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## Price Gouging: Application of Florida's Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew

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## **Abstract**

On August 23, 1992, in the wake of Hurricane Andrew, Florida's Governor, Lawton Chiles, issued Executive order 92-222-E making the imposition or demand of an exorbitant or excessive price by any vendor of fuels, foods, medicine or other necessities a violation of Florida's Deceptive and Unfair Trade Practices Act (the Act).

**KEYWORDS:** hurricane, complaint, subpoenas

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## I. INTRODUCTION

On August 23, 1992, in the wake of Hurricane Andrew, Florida's Governor, Lawton Chiles, issued Executive Order 92-222-E<sup>1</sup> making the imposition or demand of an exorbitant or excessive price<sup>2</sup> by any vendor of fuels, foods, medicines or other necessities a violation<sup>3</sup> of Florida's Deceptive and Unfair Trade Practices Act (the Act).<sup>4</sup> Similarly, both Dade and Broward County Commissioners have passed county ordinances making price gouging an unlawful and unfair business practice in these counties.<sup>5</sup>

By virtue of Executive Order 92-222-E, the Florida Attorney General, Department of Legal Affairs, Office of Consumer Protection (the Attorney General), has been given primary responsibility to investigate and enforce the Act.<sup>6</sup> Specifically, the Attorney General has been given the responsibility of investigating complaints by consumers of price gouging.<sup>7</sup>

Generally, if the Attorney General has a "reason to believe" that a violation of the Act has occurred, a subpoena will be issued requiring the alleged price gouger to produce all information and documents regarding his

1. Fla. Exec. Order No. 92-222-E (Aug. 23, 1992).

2. This demand is commonly called "price gouging."

3. FLA. STAT. § 501.204 (1991).

4. FLA. STAT. §§ 501.201-.213 (1991 & Supp. 1992).

5. Dade County, Fla., Ordinance 92-89, § 2 (Aug. 27, 1992); Broward County, Fla., Ordinance 92-26, § 2 (Aug. 31, 1992). The Dade County ordinance remained in effect until September 26, 1992, after which time it was deemed repealed. The Broward County ordinance remained in effect until October 1, 1992, after which time it was deemed repealed.

6. Fla. Exec. Order No. 92-222-E (Aug. 23, 1992).

7. FLA. STAT. § 501.206(1) (1991).

pricing practices.<sup>8</sup> The Attorney General is also empowered by the Act to refer any matter to the State Attorney's office for concurrent civil enforcement.<sup>9</sup>

After investigation, if the Attorney General finds sufficient evidence that a violation of the Act has occurred, it may bring an action to obtain a declaratory judgment that a violation of the Act has occurred, an injunction action against the alleged wrongdoer to enjoin him from continued violations of the Act, or an action on behalf of one or more consumers for actual damages caused by the particular defendant's violation of the Act.<sup>10</sup>

In addition, persons found to have engaged in price gouging may be fined up to \$10,000 for each violation.<sup>11</sup> Civil penalties are paid to the State of Florida and are not paid to the consumer(s) who has been gouged.<sup>12</sup> A prevailing party is also entitled to recover its reasonable attorneys fees and costs.<sup>13</sup>

Under the Act, the above remedies are also available to private litigants who may bring individual actions for consumer losses suffered as a result of a violation of the Act, plus reasonable attorneys fees and costs.<sup>14</sup> However, in private actions, the court may, after an evidentiary hearing, require the party bringing in the action to post the bond in an amount sufficient to cover the defendant's damages (including reasonable attorneys fees and costs) in the event that the court finds the suit to be frivolous.<sup>15</sup>

Damages recoverable by consumers are generally equal to the difference between the inflated price paid for the goods or services as a result of Hurricane Andrew minus the market value of the goods or services when provided or delivered prior to Hurricane Andrew. Although the Governor's Executive Order does not define the meaning of the term "exorbitant or excessive price," it is defined in the Dade and Broward County ordinances as "any cost greater than the price for similar goods, services or materials that was imposed or demanded prior to August 24, 1992."<sup>16</sup>

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8. *Id.*

9. FLA. STAT. § 501.2075 (Supp. 1992).

10. *Id.* § 501.207.

11. *Id.* § 501.2075.

12. *Id.*

13. FLA. STAT. § 501.2105(1) (1991).

14. *Id.* § 501.211.

15. *Id.* § 501.211(3).

16. On August 27, 1992, the Dade County Board of County Commissioners passed a local ordinance which made it an unlawful business activity for any seller of products and services to impose or demand an excessive or exorbitant price for such goods, services or materials. This included, but was not limited to, fuels, food, medicines, water or other

Thus, under the Act, alleged price gougers must show that increased prices reflected increased costs, or they would likely have been in violation of the Act.

## II. THE ROLE OF THE MEDIA AND STATE ENFORCEMENT ACTIVITIES

Accusations of price gouging naturally attract a great deal of public attention, as well as media coverage. In the days following Hurricane Andrew, articles appeared in newspapers across the country outlining two basic positions as to the issue of price gouging.<sup>17</sup> Some commentators have taken the view that alleged "profiteering" and "price gouging" is nothing more than a free market economy working to distribute goods in an efficient manner.<sup>18</sup> Generally, they argue that prices rise for the simple reason that demand has increased. Consumers crowd into stores in an attempt to purchase supplies that are woefully insufficient to meet their needs. In response to the competition among consumers, businessmen raise their prices. Literally, these businessmen are "profiteering," that is, they are seeking to make a profit. But in following their own narrow interest, so the argument goes, they are actually providing an indispensable public service and promoting the public good.

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necessities. Dade County, Fla., Ordinance 92-89, § 2 (Aug. 27, 1992). The Dade County ordinance was effective until September 26, 1992. Persons found guilty under the Dade County ordinance could have been fined up to \$500 for each violation of the ordinance.

On August 31, 1992, the Broward County Board of County Commissioners passed a similar ordinance. The Broward ordinance was effective until October 1, 1992. Persons found guilty under the Broward County ordinance could have been fined up to \$500 for each violation of the ordinance. Broward County, Fla., Ordinance 92-26, § 5 (Aug. 31, 1992).

Under both the Dade and Broward County ordinances, the provider of goods or services may have lawfully passed along actual increased costs of providing the goods or services, as well as a reasonable profit. However, the seller must have been able to show that the price increase was a reasonable reflection of the provider's increased cost. Dade County, Fla., Ordinance 92-89, § 2 (Aug. 27, 1992); Broward County, Fla., Ordinance 92-26, § 2 (Aug. 31, 1992).

17. See, e.g., Matthew C. Hoffman, *Post-Storm 'Profiteering' for the Public Good*, MIAMI HERALD, Sept. 1, 1992, at 39A; Thomas Sowell, *Natural and Man-made Disasters in the Wake of a Hurricane, Charging \$5 for a Bag of Ice is an Efficient Way to Ration Scarce Resources*, CHARLOTTE OBSERVER, Sept. 4, 1992, at 13A; Jerry Shinn, *Call it Profiteering Not the Free Market, Price Gouging Distributes Vital Resources on the Basis of Who has the Most Money, Not Who has the Most Need*, CHARLOTTE OBSERVER, Sept. 7, 1992, at 13A.

18. Hoffman, *supra* note 17, at 39A; Sowell, *supra* note 17, at 13A.

In the short run, price increases will equilibrate consumer markets lowering demand to meet supply. If prices remained at pre-storm levels, it is argued that the first consumers to arrive would purchase all of the existing supplies, leaving none for others. However, when prices are allowed to increase in response to higher demand, consumers engage in a voluntary rationing process, each responding to higher prices by reducing his purchases. Thus, this allows scarce goods to be distributed among many people, instead of hoarded by a few.<sup>19</sup>

On the other hand, other commentators argue that price gouging merely rations scarce resources on the basis of who has the most money, without regard to who has the most need.<sup>20</sup> They argue that when someone exploits a disaster to quadruple the price of a basic necessity, thereby taking advantage of desperate people who must pay the inflated price, it is nothing more than blatant, unconscionable greed and profiteering, and not the "benign working of the invisible hand of the free market."<sup>21</sup>

Regardless of which viewpoint one finds more persuasive, the Florida Legislature has enacted laws evincing a policy that is decidedly in favor of consumers as opposed to theories espoused by free market economists. In the chaos and hysteria immediately following Hurricane Andrew, Florida's Attorney General, Bob Butterworth, made the following statements to the press:

I don't see any difference between the looters, who go through the rubble in the trailer parks, and the business people who cash in on this disaster by gouging customers. I can't give you a good definition of the difference between a looter and a price gouger, except that the price gouger may wear a suit and a tie. The price gouger looks you right in the face and takes your money.<sup>22</sup>

While such hyperbole may be appropriate in contexts outside of the legal arena, Mr. Butterworth's statements appear to be unduly inflammatory and could potentially prejudice an alleged price gouger's right to a fair and impartial trial.<sup>23</sup>

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19. Hoffman, *supra* note 17, at 39A; Sowell, *supra* note 17, at 13A.

20. Shinn, *supra* note 17, at 13A.

21. *Id.*

22. Hoffman, *supra* note 17, at 39A; Beatrice E. Garcia, *Prices for Building Supplies Soaring*, MIAMI HERALD, Aug. 28, 1992, at 6A.

23. It should be remembered that in any action brought by the State against an alleged price gouger, the Attorney General is both a party and an attorney to the proceeding. Although Mr. Butterworth's remarks were not directed towards any particular party, such

### III. PRICE GOUGING ENFORCEMENT: PRACTICES AND PROCEDURES OF THE ATTORNEY GENERAL

To assist practitioners who may defend price gouging actions brought by the State, the following information is provided to acquaint the reader with certain practices and procedures of the Attorney General's Office regarding enforcement of Governor Chiles' August 24, 1992 Executive Order.<sup>24</sup>

#### A. Consumer Complaints

The first step in the enforcement process is that a consumer must file a complaint with the Attorney General. Complaints are generally received by telephone and recorded on a form called "Complaints On Pricing Of Items." Initial complaints following Hurricane Andrew involved ice, water, batteries and generators. Later complaints involved repairs, windows, roofs and tree trimmers. The last type of consumer complaints to be received by the Attorney General involved rent-hike disputes between landlords and tenants.

After receipt by the Attorney General's Office, complaints are then generally followed up by either a phone call or a visit from an investigator from the Attorney General's Office. However, not all complaints are investigated by the Attorney General's Office. For example, complaints concerning companies in regulated industries are generally referred to the corresponding regulatory agency. Thus, complaints regarding contractors are referred to the Department of Professional Regulation; complaints regarding

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extreme remarks should be carefully avoided by state prosecutors to avoid even the appearance of impropriety and to ensure responsible enforcement. Thus, in the face of future public outcries, the Attorney General should well heed the words of our supreme court:

[The] [I]mitations placed upon lawyers, litigants and officials directly affected by court proceedings may be made at the court's discretion for good cause to assure fair trials. Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court's inherent power to control professional conduct. The constant spotlight of public attention focused upon public officials during litigation makes it imperative that they be more subject to judicial restrictions against inflammatory and prejudicial statements than other persons . . . .

*Shevin v. Thuotte*, 339 So. 2d 253, 254 (Fla. 2d Dist. Ct. App. 1976) (quoting Florida *ex rel. Miami Herald Publishing Co. v. MacIntosh*, 340 So. 2d 904, 910 (Fla. 1976)).

24. Interview with Mona Fandel, Esq., Florida Deputy Attorney General, Department of Legal Affairs, Office of Consumer Protection, in Hollywood, Florida (Oct. 8, 1992) (interview conducted by Eric D. Rosenberg of the *Nova Law Review* staff).



hotels are referred to the Department of Business Regulation; and complaints regarding insurance companies are referred to either the Department of Insurance or the Department of Banking and Finance. It should also be noted that the Attorney General's Office handles only civil matters. Any criminal actions, pursuant to section 501.2045,<sup>25</sup> are handled exclusively by the State Attorney's Office.

### B. Investigation

Generally, consumer complaints are followed up by the Attorney General's Office in one of two ways: 1) the majority of complaints are followed up by an investigator from the Attorney General's Office who telephones the alleged price gouger to investigate the allegations contained in the complaint; and 2) where there are more substantial allegations of price gouging, an investigator from the Attorney General's Office is sent into the field to make an on-site investigation.

In either case, information is gathered by the Attorney General's Office in order to make a determination as to whether there is "reason to believe" that the alleged violator has engaged in price gouging. Lawyers in the Attorney General's Office review the information obtained by their investigators, and make a determination whether there is sufficient evidence of price gouging to issue a subpoena to the alleged violator. According to the Attorney General's Office, there is no standard under which a determination of price gouging is made.<sup>26</sup> Florida Statute section 501.206 provides a "reason to believe" standard, and determinations are made on a case-by-case basis. The initial standard used by the Attorney General's Office to determine whether there was sufficient evidence to reasonably believe that a violation of the Act had occurred was simply to compare the price paid for goods or services provided or delivered after Hurricane Andrew, to the price paid for goods or services provided or delivered prior to Hurricane Andrew. Beyond this benchmark, there are no written guidelines, no percentages, and no basis upon which such a determination is made. The decision to issue a subpoena, therefore, is essentially subjective (hence, arbitrary) and left to the discretion of the reviewing attorney.<sup>27</sup>

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25. FLA. STAT. § 501.2045 (1991) (concerns the sale of "used" goods as "new" goods).

26. *Id.* § 501.206(1). During Mr. Rosenberg's interview of Mona Fandel, Esq., Ms. Fandel was either unable or unwilling to provide any verbal indication as to what basis the Attorney General's Office was using, if any, to make such determinations. Fandel, *supra* note 24.

27. During Mr. Rosenberg's interview of Mona Fandel, Esq., Ms. Fandel also stated that such a discussion would touch upon legal theories and arguments to be used by the Attorney

Consumers are then requested to sign affidavits concerning their complaints originally filed with the Attorney General's Office. Specifically, the Attorney General's Office sends a form to the consumer which they are to complete, have notarized and return to the Attorney General's Office, along with all copies of any bills, receipts or other relevant documents.

At the investigation stage, most of the cases are either settled, referred elsewhere, or a determination is made that no action is required. As indicated earlier, many of the complaints are directed to other state agencies. Some cases, particularly landlord-tenant cases, are not viewed by the Attorney General's Office as instances of price gouging, but are otherwise seen as valid disputes. In these cases, the consumer is advised by the Attorney General's Office to contact an attorney for representation.<sup>28</sup>

As might be expected, many of the cases are settled at the investigation stage. The alleged price gouger may be required to refund the purchase price to the complaining consumer. The alleged price gouger may also be given the opportunity to volunteer, or be required, as part of a settlement, to make a donation to a hurricane relief organization.<sup>29</sup>

In many of the cases, the investigator determined that no action by the Attorney General's Office was required. In some cases, the investigator found that the alleged violator had not engaged in price gouging. In others, the alleged violator had a sufficient reason for charging higher prices. In a few cases, the consumer was unable to document the allegations made while in others, there was insufficient information supplied by the consumer.<sup>30</sup>

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General's Office in pursuing their cases. Therefore, she was unable to pursue this specific subject further. Ms. Fandel did relate, however, that the Attorney General's Office has gathered information and established price lists which their attorneys and investigators may use to establish "acceptable" prices. *Id.*

28. During Mr. Rosenberg's interview with Mona Fandel, Esq., several of the complaint forms showed that the consumer had been advised by the Attorney General's Office to contact Legal Services of Greater Miami, Inc. or some other legal aid organization. *Id.*

29. Obviously, it is financially preferable to the alleged price gouger to settle such cases. In most, if not all, instances, the potential fines far exceed any payments made by the alleged price gouger pursuant to a settlement or donation to a hurricane relief organization. In fact, in many of the cases, the alleged price gouger has written a letter of explanation, some of which have included some or all the following: apologizing for any overcharging; explaining that it was an isolated incident; and suggesting that any overcharging was done by an employee without the knowledge or authorization of the owner or the management.

30. *Id.*

### C. Issuance of Subpoenas

Upon a determination that there is "reason to believe" that one has engaged in price gouging, the Attorney General's Office issues a "subpoena duces tecum without appearance." As with the initial determination as to whether price gouging has occurred, there is no standard or guidelines (other than "reason to believe") to determine whether the Attorney General's Office shall issue a subpoena.<sup>31</sup> All such determinations to issue a subpoena are made on a case-by-case basis by attorneys from the Attorney General's Office.<sup>32</sup> Subpoenas are issued by the Attorney General's Office under the authority of *State v. Jackson*.<sup>33</sup>

### D. Filing a Complaint

If, upon review of the documents and other information provided under the subpoena, the Attorney General's Office believes that price gouging has occurred, it may file a civil complaint under the Act.<sup>34</sup> As of October 8, 1992, no complaint had yet been filed by the Attorney General's Office.<sup>35</sup>

In sum, over 1,500 consumer complaints have been filed with the Attorney General's Office in the wake of Hurricane Andrew. In response to those complaints, the Attorney General's Office has issued less than seventy-five subpoenas. About one-third of the cases in which subpoenas had been issued have been settled with no further action taken. Those cases which have not yet settled are either in the process of being settled, or under further investigation by the Attorney General's Office. As previously noted, there is tremendous leeway to allow alleged violators to settle. Ultimately, it appears that only a few cases, if any, will actually proceed to the stage at which the Attorney General's Office will institute litigation. Because alleged violators are allowed substantial opportunities to settle their cases, there is little deterrent effect. In most cases, the alleged violator merely settles with the consumer who complained, and is otherwise not held

31. FLA. STAT. § 501.206(1) (1991).

32. Approximately one-third of the alleged violators to whom subpoenas had been issued settled their cases during this stage.

33. 576 So. 2d 864 (Fla. 3d Dist. Ct. App. 1991); Fandel, *supra* note 24.

34. FLA. STAT. § 501.207 (Supp. 1992).

35. Based upon his interview with Mona Fandel, Esq., Mr. Rosenberg was given the impression that the Attorney General gives an alleged violator every possible opportunity to settle a case prior to filing an action under the Act. Thus, in the final analysis, it appears that most cases will settle, and few, if any, will reach the litigation stage. Fandel, *supra* note 24.

accountable for his actions. There is neither a fine or other penalty, nor is there necessarily any redress to others who did not complain. Thus, it appears that there is very little risk involved in engaging in such price gouging activities.

#### IV. SECTION-BY-SECTION ANALYSIS OF FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

As initial point of analysis, there are no reported Florida decisions construing Florida's Deceptive and Unfair Trade Practices Act as it relates to price gouging in the wake of a natural disaster. However, there are two reported New York decisions involving the same case at the trial and appellate levels that arose in the aftermath of Hurricane Gloria. These decisions construe a statute similar to Florida's Deceptive and Unfair Trade Practices Act.<sup>36</sup> *Two Wheel Corp.* involved a retailer of portable electric generators who sold approximately 100 generators at inflated prices ranging from four percent to seventy-seven percent over the "base prices" for those models during a two-week period commencing immediately prior to Hurricane Gloria and continuing for ten days following the storm.<sup>37</sup> The defendant first argued that the generator sales were not governed by the price gouging statute because they did not constitute "necessities." In addition, the defendant contended that the price increases were justified by increased freight and labor costs, and various business risks associated with the sales, such as the possibility that customers might cancel their orders if power were restored before the generators were delivered, leaving the defendant with a large inventory. The defendant also argued that the prices charged were not "unconscionably excessive" because, in the majority of sales, there was no "gross disparity" between the sales price at the time of the market disruption and the price charged before the disruption.

Ruling in favor of the plaintiff, the New York Court of Appeals rejected all of defendant's arguments and upheld the lower court's decision which imposed a civil penalty of \$5,000, ordered the defendant to make restitution to thirteen known consumers who had submitted affidavits in support of the petition, and ordered the defendant to establish a \$20,000 restitution fund for other consumers who purchased generators from the defendant during the period for any amount exceeding the base price. While

36. *People v. Two Wheel Corp.*, 512 N.Y.S.2d 439 (N.Y. App. Div. 1987) (construing N.Y. GEN. BUS. LAW § 396-r (McKinney 1984)), *aff'd*, 525 N.E.2d 692 (N.Y. 1988).

37. *Id.* at 693.

the majority's interpretation of the New York statute is overbroad and probably incorrect,<sup>38</sup> its holding is nonetheless instructive in that it addresses arguments that a prospective defendant might assert to claims brought under Florida's Deceptive and Unfair Trade Practices Act. For sake of convenience and to familiarize practitioners with Florida's Deceptive and Unfair Trade Practices Act, amendments to the Act and relevant Florida decisions, a section-by-section analysis follows.

#### A. *Section 501.201, Short Title*

Section 501.201 states that sections 501.201 to 501.213 shall be known, and may be cited as the "Florida Deceptive and Unfair Trade Practices Act."<sup>39</sup>

#### B. *Section 501.202, Purposes; Rules of Construction*

Section 501.202 states:

The provisions of this part shall be construed liberally to promote the following policies:

- (1) To simplify, clarify, and modernize the law governing consumer sales practices.
- (2) To protect consumers from suppliers who commit deceptive and unfair trade practices.
- (3) To make state regulation of consumer sales practices consistent with established policies of federal law relating to consumer protection.<sup>40</sup>

#### C. *Section 501.203, Definitions*

Section 501.203 defines the following terms, as used in the Act. Definitions are included only to the extent that they are relevant to an action based upon allegations of price gouging.

(1) "Consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family, or household . . . .

(2) "Final judgment" means a judgment, including any supporting

38. See *id.* at 696-98 (Alexander, J., dissenting).

39. FLA. STAT. § 501.201 (1991).

40. *Id.* § 501.202.

opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(3) "Supplier" means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

(4) "Enforcing authority" means the office of the state attorney if a violation of [the Act] occurs in or affects the judicial circuit under the office's jurisdiction. "Enforcing authority" means the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of state attorney fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.<sup>41</sup>

(5) "Violation of this part" means either a violation of a provision of this part or a violation of any rule promulgated pursuant to this part.

(6) "Department" means the Department of Legal Affairs.

(7) "Order" means a cease and desist order issued by the enforcing authority as set forth in s. 501.208.

(8) "Interested party or person" means any person effected by a violation of this part or any person affected by an order of the enforcing authority.

(9) "Consumer" means an individual; child, by and through its parent or legal guardian; firm; association; joint adventure; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; or any other group or combination.<sup>42</sup>

#### D. Section 501.204, Unlawful Acts and Practices

Section 501.204(1) states that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."<sup>43</sup>

41. Under subsection (4), both the appropriate state attorney and the Department of Legal Affairs have concurrent jurisdiction to enforce the Deceptive and Unfair Trade Practices Act, even when the violation is also occurring in or effecting other judicial circuits, when the matter has been referred to the state attorney by the Department of Legal Affairs. 1973 FLA. ATTY. GEN. ANN. REP. 768, 768 (opinion 073-459).

42. FLA. STAT. § 501.203 (1991).

43. *Id.* § 501.204(1). Governor Lawton Chiles' Executive Order No. 92-222-E, dated August 23, 1992 "declaring the existence of a state of emergency as a result and consequence of the serious threat [Hurricane Andrew] posed to public health, safety and property in portions of South and Central Florida . . ." Fla. Exec. Order No. 92-222-E (Aug. 23, 1992). Section three of this executive order provides:

The imposition or demand of any exorbitant or excessive prices by any vendor

Under section 501.204, proof of misrepresentation or deceit, as would constitute fraud, is not a necessary element in all causes of action brought under the Florida Deceptive and Unfair Trade Practices Act.<sup>44</sup>

#### E. Section 501.2045, Sale of Used Goods As New; Penalty

Section 501.2045 states:

(1) It is unlawful for a seller in a consumer transaction, as defined in s. 501.203, where the purchase price of goods exceeds \$100, to misrepresent orally, in writing, or by failure to speak that the goods are new or original when they are used, repossessed, or where they have been used for sales demonstration.

(2) Whoever violates the provisions of this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.<sup>45</sup>

#### F. Section 501.205, Rule-making Power

Section 501.205(1) states, in apposite part, that "[t]he department shall

of fuels, foods, medicines or other necessities, the shortage of which was created by the hurricane disaster, is shocking to the conscience and is an unfair business practice, in violation of Section 501.204, Florida Statutes.

Fla. Exec. Order No. 92-222-E(3) (Aug. 23, 1992).

Section 4 of the Governor's Executive Order also states:

The vendor or person engaged in this unfair business practice shall be reported to the law enforcement agencies, local emergency management agencies and the State Attorneys in the city, county or area in which such unfair business practice occurs.

Fla. Exec. Order No. 92-222-E(4) (Aug. 23, 1992).

Executive Order 92-922-E further provides:

Each local emergency management agency receiving notice that any vendor or person has engaged in unfair business practice shall be authorized to give notice to the public of the unfair business practice of such vendor or person, and the State Attorney for the Judicial Circuit in which such unfair business practice has occurred shall enforce the remedies provided in Chapter 501, Florida Statutes.

Fla. Exec. Order No. 92-222-E(6) (Aug. 23, 1992).

More importantly, the Governor's Executive Order authorizes "[l]ocal law enforcement agencies . . . to take all necessary legal measures to curtail the unfair business practices of . . . unprincipled suppliers." Fla. Exec. Order No. 92-222-E(5) (Aug. 23, 1992).

44. Donald Frederick Evans & Assoc. v. Continental Homes, Inc., 785 F.2d 897 (11th Cir. 1986) (construing Florida law).

45. FLA. STAT. § 501.2045 (1991). As previously noted, criminal prosecutions, under § 501.2045, are handled exclusively by the State Attorney's Office.

adopt rules which prohibit with specificity acts or practices that violate this part and which prescribe procedural rules for the administration of this part."<sup>46</sup>

G. *Section 501.206, Investigative Powers of Enforcing Authority*

Section 501.206 states:

(1) If, by its own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates this part, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence. Within 10 days after the service of a subpoena or at any time before the return date specified therein, whichever is longer, the party served may file in the circuit court in the county in which he resides or in which he transacts business and serve upon the enforcing authority a petition for an order modifying or setting aside the subpoena. The petitioner may raise any objection or privilege which would be available under this chapter or upon service of such subpoena in a civil action. The subpoena shall inform the party served of his rights under this subsection.<sup>47</sup>

(2) If matter that the enforcing authority seeks to obtain by subpoena is located outside of the state, the person subpoenaed may make it available to the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar request from officials from other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the circuit court for an order compelling compliance.

(4) The enforcing authority may request that an individual who refuses to comply with this subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law shall not have the testimony or matter so provided, or evidence

46. FLA. STAT. § 501.205(1) (Supp. 1992).

47. As previously mentioned, the Attorney General issues subpoenas pursuant to this subsection and the authority of *State v. Jackson*, 576 So. 2d 864 (Fla. 3d Dist. Ct. App. 1991).



derived therefrom, received against him in any criminal investigation or proceeding.<sup>48</sup>

#### H. Section 501.207, Remedies of Enforcing Authority

Section 501.207 states:

(1) The enforcing authority may bring:

(a) An action to obtain the declaratory judgment that an act or practice violates this part.

(b) An action to enjoin a supplier who has violated, is violating, or is otherwise likely to violate, this part.

(c) An action on behalf of one or more consumers for the actual damages caused by an act or practice performed in violation of this part. However, no damages shall be recoverable under this section against a retailer who has in good faith engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(2) Before bringing an action under paragraph (1)(a) or paragraph (1)(c), the head of the enforcing authority shall review the matter and determine if an enforcement action serves the public interest. This determination shall be made in writing, but shall not be subject to the provisions of chapter 120.<sup>49</sup>

(3) Upon motion of the enforcing authority or any interested party in any action brought under subsection (1), the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged; to carry out a consumer transaction in accordance with consumers' reasonable expectations; to strike or limit the application of clauses of contracts to avoid an unconscionable result; or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier. Any injunctive order, whether temporary or permanent, issued by the court shall be effective throughout the state unless otherwise provided in the order.

(4) If a violator shows that a violation of this part resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the violator was unjustly enriched by violation.

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48. FLA. STAT. § 501.206 (1991).

49. Florida Statute § 120, entitled *Administrative Procedure Act*, sets forth certain agency rule-making procedures and methods of public inspection and judicial review. *Id.* § 120.51.

(5) No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a consumer transaction involved in a violation of this part, whichever is later.

(6) The enforcing authority may terminate an investigation or an action upon acceptance of a person's written assurance of voluntary compliance with this part. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or to take other appropriate corrective action. An assurance is not evidence of a prior violation of this part. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this part. No such assurance shall act as a limitation upon any action or remedy available to a person aggrieved by a violation of this part.<sup>50</sup>

### I. Section 501.2075, Civil Penalty

Section 501.2075 states:

Except as provided in s. 501.2077, any person, firm, corporation, association, or entity, or any agent or employee of the foregoing, who engages in any act or practice declared in this part to be unlawful, or who violates any of the rules of the Department of Legal Affairs promulgated under this part, with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive or is prohibited by rule, is liable for a civil penalty of not more than \$10,000 for each such violation. This civil penalty may be recovered in any action brought under this part by the enforcing authority; or the enforcing authority may terminate any investigation or action upon agreement by the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, to pay a stipulated civil penalty. The department or the court may waive any such civil penalty if the person, firm, corporation, association, or entity, or the agent or employee of the foregoing, has previously made full restitution or reimbursement or has paid actual damages to the consumers who have been injured by the unlawful act or practice or rule violation. A civil penalty so collected shall accrue to the state and shall be deposited as received into the General Revenue Fund unallocated.<sup>51</sup>

50. FLA. STAT. § 501.207(1)-(6) (Supp. 1992) (the final subsection, (7), applies to hearsay statements).

51. *Id.* § 501.2075. As previously noted, civil penalties are unavailable to private litigants.

## J. Section 501.208, Cease and Desist Orders; Procedures

Section 501.208 states:

(1) Whenever the Department of Legal Affairs has reason to believe that a person has been, or is, violating this part, or if it appears to the department that a cease and desist order against such violation would be in the interest of the public, it shall issue and serve upon such person a complaint and order stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least 30 days after the service of said complaint. Said hearing shall be held in conformity with the provisions of chapter 120.

(2) The department may modify or set aside its order at any time by rehearing upon its own motion when such rehearing is in the interest of the public welfare.

(3) Judicial review of orders of the department shall be in accordance with the provisions of section 120.68 and shall take precedence over other civil cases pending and shall be expedited in every way.

(4) An order of the department to cease and desist shall not become effective until 10 days after all administrative action has been concluded or, if appeal is made to the district court of appeal and bond is posted, until a final order has been entered by that court.

(5) No cease and desist order shall act as a limitation upon any other action or remedy available to a person aggrieved by a violation of this Act.

(6) When a court remands an order of the department for rehearing, such rehearing shall be held within 45 days after the remand.

(7) Any person who violates the cease and desist order of the department after it becomes final and while such order is in effect shall forfeit and pay to the state a civil penalty of not more than \$5,000.00 for each violation which shall accrue to the state and may be recovered in a civil action brought by the state. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the department, each day of continuance of such failure or neglect shall be deemed a separate offense.<sup>52</sup>

## K. Section 501.209, Other Supervision

Section 501.209 states that: "If the enforcing authority receives a complaint or other information relating to noncompliance with this act by

<sup>52</sup> FLA. STAT. § 501.209 (1991).

a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision."<sup>53</sup>

L. *Section 501.2091, Stay of Proceedings Pending Trial*

Section 501.2091 states:

Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this part by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party's residence. All parties shall be bound by the final order of the circuit court.<sup>54</sup>

M. *Section 501.2101, Enforcing Authorities; Monies Received in Certain Proceedings; Consumer Frauds Trust Fund*

Section 501.2101 states:

(1) Any moneys received by an enforcing authority for attorney's fees and costs of investigation or litigation in proceedings brought under the provisions of s. 501.207, s. 501.208, or s. 501.211 shall be deposited as received in the Consumer Frauds Trust Fund in the State Treasury.

(2) There is created in the State Treasury a trust fund to be known as the Consumer Frauds Trust Fund. Money deposited therein shall be disbursed to the enforcing authority responsible for its collection for the funding of activities conducted by enforcing authorities pursuant to ss. 501.201-501.213, inclusive.

(3) Any moneys received by an enforcing authority and neither received for attorney's fees and costs of investigation or litigation nor used to reimburse consumers found under this law to be damaged shall accrue to the state and be deposited as received in the General Revenue Fund unallocated.<sup>55</sup>

N. *Section 501.2105, Attorney's Fees*

Section 501.2105 states:

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53. *Id.* § 501.209.

54. *Id.* § 501.2091.

55. FLA. STAT. § 501.2101 (Supp. 1992).

(1) In any civil litigation resulting from a consumer transaction involving a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his reasonable attorney's fees and costs from the non-prevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case and his costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(3) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(5) In any civil litigation initiated by the enforcing authority, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(6) In any administrative proceeding or other non-judicial action initiated by an enforcing authority, the attorney for the enforcing authority may certify by sworn affidavit the number of hours and the cross thereof to the enforcing authority for the time spent in the investigation and litigation of the case plus costs reasonably incurred in the action. Payment to the enforcing authority of the sum of such costs may be made by stipulation of the parties a part of the final order or decree disposing of the matter. The affidavit shall be attached to and become a part of such order or decree.<sup>56</sup>

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56. FLA. STAT. § 501.2105 (1991). In *Cuevas v. Potamkin Dodge, Inc.*, 483 So. 2d 55 (Fla. 3d Dist. Ct. App. 1986), the court held that a car buyer who prevailed in arbitration with a car dealer regarding known, unrevealed defects in a car was entitled to recover costs reasonably and necessarily incurred in the arbitration. However, the car buyer could not recover legal fees where the car buyer's success in the action was achieved not after judgment in the trial court, but through an arbitration process to which she had voluntarily agreed.

To be entitled to recovery of attorney's fees pursuant to § 501.2105, a party must recover a judgment on the deceptive trade practices claim and recover a net judgment in the entire case. *Heindel v. Southside Chrysler-Plymouth, Inc.*, 476 So. 2d 266 (Fla. 1st Dist. Ct. App. 1985).

A defendant against whom a deceptive trade practices action was brought and subsequently voluntarily dismissed by the plaintiffs could not recover attorney's fees under § 501.2105, which allows a prevailing party to recover attorney's fees after a judgment is entered in the trial court, since no judgment had been entered. *Nolan v. Altman*, 449 So. 2d 898 (Fla. 1st Dist. Ct. App. 1984).

## O. Section 501.211, Other Individual Remedies

Section 501.211 states:

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a supplier who has violated, is violating, or is otherwise likely to violate this part.

(2) In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such individual may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105; however, no damages, fees, or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(3) In any action brought under this section, upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefor, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees. This subsection shall not apply to any action initiated by the enforcing authority.<sup>57</sup>

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Section 501.2105 does not require that the trial court reserve jurisdiction in order to award attorney's fees and costs on a later date. *Jeffcoat v. Heinicka, Inc.*, 436 So. 2d 1042 (Fla. 2d Dist. Ct. App. 1983).

57. FLA. STAT. § 501.211 (1991). In *Hamilton v. Palm Beach Chevrolet-Oldsmobile, Inc.*, the court held that the trial court, which did not hear evidence concerning the need for a bond, was not permitted to require buyers to post a bond in order to pursue a claim against an auto dealership based upon alleged violations of Florida's Deceptive and Unfair Trade Practices Act. 366 So. 2d 1233, 1234 (Fla. 2d Dist. Ct. App. 1979).

The purpose of requiring a bond [under this section, where frivolous complaints are alleged], is to provide defendants an opportunity for redress for harassment rather than to discourage plaintiffs from seeking access to the courts . . . [Thus, evidence adduced at evidentiary hearings pursuant to such motions] must be directed toward the merits of the cause[s] of action which [are] being prosecuted . . . [and] the amount of any bond which is required should not exceed the amount of damages the defendants might legally be able to recover from the plaintiffs should the plaintiffs lose.

*Id.*

### P. Section 501.212, Application

Section 501.212 states that Florida's Deceptive and Unfair Trade Practices Act does not apply to:

(1) An act or practice required or specifically permitted by federal or state law.

(2) A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part.

(3) A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction.

(4) The holder in due course of a negotiable instrument or the transferee of a credit agreement received in good faith without knowledge of a violation of this part.

(5) Any person or activity regulated under the laws administered by the Department of Insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance or banks and savings and loan associations regulated by federal agencies.<sup>58</sup>

### Q. Section 501.213, Effect on Other Remedies

Section 501.213 states that: "(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law. (2) This part is supplemental to, and makes no attempt to preempt, local consumer protection ordinances not inconsistent with this part."<sup>59</sup>

## V. CONCLUSION

As of January 19, 1993, there have been no cases filed by private litigants against alleged price gougers based upon violations of Florida's Deceptive and Unfair Trade Practices Act. Although these actions are widely available to private litigants, it appears that only in exceptional cases will the damages sustained as a result of price gouging be substantial

58. FLA. STAT. § 501.212 (1991).

59. *Id.* § 501.213.

enough to justify the time, energy and expense of bringing such an action. Of course, for those individuals who have sustained, or believe they have sustained, substantial damages at the hands of a price gouger, those persons should contact an attorney to discuss their case.

With regard to enforcement activities by the Attorney General's Office, the first lesson to be learned is that if one is going to raise prices in the aftermath of a storm, there should be a justification for such increased prices supported by documentation demonstrating additional costs to the retailer or supplier. Without such documentation, the alleged price gouger bears little chance of prevailing in an action commenced by any enforcing authority.

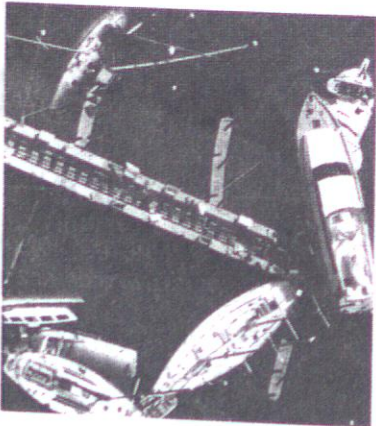
At the same time, it appears that the current procedures utilized by the Attorney General's Office are lacking in two areas. First, the standard under which a determination that price gouging has actually taken place is extremely arbitrary. It is totally within the discretion of the reviewing attorney without any standards or guidelines. Further, there is currently no indication as to what a merchant may rightfully do in order to recoup additional costs legitimately incurred as a result of such a crisis without becoming the target of an investigation by the Attorney General's Office. It is therefore suggested that the Attorney General's Office prepare and publish enforcement guidelines that set forth specific criteria for making determinations as to whether price gouging has occurred. This would add uniformity, as well as objectivity, to an enforcement process that is all too subjective and creates unnecessary legal costs to innocent persons who may find themselves the targets of zealous prosecutors for unknowingly or unwittingly violating the Act.

When faced with another natural disaster, such guidelines would also put merchants on notice as to what constitutes lawful or unlawful conduct. For example, under the guidelines, merchants could be allowed to raise prices up to a certain percentage of the pre-storm price to cover increased operating costs in the aftermath of such a storm. In short, people deserve to know what conduct is permissible and what conduct is unlawful before they become the targets of an investigation by a state agency.

The second area in which the law is lacking is that, under the current enforcement procedures, few price gougers are ever penalized. Consequently, the general deterrence created by current enforcement policies is minimal at best. Indeed, the steep fine of \$10,000 creates an incentive to settle the matter privately. In most cases, this means merely refunding the amount overcharged or making a quiet donation to a hurricane relief organization. In sum, the lack of penalties coupled with the fact that the current procedure is far too involved and drawn out, means that the majority of the complaints cannot be addressed in any meaningful manner.



It is therefore suggested that the Attorney General's Office create additional methods that result in better enforcement and greater deterrence. For example, the Attorney General could issue citations, similar to traffic tickets, to anyone who has been determined to have violated the Act in accordance with the enforcement guidelines. The more serious the offense, the bigger the fine. The citations could be handled procedurally in the same manner as traffic citations. More serious offenses could be handled under the current procedure, as modified by the enforcement guidelines. Thus, if a merchant knew that there would be a fine, regardless of the remedial action taken after a complaint is filed, there would be much greater general deterrence created under the Act. This, in turn, would curb future abuses by those who would seek to profit at the expense of desperate people who find themselves in equally desperate situations. It is inevitable that natural disasters will continue to visit our shores. We can only hope that our lawmakers shall have the wisdom, insight, courage and creativity to make changes in our laws to prevent needless suffering and the scourge of price gouging.



FLORIDA'S PATH OF DESTRUCTION—HURRICANE ANDREW (Historic Publications, Aug. 1992).