

**SUBJECT:** Restricted prices during an abnormal disruption of the market

**COMMITTEE:** Business and Industry — committee substitute recommended

**VOTE:** 8 ayes — Giddings, Elkins, Bailey, Bohac, Martinez, Solomons, Vo, Zedler

0 nays

1 absent — Taylor

**WITNESSES:** None

**BACKGROUND:** The Deceptive Trade Practices Act (DTPA) in Business and Commerce Code, sec. 17.46 holds that false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are illegal and subject to action by the consumer protection division of the Attorney General's Office. Among the acts expressly forbidden under the section is taking advantage of a disaster declared by the governor by:

- selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or
- demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

Government Code, sec. 418.011 states that the governor is responsible for dealing with dangers to the state and its people caused by disasters, including disruptions caused by energy emergencies.

**DIGEST:** CSHB 695 would authorize the governor to issue a proclamation declaring an abnormal disruption of the market due to various calamities, including fire, natural disasters, oil or hazardous substance spills, a utility or transportation emergency, disease, blight, infestation, civil disturbance, riot or an act of war, terrorism, or sabotage resulting in numerous deaths or massive destruction. The proclamation would have to specify the geographic area covered and the date and time at which the abnormal market disruption occurred.

The bill would prohibit a merchant or wholesaler, excluding government entities, in the area covered by proclamation from selling an essential consumer good or service at an “unconscionably excessive” price — i.e., an increase of 20 percent or more from its pre-emergency price. “Essential consumer good or service” would be defined as a good or service, including residential construction, provided primarily for personal, family, or household purposes and necessary for a consumer’s health, safety, or welfare.

A violation would constitute a deceptive trade practice. An affirmative defense to liability would be that the price charged was attributable to the seller’s legitimately higher costs due to the emergency or as a result of factors unrelated to the abnormal market disruption.

If the event or circumstance that prompted the proclamation no longer existed, the proclamation could be terminated at any time by the governor or by a joint resolution of the Legislature.

The bill would take effect September 1, 2005.

**SUPPORTERS  
SAY:**

CSHB 695 would clarify what constitutes price gouging and give the governor additional authority to protect the citizens of Texas during a time of emergency or disaster. While adversity tends to bring out the best in most Texans, it also can be inviting to unscrupulous individuals who attempt to take advantage of people at their most vulnerable. In such circumstances, reports of merchants charging \$10 for a bag of ice that normally would cost \$1 or pricing a gallon of milk at \$5 unfortunately are common.

The bill would outlaw the practice of raising prices only to reap excessive, unconscionable profits. It would set a clear threshold for what constitutes an exorbitant price, which is missing under current law governing deceptive trade practices. By providing sufficient flexibility to raise prices on products and services due to legitimate cost drivers, the bill would not punish honest merchants or threaten commerce during a disaster.

CSHB 695 would allow the governor to issue a proclamation even before a disaster occurred. For example, if a hurricane were approaching, the governor could declare an abnormal disruption of the market before the storm hit to prevent gasoline and plywood prices from spiraling out of control.

OPPONENTS  
SAY:

By allowing the governor to issue a proclamation of an abnormal disruption of the market, CSHB 695 would provoke a procedural abnormality. The attorney general currently is the enforcing agent and the authority who has the expertise to deal with such situations and any resulting legal action. Also, language in the bill potentially could expand private causes of action under the DTPA.

NOTES:

Rep. Elkins intends to offer two floor amendments acceptable to the author. The first amendment would give only the attorney general enforcement authority over any deceptive trade practice that resulted from the sale of essential goods or services over the 20-percent threshold. That amendment also would remove all provisions related to the governor's proclamation and the governor's declaration of an abnormal disruption.

The second floor amendment by Rep. Elkins would stipulate that the price of a hotel room during an abnormal disruption in the market would be unconscionably excessive as a matter of law if it exceeded the daily posted room rate.

The committee substitute differs from the introduced version in that it would correct an incorrect statutory cite in the provisions related to sec. 48.005(c).

HB 2922 by Elkins, which also deals with a deceptive trade practices in the wake of an abnormal market disruption, has been referred to the House Business and Industry Committee. Its companion, SB 803 by Averitt, has been referred to the Senate State Affairs Committee.