; Telephone interview with Barry Reid, Administrator of the Governor’s Office of Consumer Affairs (Mar. 30, 1995). A related bill, SB 116, was introduced independently and was also supported by the OCA. Hurt Interview, *supra* note 3. SB 116 created Code section 10-1-438, which imposes severe civil penalties for “disaster related

Governors in both South Carolina and Florida have attempted to impose liability upon "gougers" by executive order.<sup>13</sup>

### *HB 283*

Consumer protection statutes allow officials to sue only on behalf of complaining consumers and only for recovery of actual damages.<sup>14</sup> Additionally, such statutes are designed to prohibit deceptive and unconscionable acts and practices and are concerned with practices used by suppliers, not completed transactions.<sup>15</sup> In contrast, the Act imposes liability for completed transactions.<sup>16</sup> In addition, sellers may be liable to the state regardless of whether a buyer complains or brings an action.<sup>17</sup>

Prior to the Act, consumers had no remedy at law against a seller, barring any fraud or misrepresentation, for an arm's length transaction concerning price.<sup>18</sup> Under the Act, retail sellers of goods or services are liable for raising prices after a state of emergency has been declared.<sup>19</sup>

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violations." 1995 Ga. Laws 697 (codified at O.C.G.A. § 10-1-438 (Supp. 1995)). Precedent for this new Code section may be found, according to the OCA, in statutes authorizing heightened penalties for targeting elderly and handicapped persons. Hurt Interview, *supra* note 3. The Georgia Fair Business Practices Act already authorizes civil penalties whenever unfair and deceptive practices are found in violation of its terms. 1975 Ga. Laws 376 (codified at O.C.G.A. § 10-1-405 (1994)); 1993 Ga. Laws 1092 (codified at O.C.G.A. § 10-1-851 (1994)).

13. Hurt Interview, *supra* note 3. However, the Attorney General of Florida was unsuccessful in enforcing the order. Hurt Interview, *supra* note 3.

14. UNIFORM CONSUMER PROTECTION SALES PRACTICES ACT § 9(a)(3) (Am. Law Inst. 1970) [hereinafter CONSUMER PRACTICES ACT].

15. *See, e.g.,* Brown v. Market Dev., Inc., 322 N.E.2d 367 (Ohio 1974). Section 4 of the Uniform Consumer Protection Sales Practices Act contains a list of six factors for consideration by courts in determining the presence of unconscionable transactions. CONSUMER PRACTICES ACT, *supra* note 14, § 4.

16. *See* O.C.G.A. § 10-1-393.4 (Supp. 1995).

17. *Id.* § 10-1-397(a).

18. *See, e.g.,* American Food Servs., Inc. v. Goldsmith, 175 S.E.2d 57, 59 (Ga. Ct. App. 1970) (denying relief to purchaser in arm's length transaction because of insufficient evidence of fraud or misrepresentation).

19. O.C.G.A. § 10-1-393.4 (Supp. 1995).

*Price Controls*

The Act adds Code section 10-1-393.4, which provides that it shall be an unfair and deceptive business practice

to sell or offer for sale at retail any goods or services necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency.<sup>20</sup>

The original draft<sup>21</sup> did not include services, but imposed civil

20. *Id.* § 10-1-393.4(a). HB 288, a related bill that would have allowed state agencies to purchase “any needed supplies, materials, or equipment” during declared states of emergency, included “services” in the original draft. HB 288, as introduced, 1995 Ga. Gen. Assem. The House Committee on State Institutions and Property, however, rejected the inclusion of services in the House version of the bill. *Compare* HB 288, as introduced, 1995 Ga. Gen. Assem. *with* HB 288 (HCS), 1995 Ga. Gen. Assem. The bill failed to pass during the 1995 session. Final Composite Status Sheet, Mar. 17, 1995.

21. Although HB 283 was sponsored by Reps. Mike Snow, House District No. 2, Frank I. Bailey, Jr., House District No. 93, Tim Perry, House District No. 11, and Hanson Carter, House District No. 166, the bill’s language was taken from HB 173, authored by Rep. Dorothy B. Pelote, House District No. 149 and introduced during the 1993 legislative session. Pelote Interview, *supra* note 12; Hurt Interview, *supra* note 3. HB 283 was taken verbatim from the House committee substitute version of HB 173. *Compare* HB 283, as introduced, 1995 Ga. Gen. Assem. *with* HB 173 (HCS), 1995 Ga. Gen. Assem. Rep. Pelote became concerned about price gouging in disasters after reading a *Newsweek* article on Hurricane Andrew. Pelote Interview, *supra* note 12; Hurt Interview, *supra* note 3. After conferring with its sister agencies in other states, the Georgia OCA has determined that such problems are common after disasters. Hurt Interview, *supra* note 3. The OCA was especially aware of price gouging after Hurricane Hugo. Hurt Interview, *supra* note 3. In particular, complaints of \$500 chainsaws, \$1500 gas generators, and \$20 gallons of water were recorded. Hurt Interview, *supra* note 3. The problem in these situations, according to Rep. Hurt, is that “there is no opportunity to comparison shop. Customers are ignorant of the regular prices, they are in a state of shock—traumatized by the disaster. [By these sales,] the victims are further victimized. The laws of supply and demand should be suspended in unnatural situations.” Hurt Interview, *supra* note 3. The 1993 bill passed the House, but failed in the Senate Special Judiciary Committee. Hurt Interview, *supra* note 3; Telephone Interview with Erv Goodroe, Executive Vice President and Chief Operating Officer of the Construction Suppliers Association (CSA) (Apr. 27,

penalties only for price gouging in the sale of goods.<sup>22</sup> In the House Industry Committee, HB 283 was amended to add “services” and to make a special provision for lumber and lumber products.<sup>23</sup>

The Act allows sellers to raise prices to reflect increases in the cost of acquiring or transporting goods or services into the disaster area.<sup>24</sup> The Act further provides that retail sellers or installers of “lumber, plywood, and other lumber products” may increase prices to reflect the cost of maintaining inventories at market prices, provided the markup percentage is no greater than that prior to the state of emergency.<sup>25</sup> The provision in subsection (b) for maintenance of previous markup percentages on lumber products is more generous than the absolute profit cap imposed by subsection (a) upon suppliers of all other goods and services.<sup>26</sup>

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1995) [hereinafter Goodroe Interview]. The bill was not reintroduced in the 1994 legislative session. Pelote Interview, *supra* note 12; Snow Interview, *supra* note 9. The success of the bill in 1995 was largely due to the efforts of Rep. Snow, the OCA, and the GEMA. Goodroe Interview, *supra*.

22. HB 283, as introduced, 1995 Ga. Gen. Assem.; Pelote Interview, *supra* note 12.

23. HB 283 (HCS), 1995 Ga. Gen. Assem. Representatives of the CSA testified before the House Industry Committee that lumber has one of the most volatile market prices of all products, certainly the most volatile of housing construction products. Goodroe Interview, *supra* note 21. For suppliers of lumber and wood products to meet demand, they must be able to raise enough revenue from the sale of current inventories to fund the purchase of replacement inventories. Goodroe Interview, *supra* note 21. Thus, the “market price” is the regional market price, not the street price of such goods in the immediate disaster area. Goodroe Interview, *supra* note 21.

24. O.C.G.A. § 10-1-393.4(a) (Supp. 1995).

25. *Id.* § 10-1-393.4(b). The CSA proposed a similar amendment to the 1993 bill to the Senate Special Judiciary Committee. Goodroe Interview, *supra* note 21.

26. O.C.G.A. § 10-1-393.4(b) (Supp. 1995). According to Mr. Goodroe, author of the amendment, the markup percentage was used because it is easier to calculate than gross profit. Goodroe Interview, *supra* note 21. The language was not intended or seen as a concession. Goodroe Interview, *supra* note 21.

### *Penalties*

Section 2 of the Act, added by the House Industry Committee, makes any violation of the Act a violation of the Georgia Fair Business Practices Act (FBPA),<sup>27</sup> thus giving jurisdiction to the OCA.<sup>28</sup> The Act authorizes the OCA to enforce the provisions of Code section 10-1-393.4 under the authority of the FBPA.<sup>29</sup> Thus, penalties for violating the Act are the same as those provided in the FBPA.<sup>30</sup>

### *Registration Program*

Finally, the Act allows counties and municipalities to adopt “a program of emergency registration of all or certain designated classes of businesses . . . during a state of emergency declared by the Governor.”<sup>31</sup> The registration may continue for the duration of the state of emergency and for a three-month recovery period thereafter.<sup>32</sup> Businesses failing to register may not lawfully do business in the county or municipality adopting the provision.<sup>33</sup> This provision originated as a recommendation from the Association of County Commissioners of Georgia (ACCG) to the

27. O.C.G.A. § 10-1-397 (Supp. 1995); *Compare* HB 283 (HCS), 1995 Ga. Gen. Assem. *with* HB 283, as introduced.

28. Hurt Interview, *supra* note 3. A proposal by the Association of County Commissioners of Georgia (ACCG) would have given authority to county and municipal governments to prosecute violations of the Act. Goodroe Interview, *supra* note 21. This proposal was rejected after being opposed by the CSA and Rep. Snow, the bill’s sponsor. Goodroe Interview, *supra* note 21. However, the Act provides that only the state, through the OCA, has authority to prosecute violations. O.C.G.A. § 10-1-397(a) (Supp. 1995).

29. O.C.G.A. § 10-1-397(a) (Supp. 1995).

30. *Id.* § 10-1-397(a)(1)(B). A fine of \$2000 per violation may be imposed, subject to notice and opportunity for hearing, for willful violation of the Act. *Id.* Upon certification of cause by a superior court, a \$5000 fine per violation may be imposed. *Id.* § 10-1-397(a)(2)(B). A related act, however, provides for imposition of civil penalties up to \$10,000 “for each transaction” involving “disaster related violations” involving “[t]he sale or offer for sale of supplies for use in the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster; or . . . [t]he performance of or offer to perform services for the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster.” 1995 Ga. Laws 344 (codified at O.C.G.A. § 10-1-438 (Supp. 1995)).

31. O.C.G.A. § 38-3-56 (1995).

32. *Id.*

33. *Id.*



House Industry Committee.<sup>34</sup> During the Albany-area flooding, the OCA contacted the ACCG to draft model ordinances concerning business licenses for local governments.<sup>35</sup> These ordinances were so effective that the Committee amended the bill to allow local governments to establish this system “in concrete form.”<sup>36</sup> Under the Act, any county or municipal government is authorized to order registration of businesses without having to await special orders of the Governor.<sup>37</sup>

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34. Hurt Interview, *supra* note 3.

35. Hurt Interview, *supra* note 3. Under the ordinances, those with an existing license had to obtain blue cards to display on their vehicle dashboards. Hurt Interview, *supra* note 3. The local police and the Georgia Bureau of Investigation were empowered to arrest anyone operating without a blue card. ANNUAL REPORT, *supra* note 1, at 8. New applicants for Georgia business licenses were subjected to a much more involved application process than applicants before the disaster, including fingerprinting, a national criminal records check, and a check with the OCA for any previous complaints. ANNUAL REPORT, *supra* note 1, at 8; Hurt Interview, *supra* note 3. All these measures were taken to deter would-be gougers. Hurt Interview, *supra* note 3.

36. Hurt Interview, *supra* note 3.

37. O.C.G.A. § 38-3-56 (1995).