# CHAPTER 57
# Trade Practices and Regulations

# ARTICLE 1
# Restraints of Trade

## 57-1-1. Contracts, agreements, combinations or conspiracies in restraint of trade.

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful.

**History:** Laws 1891, ch. 10, § 1; C.L. 1897, § 1292; Code 1915, § 1685; C.S. 1929, § 35-2901; 1941 Comp., § 51-1101; 1953 Comp., § 49-1-1; Laws 1979, ch. 374, § 1; 1987, ch. 37, § 1.

### ANNOTATIONS

**Cross references.** — For unfair trade practices generally, *see* 57-12-1 to 57-12-22 NMSA 1978.

For provision that actions of cooperative associations are not in restraint of trade, *see* 53-4-42 NMSA 1978.

For cooperative marketing associations not being in restraint of trade, *see* 76-12-18 NMSA 1978.

**The 1987 amendment,** effective June 19, 1987, deleted the Subsection A designation from the beginning, deleted "hereby declared to be" preceding "unlawful", and deleted Subsection B, concerning controlling the quantity, price or exchange of goods in restraint of trade.

### I. GENERAL CONSIDERATION.

**Underlying purposes behind both federal and state antitrust laws are same,** to establish a public policy of first magnitude; that is, promoting the national interest in a competitive economy. *United Nuclear Corp. v. General Atomic Co.*, 1979-NMSC-036, 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979).

**State action immunity doctrine.** — The rationale underlying the state action immunity doctrine does not apply to causes of action brought pursuant to the New Mexico Antitrust Act, which does not implicate the relationship between federal and state

governments. *City of Sunland Park v. Macias*, 2003-NMCA-098, 134 N.M. 216, 75 P.3d 816, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**State's trusts policy subject to legislature's control and modification.** — The policy of the state with reference to trusts and combinations in restraint of trade as declared in 57-1-1 to 57-1-3 NMSA 1978 is within the control of the legislature and subject to modification by it. *Elephant Butte Alfalfa Ass'n v. Rouault*, 1926-NMSC-009, 33 N.M. 136, 262 P. 185.

**To be violative, contract's object or operation must restrict trade.** — In order for a contract to be violative of the statute, it must have been one having for its object, or which would operate to restrict trade or commerce, or control the quantity, price or exchange of article in question. *State v. Gurley*, 1919-NMSC-017, 25 N.M. 233, 180 P. 288.

**Mere refusal to sell, in itself, does not provide basis for relief** under this section. *Rogers v. Consolidated Distribs., Inc.*, 1981-NMCA-010, 95 N.M. 467, 623 P.2d 587.

**Covenants not to compete.** — Covenants not to compete that restrict employment present competing principles: the freedom to contract and the freedom to work. A covenant not to compete is enforceable if the restrictions imposed are reasonable. Whether there is a reasonable restraint depends on the facts of a particular case. Covenants not to compete with reasonable restraints will be enforced when they are not against public policy, and any detriment to the public interest in the possible loss of the services of the covenantor is more than offset by the public benefit arising out of the preservation of the freedom of contract. *KidsKare v. Mann*, 2015-NMCA-064.

In an action to enforce a covenant not to compete, where the covenant specifically provided for the amendment of any provision found by a court to be overbroad or otherwise unenforceable, and further provided for the enforceability to the maximum extent deemed reasonable by such court, and that all provisions not found to be invalid, illegal or unenforceable, in whole or in part, were to remain intact and enforceable, the district court did not err in reforming the covenant not to compete because the parties agreed to the type of reformation performed by the district court. *KidsKare v. Mann*, 2015-NMCA-064.

**Time period and distance restrictions in covenant not to compete were reasonable.** — In an action to enforce a covenant not to compete, a one-year time period and thirty-mile distance restriction were deemed reasonable and enforceable where the defendant conceded that a restriction of one or two years is frequently found to be reasonable in the field of dentistry and evidence showed that ninety percent of plaintiff’s patients came from within a thirty-mile radius. *KidsKare v. Mann*, 2015-NMCA-064.

**Fifteen-year noncompetition covenant in contract for sale of insurance business was not void** as a restraint of trade. *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, 104 N.M. 514, 724 P.2d 223.

**Conspiracy to fix prices is per se restraint of trade;** this means that the reasonableness of the prices is not an issue, i.e., the "rule of reason" does not apply to per se restraints of trade. *State v. Ray Bell Oil Co.*, 1983-NMCA-068, 101 N.M. 368, 683 P.2d 50, cert. quashed, 101 N.M. 362, 683 P.2d 44, appeal dismissed, 469 U.S. 1030, 105 S. Ct. 498, 83 L. Ed. 2d 391 (1984).

**Tying arrangement** exists when a seller conditions a buyer's purchase of a desired product (the tying product) on the buyer's agreement to purchase an undesired product (the tied product); a requirement by a manufacturer that its dealers purchase all of the manufacturer's products is a tying arrangement often referred to as "full-line forcing," while a requirement that only a portion of the products be stocked is referred to as "representative-line forcing." *Smith Mach. Corp. v. Hesston, Inc.*, 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

Tying analysis should apply even though the business relationship at issue is solely between a manufacturer and a dealer without directly involving the ultimate consumer. *Smith Mach. Corp. v. Hesston, Inc.*, 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

For note, "New Mexico Antitrust Law - Tying Arrangements Under the New Mexico Antitrust Act: Smith Machinery Corp. v. Hesston, Inc.," see 16 N.M.L. Rev. 363 (1986).

Annual Survey of New Mexico Commercial Law, see 17 N.M.L. Rev. 219 (1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 784 et seq., 795.

Contract to keep out of a particular business as an unlawful restraint of trade, when independent of any other contract, 3 A.L.R. 250, 91 A.L.R. 980.

Right of manufacturer, producer or wholesaler to control resale price, 7 A.L.R. 449, 19 A.L.R. 925, 32 A.L.R. 1087, 103 A.L.R. 1331, 125 A.L.R. 1335.

Restrictive covenants in contracts of employment, 9 A.L.R. 1456, 20 A.L.R. 861, 29 A.L.R. 1331, 52 A.L.R. 1362, 67 A.L.R. 1002, 98 A.L.R. 963.

Combination among farmers, 11 A.L.R. 1185, 130 A.L.R. 1326.

Validity of agreement by bailee of instrumentality to purchase his supplies from bailor, 14 A.L.R. 114, 17 A.L.R. 392.

Application of principles of unfair competition to artistic or literary property, 19 A.L.R. 949.

Combinations or agreements between insurance companies or insurance agents, 21 A.L.R. 543.

Applicability of state antitrust act to interstate transaction, 24 A.L.R. 787.

Cooperative marketing of farm products by producers' associations, 25 A.L.R. 1113, 33 A.L.R. 247, 47 A.L.R. 936, 77 A.L.R. 405, 98 A.L.R. 1406, 12 A.L.R.2d 130.

Boycott as violating antitrust laws or statutes prohibiting combinations in restraint of trade, 27 A.L.R. 656, 32 A.L.R. 779, 116 A.L.R. 484.

Accessories, right of manufacturer to make its warranties conditional on nonuse of accessories manufactured by others, and to require its agents not to handle them, 29 A.L.R. 235.

Cemetery association's regulations as to improvement or care of lots as in restraint of trade, 32 A.L.R. 1417, 47 A.L.R. 70.

Public policy in respect of associations or combinations of public contractors and their rules and regulations, 45 A.L.R. 549.

Application of antitrust acts to combinations to maintain prices of commodities as affected by reasonableness of prices fixed, 50 A.L.R. 1000.

Custom or contractual obligation against making for third person machine or device similar to that which one has contracted to make for another, 54 A.L.R. 1219.

Stockholder's agreement not to engage in business in which corporation is engaged, 63 A.L.R. 316.

Territorial scope permissible in covenants ancillary to sale of business or corporate stock against engaging in similar business, 78 A.L.R. 1038.

Contract by seller of air transport business against engaging in competing business, 83 A.L.R. 378, 99 A.L.R. 173, 155 A.L.R. 1026.

Contract against use of property for specified purpose independent of any other contract, 91 A.L.R. 980.

Constitutionality of statute as to combinations in restraint of trade which predicates criminality upon reputation or repute, 92 A.L.R. 1235.

Collective labor agreements as in restraint of trade, 95 A.L.R. 25.

Contract for manipulation of securities for purpose of cornering market, 115 A.L.R. 283.

Statute or ordinance as to weighing of merchandise sold in load or bulk lot as restraint of trade, 116 A.L.R. 246.

Validity of covenant by seller of business not to enter employment of customers, clients or patrons of the business, 119 A.L.R. 1452.

Legality of combination among building or construction contractors, 121 A.L.R. 345.

Validity and effect of lessee's covenants as regards his activities after expiration of lease, 122 A.L.R. 1031.

Original contract of employment, validity and enforceability of making of restrictive covenant not included in, but included in subsequent contract for continuance of employment, 152 A.L.R. 415.

Provisions of articles or bylaws of nonprofit corporation or association formed by business competitors whereby the amount of dues of respective members varies according to the amount of business done by them, as contrary to public policy, 161 A.L.R. 795.

Validity of contract for exclusive participation of person participating in or connected with entertainment enterprise, 175 A.L.R. 631.

Discounts permissible under Robinson-Patman amendment to the Clayton Act, 1 A.L.R.2d 276.

Statute prohibiting restraint on profession, trade or business as applicable to restriction in agency contracts, 3 A.L.R.2d 522.

Restrictive agreement or covenant in respect of purchase or handling of petroleum products by operator of filling station as in restraint of trade or in violation of antitrust statute, 26 A.L.R.2d 219.

Enforceability of restrictive covenant, ancillary to employment contract, as affected by duration of restriction, 41 A.L.R.2d 15.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by duration of restriction, 45 A.L.R.2d 77, 13 A.L.R.4th 661.

Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice or property, as affected by territorial extent of restriction, 46 A.L.R.2d 119, 13 A.L.R.4th 661.

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to sale of practice, 62 A.L.R.3d 918.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to partnership agreement, 62 A.L.R.3d 970.

Validity and construction of contractual restrictions on right of medical practitioner to practice, incident to employment agreement, 62 A.L.R.3d 1014.

Statute prohibiting buyer or seller of commodities from fixing prices in one locality higher or lower than in another, 67 A.L.R.3d 26.

Application of state antitrust laws to activities or practices of real estate agents or associations, 22 A.L.R.4th 103.

Validity, construction, and application of state statutory provision prohibiting sales of commodities below cost - modern cases, 41 A.L.R.4th 612.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

Provisions of insurance company's contract with independent insurance agent restricting competitive placements by agent as illegal restraint of trade under state law, 42 A.L.R.4th 1072.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 A.L.R.4th 1006.

Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade practice under state law, 49 A.L.R.4th 1240.

Covenants to reimburse former employer for lost business, 52 A.L.R.4th 139.

Enforceability of sale-of-business agreement not to compete against nonsigner or nonowning signer, 60 A.L.R.4th 294.

Anticompetitive covenants: aerial spray dust business, 60 A.L.R.4th 965.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

Damages recoverable by victim of discrimination in violation of Robinson-Patman Act, 9 A.L.R. Fed. 279.

Validity, construction and application of provisions of Robinson-Patman Act regarding furnishing services or facilities, 24 A.L.R. Fed. 9

Reciprocal dealing as violation of Sherman Antitrust Act (15 USC § 1 et seq.) and Clayton Antitrust Act (15 USC § 12 et seq.), 69 A.L.R. Fed. 330.

Fraudulent concealment, so as to toll statute of limitations, as presenting common question of proof in antitrust class action, 70 A.L.R. Fed. 498.

"Target area" doctrine as basis for determining standing to sue under § 4 of Clayton Act (15 USC § 15) allowing treble damages for violation of antitrust laws, 70 A.L.R. Fed. 637.

"Sham" exception to application of Noerr-Pennington Doctrine, exempting from federal antitrust laws joint efforts to influence governmental action, 71 A.L.R. Fed. 723.

Standing of private party under § 16 of Clayton Act (15 U.S.C. § 26) to seek injunction to prevent merger or acquisition allegedly prohibited under § 7 of the act (15 U.S.C. § 18), 78 A.L.R. Fed. 159.

Vertical restraints on sales territory or location as violative of § 1 of Sherman Act (15 USC § 1) - post-GTE Sylvania cases, 92 A.L.R. Fed. 436.

58 C.J.S. Monopolies §§ 19, 56 et seq.

## II. PARTIAL, REASONABLE OR INCIDENTAL RESTRAINT.

**Partial and reasonable restraints with consideration are valid.** — Contracts only in partial restraint of any particular trade or employment, if founded upon a sufficient consideration, are valid and enforceable, if the restraint be confined within limits which are no larger and wider than the protection of the party with whom the contract is made may reasonably require. Nichols v. Anderson, 1939-NMSC-028, 43 N.M. 296, 92 P.2d 781; Excelsior Laundry Co. v. Diehl, 1927-NMSC-007, 32 N.M. 169, 252 P. 991.

**Some restrictive franchise provisions may be valid.** — Franchise agreement prohibiting sale of competing products from a specified location was a partial and reasonable restraint of trade and did not violate this section. Yarborough v. Harkey, 1960-NMSC-064, 67 N.M. 204, 354 P.2d 137.

**Anti-competition agreement void unless incidental to general or principal transaction.** — A naked agreement by one party not to engage in business in competition with another party is in contravention of public policy and therefore void, unless such agreement and restriction be incidental to some general or principal transaction. Its main object must not be to stifle competition. Nichols v. Anderson, 1939-NMSC-028, 43 N.M. 296, 92 P.2d 781; Gross, Kelly & Co. v. Bibo, 1914-NMSC-085, 19 N.M. 495, 145 P. 480.

**Refraining from engaging in business valid if subsidiary.** — An agreement to refrain from engaging in a certain business or profession within reasonable limits of time and place is valid if subsidiary to other legitimate purposes such as the sale or disposal of property, business or good will. Nichols v. Anderson, 1939-NMSC-028, 43 N.M. 296, 92 P.2d 781; Thomas v. Gavin, 1910-NMSC-060, 15 N.M. 660, 110 P. 841; Gallup Elec. Light Co. v. Pacific Improvement Co., 1911-NMSC-012, 16 N.M. 86, 113 P. 848; Gross, Kelly & Co. v. Bibo, 1914-NMSC-085, 19 N.M. 495, 145 P. 480; Gonzales v. Reynolds, 1929-NMSC-018, 34 N.M. 35, 275 P. 922.

## III. PROOF OF RESTRAINT.

**Compliance with federal substantive law as it relates to oligopolies.** — To ensure uniform application of federal and state laws in antitrust actions under the Antitrust Act, 57-1-1 to 57-1-15 NMSA 1978, involving oligopolies, such as the tobacco industry, which are by nature interdependent such that it is likely that when one company acts in a certain manner, the other firms will determine whether it is in their best interest to follow the leader's action, plaintiffs must meet the standard of federal substantive antitrust law which requires that to show that there was an unlawful agreement, plaintiffs must present evidence that tends to exclude the possibility that defendants acted independently or plaintiffs cannot meet their burden of establishing a genuine issue of material fact to withstand summary judgment for defendants. Romero v. Philip Morris, Inc., 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, *rev'g*, 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

**Evidence of "plus factors" did not exclude the possibility of independent action.** — Where plaintiffs alleged that defendants engaged in an agreement to fix the price of cigarettes; defendants were large manufacturers of cigarettes; defendant Philip Morris reduced wholesale prices on all brands; the other defendants followed the price reductions; defendants then began to increase wholesale prices in near lock-step fashion; and plaintiffs offered evidence of parallel pricing behavior, the economies of the market place, motivation to conspire, condensation of price tiers, actions contrary to self-interest, conspiratorial meetings in foreign markets, a smoking and health conspiracy, defendants monitoring the market through a business data service, opportunities to conspire, and pricing decisions made at high levels, the district court properly granted summary judgment for defendants, because plaintiffs' evidence was just as consistent with lawful, independent actions as it was with price fixing and did not exclude independent conduct that was required to raise a genuine issue of material fact that there was an agreement among defendants to fix the price of cigarettes and,

because defendants offered evidence of fierce retail competition that undermined the plausibility of a price-fixing agreement, that wholesale prices did not exceed the wholesale price levels that existed at the time defendants began to lower prices until almost five years later, and that plaintiffs' expert acknowledged that it was just as likely that defendants would have behaved in the same manner if they were acting independently and not under a price-fixing agreement. Romero v. Philip Morris, Inc., 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, *rev'g* 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

**Conscious parallelism.** — Behavior of market participants that is characterizable as mere conscious parallelism, which is parallel price changes by firms in a concentrated market who recognize their independence, does not satisfy the conspiracy element required by 57-1-1 NMSA 1978. Romero v. Philip Morris, Inc., 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873; *rev'd*, Romero v. Philip Morris, Inc., 2010-NMSC-035,148 N.M. 713, 242 P.3d 280.

**Evidence to rule out conscious parallelism.** — Testimony by a qualified economics expert that the character or degree of parallelism actually exhibited by prices exceeds the parallelism that economic theory predicts would result from independent competitive behavior is evidence that tends to exclude the possibility that firms in a concentrated market acted independently. Romero v. Philip Morris, Inc., 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873; *rev'd*, Romero v. Philip Morris, Inc., 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280.

Where the plaintiff alleged that cigarette manufacturers conspired during a seven year period to fix the prices of cigarettes in New Mexico and where the plaintiff's evidence showed that during the seven year period the tobacco industry exhibited an unprecedented degree of parallelism; what had previously been ten price tiers had been consolidated into two price tiers; twelve in-tandem increases occurred in the prices of both premium and discount cigarettes; the multi-variable, multi-price-tier parallelism went well beyond the price leadership within a single-tier market demonstrated by the cigarette industry prior to the introduction of generic cigarettes; and the parallelism involved parallelism among market tiers that formerly had been in vigorous competition, the evidence allowed a reasonable fact finder to reject conscious parallelism as a plausible explanation for the parallelism in the cigarette industry, thereby leaving the competing inference of conspiracy as the most likely explanation for the parallelism. Romero v. Philip Morris, Inc., 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873; *rev'd*, Romero v. Philip Morris, Inc., 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280.

**To establish an antitrust law violation,** the plaintiff must show a conspiracy or combination among two or more persons and an unreasonable restraint of trade due to this combination or conspiracy. Clough v. Adventist Health Sys., Inc., 1989-NMSC-056, 108 N.M. 801, 780 P.2d 627.

Mere contacts and communications, or the mere opportunity to conspire, among antitrust defendants is insufficient evidence from which to infer an anticompetitive

conspiracy in the context of the denial of hospital surgical privileges. Clough v. Adventist Health Sys., Inc., 1989-NMSC-056, 108 N.M. 801, 780 P.2d 627.

**Must show scheming and attempt to combine with others.** — Where contract between distributor and manufacturer is alleged to violate antitrust acts as in restraint of trade, it is not enough to show that the manufacturer has schemed and labored to effect restraint of trade. It must be shown that it has contracted or combined with others to that end. W.T. Rawleigh Co. v. Jones, 1935-NMSC-056, 39 N.M. 381, 47 P.2d 906.

**Proof of per se illegal tying arrangement.** — To prevail on a claim that a tying arrangement is per se illegal, a plaintiff must prove the existence of three distinct elements: (1) a scheme involving two distinct products whereby a buyer must purchase the tied product in order to obtain the tying product; (2) a seller possessing sufficient economic power in the tying product market to appreciably restrain competition in the tied product market; and (3) an arrangement affecting a not insubstantial amount of commerce. Smith Mach. Corp. v. Hesston, Inc., 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

**Prima facie case of per se antitrust violation in tying arrangement was presented** where dealer was compelled to purchase tractors in order to obtain windrowers and other equipment, where manufacturer's economic power in tying product was demonstrated by a 30% market share and where amount of commerce foreclosed ranged from $100,000 to $300,000. Smith Mach. Corp. v. Hesston, Inc., 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

**Indictment which shows only large profit alleges no violation.** — An indictment under this section or 57-1-2 NMSA 1978 alleging a contract whereby another would obtain the selling agency for all broom corn produced by farmers in the vicinity, and would sell it to defendant at $150 per ton, when it was then worth $350 per ton, did not show a violation of the statute. State v. Gurley, 1919-NMSC-017, 25 N.M. 233, 180 P. 288.

**Allegations insufficient if related only to interstate sales.** — Allegations of the proposed counterclaim held insufficient where, even though filed pursuant to New Mexico statutes, they related solely to purchases and sales made in interstate commerce and contained no allegations of an unlawful agreement, combination or conspiracy to restrict or monopolize trade or commerce within the state of New Mexico as required by 57-1-1 through 57-1-3 NMSA 1978. State ex rel. Pennsylvania Transformer Div. v. Electric. City Supply Co., 1964-NMSC-136, 74 N.M. 295, 393 P.2d 325.

**Both interstate and intrastate violations alleged.** — Assuming, arguendo, that the New Mexico antitrust and price discrimination statutes involved apply only to intrastate commerce, plaintiffs' affidavit accompanying their opposition to the defendant's motions to dismiss averred that plaintiffs complained of unfair competition within New Mexico as well as between New Mexico and Texas distributors, and since the mere fact that

plaintiffs' volume had increased would not negate the possibility of actual harm, the motions to dismiss were denied. Ingram v. Phillips Petroleum Co., 252 F. Supp. 674 (D.N.M. 1966).

**Issue of competition involves questions of geographic proximity and marketing practices.** Where one defendant company had distributed entirely through jobbers and with the company itself absorbing any loss as a result of price reductions in the area during the period in question so that all jobbers retained the same profit margin before and after the alleged price discrimination, and furthermore, where the nearest jobber to plaintiff was too distant geographically (54 miles) to be considered in competition with him, it was held that plaintiff itself negated any possibility of establishing a competitive relationship with defendant under either the United States or New Mexico antitrust laws, and that defendant's pricing policies, different from the policies of the other defendants, were inconsistent with plaintiffs' conspiracy count which basically alleged selective price reductions to monopolize the gasoline distributors market; thus, in the absence of any basis for allegations of competition or conspiracy on the part of defendant, the claims against it were dismissed and its motion for summary judgment was granted. Ingram v. Phillips Petroleum Co., 252 F. Supp. 674 (D.N.M. 1966).

**Transcript must show lack of alleged violator's justification.** — Where plaintiff sued board of realtors alleging a combination in restraint of trade, a combination tending to monopolize trade and that he was injured by the alleged combination, but where there was no reference in the transcript to items which tended to show or raise a factual issue as to lack of justification for the board's practices, as was required by former 21-2-1(15)(6), 1953 Comp., the trial court's summary judgment was affirmed on procedural grounds by the court of appeals. Wilson v. Albuquerque Bd. of Realtors, 1971-NMCA-090, 82 N.M. 717, 487 P.2d 145.

**Preclusion based on insufficiency of evidence.** — Where a plaintiff argued that preclusion should not have applied because he was not given an opportunity in the state case to pursue discovery to prove his conspiracy claims and that defendants intentionally withheld information in the state case, and where the plaintiff maintained that because the state court summary judgment was based on insufficiency of the evidence, rather than litigation of actual factual issues, preclusion did not apply, preclusion still applied; the plaintiff was afforded a full and fair opportunity to litigate his claims, there was no evidence that defendants had fraudulently withheld evidence, and the state court had considered the merits of all the claims. Clough v. Rush, 959 F.2d 182 (10th Cir. 1992).

**Wholesalers may refuse to sell when goods used illegally.** — These provisions do not make it unlawful for either a wholesaler or a group of wholesalers to refuse to sell their goods to a firm or individual intending to use them in contravention of law. 1943 Op. Att'y Gen. No. 43-4402.

**City ordinance should regulate hotel's solicitation on railroad station grounds.** — The practice of a railroad company in excluding from its station grounds solicitors for

certain hotels for the benefit of other hotels should be regulated by city ordinance. 1913 Op. Att'y Gen. 13-1054.

## 57-1-1.1. Short title.

Sections 57-1-1 through 57-1-15 NMSA 1978 may be cited as the "Antitrust Act".

**History:** 1978 Comp., § 57-1-1.1, enacted by Laws 1979, ch. 374, § 2.

**ANNOTATIONS**

**Compiler's notes.** — Although this section defines the Antitrust Act as 57-1-1 through 57-1-15 NMSA 1978, Laws 1987, Chapter 37 seems to add 57-1-16 and 57-1-17 NMSA 1978 to the Antitrust Act.

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

## 57-1-1.2. Definition.

As used in the Antitrust Act, "person" means an individual, corporation, business trust, partnership, association or any governmental or other legal entity with the exception of the state, except as used in Subsection B of Section 57-1-3 NMSA 1978, and the United States.

**History:** 1978 Comp., § 57-1-1.2, enacted by Laws 1979, ch. 374, § 3; 1987, ch. 37, § 2.

**ANNOTATIONS**

**Compiler's notes.** — Although this section defines the Antitrust Act as 57-1-1 through 57-1-15 NMSA 1978, Laws 1987, Chapter 37 seems to add 57-1-16 and 57-1-17 NMSA 1978 to the Antitrust Act.

**The 1987 amendment,** effective June 19, 1987, substituted "except as used in Subsection B of Section 57-1-3 NMSA 1978" for "of New Mexico" following "with the exception of the state."

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

## 57-1-2. Monopolies.

It is hereby declared to be unlawful for any person to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, trade or commerce, any part of which trade or commerce is within this state.

**History:** Laws 1891, ch. 10, § 2; C.L. 1897, § 1293; Code 1915, § 1686; C.S. 1929, § 35-2902; 1941 Comp., § 51-1102; 1953 Comp., § 49-1-2; Laws 1979, ch. 374, § 4.

## ANNOTATIONS

**Cross references.** — For monopolies being prohibited in the exhibition of motion pictures, *see* 57-5-3 NMSA 1978.

For provisions prohibiting monopolies in the financing of automobiles, *see* 57-11-1 to 57-11-13 NMSA 1978.

For insurance trade practices, *see* 59A-16-1 et seq. NMSA 1978.

For unfair competition in the liquor trade, *see* 60-8A-1 NMSA 1978.

**Compiler's notes.** — The cases annotated under 57-1-1 NMSA 1978 are also applicable to this section.

**Attempt to monopolize shown.** — A competing system clause within a revenue bond issued by a county demonstrated on its face an attempt to monopolize the sale of water services within the county by prohibiting the licensing of competitors and by requiring all residents to connect to the county's system. *City of Sunland Park v. Macias*, 2003-NMCA-098, 134 N.M. 216, 75 P.3d 816, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**State action immunity doctrine.** — The rationale underlying the state action immunity doctrine does not apply to causes of action brought pursuant to the New Mexico Antitrust Act, which does not implicate the relationship between federal and state governments. *City of Sunland Park v. Macias*, 2003-NMCA-098, 134 N.M. 216, 75 P.3d 816, cert. denied, 134 N.M. 179, 74 P.3d 1071.

**Restrictions against liquor sales in deeds not against public policy.** — In suit to enforce deed restrictions against sale of intoxicating liquors, except in deeds of conveyance in certain block in city, where all other deeds executed by same vendor contained such restriction, the refusal of court to find that purpose of such vendor in his attempt to enforce such restriction and to enjoin sale of such liquors was to create a monopoly or perpetuity in itself and its assigns and successors was not error nor was such restriction against public policy. *Alamogordo Improvement Co. v. Prendergast*, 1940-NMSC-075, 45 N.M. 40, 109 P.2d 254.

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade and Unfair Trade Practices §§ 781, 794.

Picketing as violation of antitrust act, 6 A.L.R. 934, 16 A.L.R. 230, 27 A.L.R. 651, 32 A.L.R. 779, 116 A.L.R. 484.

"Open competition plan," "gentleman's agreement," and the like, as violation of antitrust acts, 21 A.L.R. 1109.

Monopoly in dramatic and motion pictures, 26 A.L.R. 369.

Laundry business as within statute relating to monopolies, 31 A.L.R. 533.

Removal or attempted removal of one from field of competition by inducing him to enter another's employment as violation of antimonopoly act, 74 A.L.R. 289.

Taxation of common carriers by automobile as creating monopoly, 75 A.L.R. 46.

Contract by one party to sell his entire output to, or to take his entire requirements of a commodity from, the other party as contrary to public policy or antimonopoly statute, 83 A.L.R. 1173.

Statute providing for sale of intoxicating liquor by state or state agencies as within constitutional prohibition of creation of monopolies, 121 A.L.R. 303.

Validity of statute or ordinance relating to taxicab or bus service as against objection based upon monopolistic tendency or effect, 159 A.L.R. 821.

Participation in a legal combination as defense to action under antitrust act, 160 A.L.R. 381.

Validity, under state constitutions, of nonsigner provisions of Fair Trade Laws, 60 A.L.R.2d 420.

Application to banks and banking institutions of antimonopoly or antitrust laws, 83 A.L.R.2d 374.

Reciprocal dealing as violation of Sherman Antitrust Act (15 USC § 1 et seq.) and Clayton Antitrust Act (15 USC § 12 et seq.), 69 A.L.R. Fed. 330.

58 C.J.S. Monopolies §§ 19, 56 et seq.

## 57-1-3. Contracts for restraint of trade or monopoly void; civil liability of participants; injunctive relief; purchasers relieved from payment.

A. All contracts and agreements in violation of Section 57-1-1 or 57-1-2 NMSA 1978 shall be void, and any person threatened with injury or injured in his business or property, directly or indirectly, by a violation of Section 57-1-1 or 57-1-2 NMSA 1978

may bring an action for appropriate injunctive relief, up to threefold the damages sustained and costs and reasonable attorneys' fees. If the trier of fact finds that the facts so justify, damages may be awarded in an amount less than that requested, but not less than the damages actually sustained.

B. The attorney general may bring an action under Subsection A of this section on behalf of the state, a political subdivision thereof or any public agency.

C. In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

D. For the purposes of this section, "business or property" includes business or nonbusiness purchases and business and nonbusiness injuries.

**History:** Laws 1891, ch. 10, § 3; C.L. 1897, § 1294; Laws 1907, ch. 18, § 1; Code 1915, § 1687; C.S. 1929, § 35-2903; 1941 Comp., § 51-1103; 1953 Comp., § 49-1-3; Laws 1979, ch. 374, § 5.

## ANNOTATIONS

**Compiler's notes.** — The cases annotated under 57-1-1 NMSA 1978 are also applicable to this section.

**Standing.** — Plaintiff alleged that defendant forced merchants who accepted defendants' credit cards to also accept defendant's debit cards which resulted in higher debit processing fees for merchants who were forced to pass the cost on to their customers in the form of higher prices for retail goods; plaintiff sought class certification on behalf of New Mexico consumers; plaintiff was not a consumer or a competitor in the market for credit and debit card services provided by defendants; plaintiff's allegations did not show that plaintiff was directly harmed by the actions of defendants or that plaintiff was indirectly harmed through the chain of distribution of the debit card services; plaintiff was a consumer of goods sold by merchants who happened to be part of the affected market; the merchants who were directly affected by the alleged tying arrangement and who were a better plaintiff had participated in litigation against defendants under federal antitrust laws; plaintiff's damages were speculative because the charges paid by plaintiff on retail items were based on numerous independent factors other than the fees charged by defendants; apportioning damages among class members would be a complex task; and there was a risk of duplicative damages that were paid in prior federal antitrust litigation based on the same issue, plaintiff lacked standing to bring a claim against defendants under the New Mexico Antitrust Act for the alleged tying scheme that forced merchants to accept defendants' debit cards at inflated transaction-fee rates. *Nass-Romero v. Visa USA, Inc.*, 2012-NMCA-058, 279 P.3d 772.

**Transfer of counterclaim sharing factual questions with other action.** — Where an antitrust counterclaim and actions already pending in another district share numerous complex factual questions, transfer of the antitrust counterclaim is necessary to prevent duplicate discovery, eliminate any possibility of conflicting pretrial rulings and conserve time and effort for the parties, the witnesses and the judiciary. *In re Uranium Indus. Antitrust Litigation*, 466 F. Supp. 958 (D.N.M. 1979).

**Both public and private actions contemplated.** — The antitrust laws of this state and nation contemplate both public and private actions against those who may have violated them. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, 629 P.2d 231, appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

**Arbitration inappropriate for antitrust claims.** — The public interest in the enforcement of antitrust laws makes antitrust claims inappropriate subjects for arbitration. *United Nuclear Corp. v. General Atomic Co.*, 1979-NMSC-036, 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145.

**Most effective relief is declaring contract void.** — Because the New Mexico Antitrust Act does not provide for treble damages as available to federal litigants, the ability to have a contract declared void is the most effective tool provided by New Mexico law. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, 96 N.M. 155, 629 P.2d 231, appeal dismissed, 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

**Arbitration agreements in void contract unenforced.** — The Federal Arbitration Act does not require enforcement of arbitration agreements contained in contracts which are themselves void by operation of a state law which applies to contracts generally. *United Nuclear Corp. v. General Atomic Co.*, 1979-NMSC-036, 93 N.M. 105, 597 P.2d 290, cert. denied, 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145.

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Right of one not a party to a combination or contract in restraint of trade, to maintain suit to enjoin same or to recover damages he suffers by reason thereof, 92 A.L.R. 185.

Stockholder's action as remedy to recover damages for violation of antitrust laws, 36 A.L.R.2d 1345.

Validity of contract between public utilities, other than carriers, dividing territory and customers, 70 A.L.R.2d 1326.

Propriety, under state law, of manufacturer's or supplier's refusal to sell medical product to individual physician, hospital, or clinic, 45 A.L.R.4th 1006.

Divestiture as available relief under § 16 of Clayton Act (15 U.S.C.S. § 26) in actions by private parties, 77 A.L.R. Fed. 509.

Standing of private party under § 16 of Clayton Act (15 U.S.C.S. § 26) to seek injunction to prevent merger or acquisition allegedly prohibited under § 7 of the act (15 U.S.C.S. § 18), 78 A.L.R. Fed. 159.

Propriety of preliminary injunctive relief in private antitrust actions involving dealership terminations, 79 A.L.R. Fed. 44.

58 C.J.S. Monopolies §§ 80 et seq.

## 57-1-4. Organizations exempted.

The labor of a human being is not a commodity or article of commerce. No law against monopolies or combinations in restraint of trade shall be held or construed to forbid the existence and operation of natural gas marketing, labor, agricultural or horticultural organizations instituted for purposes of mutual help and not having capital stock or conducted for profit to the organization or to forbid or restrain individual members of such organizations from lawfully carrying out the objects thereof; nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under any law against monopolies or combinations in restraint of trade. No natural gas marketing organization exempted herein shall be organized in such a manner so as to control more than ten percent of the natural gas market. Nothing in this section shall be held or construed to justify any restraint of trade or restriction of competition except such as is incident to the protection and promotion of the interests of the members of such organizations, in view of their situation and circumstances, but such organizations and their objects and the effectuation thereof shall prima facie be presumed to be in reasonable restraint of trade or restriction of competition.

**History:** Laws 1923, ch. 37, § 1; C.S. 1929, § 35-2904; 1941 Comp., § 51-1104; 1953 Comp., § 49-1-4; 1987, ch. 243, § 1.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, inserted "natural gas marketing" preceding "labor" in the second sentence, added the third sentence, and made minor stylistic changes throughout the section.

**Monopoly is not purpose of cooperative marketing associations.** *Elephant Butte Alfalfa Ass'n v. Rouault*, 1926-NMSC-009, 33 N.M. 136, 262 P. 185.

**Cooperative marketing associations may enforce exclusive sales contracts.** — A cooperative marketing association without capital stock, and operated for a mutually beneficial purpose, may enforce performance of a grower's contract to sell his alfalfa to

it exclusively. *Elephant Butte Alfalfa Ass'n v. Rouault*, 1926-NMSC-009, 33 N.M. 136, 262 P. 185.

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Refusal of labor union to work on materials produced or transported by nonunion labor, 52 A.L.R. 1147, 54 A.L.R. 806.

58 C.J.S. Monopolies §§ 145 to 149, 167 to 169.

## 57-1-5. Attorney general; investigation.

A. If the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, he may, before bringing any action, apply to the district court of Santa Fe county for approval of a civil investigative demand, demanding, in writing, such person to appear and be examined under oath, to answer written interrogatories under oath, or to produce the document or object for inspection and copying. The demand shall:

(1) be served upon the person in the manner required for service of process in this state, or, if the person cannot be found or does not reside or maintain a principal place of business within this state, in the manner required for service of process in the state in which the person resides, maintains a principal place of business or can be found;

(2) describe the nature of the conduct under investigation;

(3) describe the class or classes of documents or objects with sufficient definiteness to permit them to be fairly identified, if the production of documents or objects is requested;

(4) contain a copy of the written interrogatories, if answers to written interrogatories are sought;

(5) prescribe a reasonable time at which the person must appear to testify, within which to answer the written interrogatories or within which the document or object must be produced;

(6) specify a place for the taking of testimony or for production and designate a person who may be an authorized employee of the attorney general, to be custodian of the document or object; and

(7) contain a copy of Subsections B, C and D of this section.

No demand to produce a document or object for inspection and copying shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued in a civil proceeding by a district court of this state.

The district court shall approve the demand if it finds that the attorney general has reasonable cause to believe that a person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978 and that the demand is proper in form. A demand shall not be issued without approval of the district court.

B. If a person fails to comply with the written demand served upon him under the provisions of Subsection A of this section, the attorney general may file in the district court of the county in which the person resides or in which he maintains a principal place of business within this state or of the county of Santa Fe if the person neither resides nor has a principal place of business in this state a petition for an order to enforce the demand. Notice of hearing the petition and a copy of the petition shall be served upon the person, who may appear in opposition to the petition. If the court finds that the demand is proper in form and there is reasonable cause to believe that the person has information or may be in possession, custody or control of any document or other tangible object relevant to a civil investigation for violation of Section 57-1-1 or 57-1-2 NMSA 1978, the court shall order the person to comply with the demand, subject to any modification that the court may prescribe. Upon motion by the person and for good cause shown, the court may make any further protective order in the proceedings that justice requires.

C. Prior to the filing of an action under the provisions of the Antitrust Act for the violation under investigation, any testimony taken or material produced under this section shall be kept confidential by the attorney general unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories or produced material, or disclosure is authorized by the court. All court records, including docket, application, petitions, motions and other papers filed under this section shall be open to inspection only to the attorney general and the person upon whom the demand for which inspection is sought has been served, unless otherwise ordered by the court.

D. Any person compelled to appear under this section and required to testify under oath may be accompanied, represented and advised by counsel. An objection may properly be made, received and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege.

**History:** 1978 Comp., § 57-1-5, enacted by Laws 1979, ch. 374, § 6.

## ANNOTATIONS

**Recompilations.** — Laws 1979, ch. 374, § 18, recompiles former 57-1-5 NMSA 1978, relating to limitation of purchases, as 57-1-18 NMSA 1978.

**Constitutionality of civil investigative demands.** — Constitutional restrictions on government searches and seizures do not impose a requirement that civil investigative demands (CID) issue only upon a reasonable cause to believe that the Antitrust Act has been or is being violated. The federal constitution requires only that for the issuance of an administrative subpoena the inquiry must be within the authority of the agency, the demand must not be too indefinite, and the information must be reasonably relevant to the purposes of the investigation; also, N.M. Const., art. II, § 10 does not require a "probability" showing that the federal constitution does not. Moreover, probable cause does not have the same meaning in the context of administrative searches as it does in the context for searches for evidence of crimes. *Wilson Corp. v. State ex rel. Udall*, 1996-NMCA-049, 121 N.M. 677, 916 P.2d 1344, cert. denied, 121 N.M. 644, 916 P.2d 844, and cert. denied, 519 U.S. 964, 117 S. Ct. 388, 136 L. Ed. 2d 304.

**Requirements for enforcement of civil investigative demands.** — The attorney general need not show reasonable cause to believe that the Antitrust Act has been or is being violated before a court can enforce a civil investigative demand (CID); this section is satisfied if the attorney general makes a sworn showing that: the attorney general is conducting an investigation to determine whether the Antitrust Act has been or is being violated, the information sought is relevant to the investigation, and there is reasonable cause to believe that the recipient of the CID possesses the information. If the attorney general makes the necessary showing, the person challenging the CID bears the burden of establishing some impropriety in the CID, such as the absence of proper use, the privileged nature of the information, or the unreasonable burden imposed by the CID. *Wilson Corp. v. State ex rel. Udall*, 1996-NMCA-049, 121 N.M. 677, 916 P.2d 1344, cert. denied, 121 N.M. 644, 916 P.2d 844, and cert. denied, 519 U.S. 964, 117 S. Ct. 388, 136 L. Ed. 2d 304.

**Summary judgment quashing investigations improper.** — A summary judgment quashing civil investigative demands (CIDs) on the ground that the attorney general's purpose in seeking them was improper was not warranted since the evidence raised genuine questions of material fact regarding the purpose of the CIDs. *Brewer Oil Co. v. State ex rel. Udall*, 1995-NMCA-142, 121 N.M. 106, 908 P.2d 799.

## 57-1-6. Criminal penalty.

A. Any person who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be guilty of a fourth-degree felony and, for conviction thereof, if a person other than an individual, it shall be punished by a fine not to exceed two hundred fifty thousand dollars ($250,000), or, if an individual, imprisonment in the penitentiary for a determinate term of not less than one year nor more than five years, or by the payment of a fine not to exceed fifty thousand dollars ($50,000), or both such imprisonment and fine in the discretion of the court. An indictment must be found or information or complaint must be filed within three years from the time of the violation.

B. No criminal action may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

C. For the purposes of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

**History:** 1978 Comp., § 57-1-6, enacted by Laws 1979, ch. 374, § 7.

**ANNOTATIONS**

**Recompilations.** — Laws 1979, ch. 374, § 18, recompiled former 57-1-6 NMSA 1978, relating to penalties, as 57-1-19 NMSA 1978.

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-7. Civil penalty.

A. The attorney general may bring an action for civil penalties in the name of the state against any person for violation of Section 57-1-1 or 57-1-2 NMSA 1978. Any individual who violates Section 57-1-1 or 57-1-2 NMSA 1978 shall be subject to a civil penalty of not more than fifty thousand dollars ($50,000), or, if a person other than an individual, not to exceed two hundred fifty thousand dollars ($250,000).

B. Any person who fails to comply with a final judgement or decree of a court of this state issued for a violation of the Antitrust Act shall be subject to a civil penalty; if an individual, the penalty shall be not more than fifty thousand dollars ($50,000), or, if a person other than an individual, the penalty shall be not more than two hundred fifty thousand dollars ($250,000).

C. No action for a civil penalty may be brought against any person for the same violation for which such person has been convicted in a criminal proceeding for violation of the federal antitrust laws.

D. For the purposes of Subsections A and B of this section, "individual" means a person other than a corporation, business trust, partnership, association or other governmental or legal entity.

**History:** 1978 Comp., § 57-1-7, enacted by Laws 1979, ch. 374, § 8.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-8. Attorney general; injunctive relief.

The attorney general may bring an action in the name of the state against any person to enjoin, restrain and prevent the doing in this state of any act declared unlawful under Section 57-1-1 or 57-1-2 NMSA 1978.

**History:** 1978 Comp., § 57-1-8, enacted by Laws 1979, ch. 374, § 9.

## 57-1-9. Election of remedies.

The obtaining of a judgement under the Antitrust Act to assess a civil penalty against a person shall be an election of remedies to not bring a criminal prosecution against such person under the Antitrust Act. The institution of a criminal prosecution under that act against a person by filing an information or complaint or returning an indictment shall be an election of remedies not to bring suit to assess a civil penalty against such person under that act.

**History:** 1978 Comp., § 57-1-9, enacted by Laws 1979, ch. 374, § 10.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-10. District attorneys; enforcement.

In order to promote the uniform administration of the Antitrust Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may, on a case-by-case basis, delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power and duty conferred upon the attorney general by this act [57-1-1 to 57-1-3, 57-1-5 to 57-1-19 NMSA 1978].

**History:** 1978 Comp., § 57-1-10, enacted by Laws 1979, ch. 374, § 11.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-11. Judgment in favor of state as prima facie evidence.

A. A final judgment or decree in a civil or criminal proceeding determining that a person has violated Section 57-1-1 or 57-1-2 NMSA 1978 in an action brought by the state is prima facie evidence against such person in any other action against him under the provisions of Section 57-1-3 NMSA 1978 as to all matters with respect to which the judgment or decree would be an estoppel between the parties thereto. This section does not affect the application of collateral estoppel or issue preclusion.

B. For the purposes of Subsection A of this section, "final judgment" or "decree" shall not include a consent judgment or decree entered before any testimony has been

taken at trial in a civil proceeding or a judgment based upon a plea of nolo contendere in a criminal proceeding.

**History:** 1978 Comp., § 57-1-11, enacted by Laws 1979, ch. 374, § 12.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-12. Limitations of actions.

A. An action brought under the provisions of Section 57-1-7 or 57-1-8 NMSA 1978 is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later.

B. An action brought under the provisions of Section 57-1-3 NMSA 1978 to recover damages is barred if it is not commenced within four years after the cause of action accrues or within four years after the plaintiff discovered, or by the exercise of reasonable diligence should have discovered, the facts relied upon for proof of the cause of action, whichever is later. Provided, however, that a cause of action is not barred if it is commenced within one year after the conclusion of a timely action brought by the state under the provisions of Section 57-1-6, 57-1-7 or 57-1-8 NMSA 1978, based in whole or in part on any matter complained of in the action for damages, whichever is later.

C. For the purposes of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.

**History:** 1978 Comp., § 57-1-12, enacted by Laws 1979, ch. 374, § 13.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Time when cause of action accrues for civil action under state antitrust, monopoly, or restraint of trade statutes, 90 A.L.R.4th 1102.

## 57-1-13. Actions involving interstate or foreign commerce.

No action under the Antitrust Act shall be barred on the ground that the activity or conduct complained of in any manner affects or involves interstate or foreign commerce.

**History:** 1978 Comp., § 57-1-13, enacted by Laws 1979, ch. 374, § 14.

## 57-1-14. Remedies cumulative.

Subject to Section 57-1-9 NMSA 1978, the remedies afforded the state under the Antitrust Act shall be cumulative.

**History:** 1978 Comp., § 57-1-14, enacted by Laws 1979, ch. 374, § 15.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-15. Construction.

Unless otherwise provided in the Antitrust Act, the Antitrust Act shall be construed in harmony with judicial interpretations of the federal antitrust laws. This construction shall be made to achieve uniform application of the state and federal laws prohibiting restraints of trade and monopolistic practices.

**History:** 1978 Comp., § 57-1-15, enacted by Laws 1979, ch. 374, § 16.

**ANNOTATIONS**

**Compliance with federal substantive law as it relates to oligopolies.** — To ensure uniform application of federal and state laws in antitrust actions under the Antitrust Act, 57-1-1 to 57-1-15 NMSA 1978, involving oligopolies, such as the tobacco industry, which are by nature interdependent such that it is likely that when one company acts in a certain manner, the other firms will determine whether it is in their best interest to follow the leader's action, plaintiffs must meet the standard of federal substantive law, which requires that to show that there was an unlawful agreement, plaintiffs must present evidence that tends to exclude the possibility that defendants acted independently or plaintiffs cannot meet their burden of establishing a genuine issue of material fact to withstand summary judgment for defendants. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 148 N.M. 713, 242 P.3d 280, *rev'g*, 2009-NMCA-022, 145 N.M. 658, 203 P.3d 873.

**New Mexico looks to federal decisions to determine meaning of "restraint of trade".** *State v. Ray Bell Oil Co.*, 1983-NMCA-068, 101 N.M. 368, 683 P.2d 50, cert. denied, 101 N.M. 362, 683 P.2d 44, appeal dismissed, 469 U.S. 1030, 105 S. Ct. 498, 83 L. Ed. 2d 391 (1984).

**Determining allegations of antitrust arrangements.** — In the absence of New Mexico decisions directly on point, New Mexico courts look to federal cases involving allegations of antitrust arrangements under § 1 of the Sherman Act (15 U.S.C. § 1). *Smith Mach. Corp. v. Hesston, Inc.*, 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-16. [Lawful activities.]

Nothing contained in the Antitrust Act is intended to prohibit actions which are:

A. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and

B. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any proprietary interest in the actions.

**History:** 1978 Comp., § 57-1-16, enacted by Laws 1987, ch. 37, § 3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Repeals and reenactments.** — Laws 1987, ch. 37, § 3, effective June 19, 1987, repeals 57-1-16 NMSA 1978, as enacted by Laws 1979, ch. 374, § 17, and enacts the present section, effective June 19, 1987. For provisions of the former section, *see* 1985 Cumulative Supplement.

**Because collect call telephone rates are under the primary jurisdiction of the New Mexico public regulation commission,** a regulatory agency, the rates are expressly permitted under the statute and, therefore, are not subject to claims under the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., and New Mexico Antitrust Act, Chapter 57, Article 1 NMSA 1978. *Valdez v. State*, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

**Law reviews.** — For article, "New Mexico Antitrust Law," see 9 N.M.L. Rev. 339 (1979).

## 57-1-17. Limitation on recovery of damages.

A. Notwithstanding the provisions of Section 57-1-3 NMSA 1978:

(1) no damages or interest on damages may be recovered under the Antitrust Act from any local government or official or employee thereof acting in an official capacity; provided, however, that in an action for a permanent injunction brought against a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party; and

(2) no damages or interest on damages may be recovered under the Antitrust Act in any claim against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity; provided, however, that in an action for permanent injunction brought against a person based on any official action directed by a local government or official or employee thereof acting in an official capacity, costs and reasonable attorneys' fees may be granted to the prevailing party.

B. As used in this section:

(1) "local government" means:

(a) a city, county or any other general function governmental unit established by state law; or

(b) a school district, sanitary district or any other special function governmental unit established by state law; and

(2) "person" has the meaning given it in Section 57-1-1.2 NMSA 1978 but does not include any local government as defined in Paragraph (1) of this subsection.

**History:** 1978 Comp., § 57-1-17, enacted by Laws 1987, ch. 37, § 4.

**ANNOTATIONS**

**Antitrust Act.** — *See* 57-1-1.1 NMSA 1978 and notes thereto.

**Immunity from liability for antitrust damages.** — An association that is organized under the Sanitary Projects Act, 3-29-1 NMSA 1978, is a special function governmental unit, established by state law, and is immune from damages for liability under the New Mexico Antitrust Act, 57-1-1 NMSA 1978. Moongate Water Co., Inc. v. Dona Ana Mut. Domestic Water Consumers Assn., 2008-NMCA-143, 145 N.M. 140, 194 P.3d 755.

## 57-1-18. Limitation of retail purchases unlawful.

It is unlawful for any merchant to advertise or offer for sale any item of merchandise with a limitation upon the number of the item that any retail purchaser may purchase at the advertised price. It is further unlawful for any merchant offering or advertising any item of merchandise in his place of business at any given price to refuse to sell to any prospective retail purchaser for cash the whole or any part of his stock of such item at such price. However, this section shall not be applicable to a purchaser purchasing for resale.

**History:** 1953 Comp., § 49-1-5, enacted by Laws 1955, ch. 250, § 1; 1957, ch. 30, § 1; 1961, ch. 52, § 1; 1978 Comp., § 57-1-5, recompiled as 1978 Comp., § 57-1-18 by Laws 1979, ch. 374, § 18; 1995, ch. 18, § 1.

**ANNOTATIONS**

**The 1995 amendment,** effective June 16, 1995, inserted "retail" in the section heading and in the first and second sentences, added the final sentence, and made stylistic changes.

**Advertising different prices for small and unlimited quantities not violative.** — Where the advertised price was one or two items at one price and additional items at a higher price and where the informations charged neither a limitation upon the number of items which any purchaser might buy at the advertised price nor a refusal to sell to any prospective purchaser the whole or any part of such items of merchandise at the advertised price, the information in each case failed to charge an offense within the meaning of the words used in this section and orders quashing the informations would be properly entered. *State v. Shop Rite Foods, Inc.*, 1964-NMSC-048, 74 N.M. 55, 390 P.2d 437.

**Law reviews.** — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 C.J.S. Monopolies §§ 62 to 69, 73, 84.

## 57-1-19. [Violation of act; penalty.]

Any person convicted of violating this act [57-1-18, 57-1-19 NMSA 1978] shall be punished by a fine of not more than five hundred dollars ($500) or by imprisonment of not more than ninety days, or by both such fine and imprisonment.

**History:** 1953 Comp., § 49-1-6, enacted by Laws 1955, ch. 250, § 2; 1978 Comp., § 57-1-6, recompiled as 1978 Comp., § 57-1-19 by Laws 1979, ch. 374, § 18.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Law reviews.** — For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 C.J.S. Monopolies § 113.

# ARTICLE 2
# Cigarettes

## 57-2-1 to 57-2-13. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1983, ch. 211, § 42, repealed 57-2-1 to 57-2-13 NMSA 1978, the Cigarette Fair Trade Practices Act, effective July 1, 1983.

## 57-2-14. Clove cigarettes; prohibit.

No person shall knowingly sell or offer for sale in New Mexico any clove cigarettes.

**History:** Laws 1985, ch. 136, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Civil liability for tobacco sales to minors, 55 A.L.R.4th 1238.

## 57-2-15. Penalty.

Any person who violates the provisions of Section 1 [57-2-14 NMSA 1978] of this act is guilty of a petty misdemeanor.

**History:** Laws 1985, ch. 136, § 2.

**ANNOTATIONS**

**Cross references.** — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 2A
# Cigarette Enforcement

## 57-2A-1. Short title.

This act [57-2A-1 to 57-2A-10 NMSA 1978] may be cited as the "Cigarette Enforcement Act".

**History:** Laws 2000, ch. 77, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

**Law reviews.** — For article, "Public Health Protection and the Commerce Clause: Controlling Tobacco in the Internet Age", see 35 N.M.L. Rev. 81 (2005).

## 57-2A-2. Definitions.

As used in the Cigarette Enforcement Act:

A. "cigarette" means any roll of tobacco or any substitute therefor wrapped in paper or any substance other than tobacco;

B. "department" means the taxation and revenue department, the secretary of taxation and revenue or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

C. "importer" means "importer" as that term is defined in 26 USCA 5702(1);

D. "package" means "package" as that term is defined in 15 USCA 1332(4); and

E. "secretary" means the secretary of taxation and revenue.

**History:** Laws 2000, ch. 77, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-3. Prohibited conduct.

It is unlawful for a person to:

A. sell or distribute in this state; acquire, hold, own, possess or transport for sale or distribution in this state; or to import, or cause to be imported, into this state for sale or distribution in this state:

(1) cigarettes, the package of which:

(a) bears a statement, label, stamp, sticker or notice indicating that the manufacturer did not intend the cigarettes to be sold, distributed or used in the United States, including labels that state: "for export only", "U.S. tax exempt", "for use outside U.S." or similar wording; or

(b) does not comply with: 1) all requirements imposed by or pursuant to federal law regarding warnings and other information on packages of cigarettes manufactured, packaged or imported for sale, distribution or use in the United States, including the precise warning labels specified in 15 USCA 1333; and 2) all federal trademark and copyright laws;

(2) cigarettes imported into the United States on or after January 1, 2000 in violation of 26 USCA 5754, any other federal law or federal implementing regulations;

(3) cigarettes that the person acting in regard thereto otherwise knows or has reason to know the manufacturer did not intend to be sold, distributed or used in the United States; or

(4) cigarettes for which there has not been submitted to the secretary of the United States department of health and human services the list or lists of the ingredients added to tobacco in the manufacture of those cigarettes as required by 15 USCA 1335A;

B. alter the package of any cigarettes prior to sale or distribution to the ultimate consumer by removing, concealing or obscuring:

(1) a statement, label, stamp, sticker or notice described in Subparagraph (a) of Paragraph (1) of Subsection A of this section; or

(2) a health warning that is not specified in, or does not conform with the requirements of, 15 USCA 1333; or

C. affix a stamp required pursuant to the Cigarette Tax Act [7-12-1 NMSA 1978] to a package of cigarettes described in Subsection A of this section or altered in violation of Subsection B of this section.

**History:** Laws 2000, ch. 77, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-4. Documentation.

A. On the first business day of each month, each person licensed or registered to affix a state tax stamp to cigarettes pursuant to Section 7-12-9.1 NMSA 1978 shall file with the department for all cigarettes imported into the United States to which the person has affixed a tax stamp in the preceding month:

(1) copies of:

(a) the permit issued pursuant to 26 USCA 5713 to the person importing the cigarettes into the United States allowing the person to import the cigarettes; and

(b) the customs form containing, with respect to the cigarettes, the internal revenue tax information required by the federal bureau of alcohol, tobacco, firearms and explosives;

(2) a statement signed under penalty of perjury by the person affixing the state tax stamp identifying the brand and brand styles of all the cigarettes, the quantity of each brand style, the supplier of the cigarettes and the person to whom the cigarettes were conveyed for resale and a separate statement by that person under penalty of perjury, which is not confidential or exempt from public disclosure, identifying only the brands and the brand styles of the cigarettes; and

(3) a statement signed under penalty of perjury by an officer of the manufacturer or importer of the cigarettes certifying that the manufacturer or importer has complied with the package health warning and ingredient reporting requirements of 15 USCA Sections 1333 and 1335a with respect to the cigarettes, including a statement indicating whether the manufacturer is or is not a participating manufacturer within the meaning of that federal law.

B. Prior to making a delivery sale or mailing, shipping or otherwise delivering cigarettes in connection with a delivery sale, each person shall file with the department and with the attorney general a statement setting forth the person's name and trade name and the address of the person's principal place of business and any other place of business.

C. Not later than the tenth day of each month, each person who has made a delivery sale or mailed, shipped or otherwise delivered cigarettes in connection with a delivery sale during the previous calendar month shall file with the department and with the attorney general a report in the format prescribed by the attorney general, which may include an electronic format, that provides for each delivery sale:

(1) the name and address of the customer to whom the delivery sale was made;

(2) the brand or brands of cigarettes that were sold in the delivery sale; and

(3) the quantity of cigarettes that were sold in the delivery sale.

D. Any person who satisfies the requirements of Section 376 of Title 15 of the United States Code shall be deemed to satisfy the requirements of this section.

E. For purposes of any penalty that may be imposed for a violation of Subsection B or C of this section, a failure to file a particular statement or report with both the department and the attorney general shall constitute a single violation.

**History:** Laws 2000, ch. 77, § 4; 2009, ch. 197, § 23.

**ANNOTATIONS**

**The 2009 amendment,** effective July 1, 2009, in Subsection A, changed Section 7-12-9 NMSA 1978 to Section 7-12-9.1 NMSA 1978; and added Subsections B through E.

## 57-2A-5. Violation of act constitutes an unfair trade practice.

A violation of Section 3 or 4 [57-2A-3 or 57-2A-4 NMSA 1978] of the Cigarette Enforcement Act constitutes an unfair trade practice pursuant to the Unfair Practices Act [57-12-1 NMSA 1978].

**History:** Laws 2000, ch. 77, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-6. Unfair cigarette sales.

For the purposes of the Cigarette Enforcement Act, cigarettes imported or reimported into the United States for sale or distribution under a trade name, trade dress or trademark that is the same as, or is confusingly similar to, a trade name, trade dress or trademark used for cigarettes manufactured in the United States for sale or distribution in the United States is presumed to have been purchased outside of the ordinary channels of trade.

**History:** Laws 2000, ch. 77, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-7. Criminal penalties for violation.

A. A person who knowingly commits an act prohibited by Section 3 [57-2A-3 NMSA 1978] of the Cigarette Enforcement Act is guilty of a fourth degree felony and upon conviction shall be sentenced in accordance with Section 31-18-15 NMSA 1978.

B. A person who fails to comply with a requirement of Section 4 [57-2A-4 NMSA 1978] of the Cigarette Enforcement Act is guilty of a fourth degree felony and upon conviction shall be sentenced in accordance with Section 31-18-15 NMSA 1978.

**History:** Laws 2000, ch. 77, § 7.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-8. Administrative penalties for violation.

A. The secretary may revoke or suspend the registration or license of a person licensed or registered pursuant to Section 7-12-9 NMSA 1978 who violates Section 3 or 4 [57-2A-3 or 57-2A-4 NMSA 1978] of the Cigarette Enforcement Act. The decision to revoke or suspend shall be taken and is subject to review in accordance with the Tax Administration Act [7-1-1 NMSA 1978].

B. Cigarettes acquired, held, owned, possessed, transported in, imported into or sold or distributed in this state in violation of the Cigarette Enforcement Act are contraband and are subject to seizure, forfeiture and destruction by the department or a law enforcement agency.

**History:** Laws 2000, ch. 77, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-9. Applicability.

The provisions of the Cigarette Enforcement Act do not apply to:

A. cigarettes allowed to be imported or brought into the United States for personal use free of federal tax or duty or voluntarily abandoned to the federal secretary of the treasury at the time of entry; and

B. cigarettes sold or intended to be sold as duty-free merchandise by a duty-free sales enterprise in accordance with the provisions of 19 USCA 1555(b) and implementing regulations, but if the cigarettes are brought back in customs territory for resale within the customs territory, the provisions of that act apply.

**History:** Laws 2000, ch. 77, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2000, ch. 77, § 11 made the Cigarette Enforcement Act effective July 1, 2000.

## 57-2A-10. General provisions.

A. The Cigarette Enforcement Act shall be enforced by the department and the attorney general; provided that, at the request of the department, the state police and all local police authorities shall enforce the provisions of the Cigarette Enforcement Act.

B. For the purpose of enforcing the Cigarette Enforcement Act, the department or the attorney general may request information from any state or local agency, and may share information with, and request information from, any federal agency and any agency of any other state or any local agency thereof.

C. In addition to any other remedy provided by law, including enforcement as provided in Subsection A of this section, any person may bring an action for appropriate injunctive or other equitable relief for a violation of the Cigarette Enforcement Act; actual damages, if any, sustained by reason of the violation; and, as determined by the court, interest on the damages from the date of the complaint, taxable costs and reasonable attorney fees. If the trier of fact finds that the violation is flagrant, it may increase recovery to an amount not in excess of three times the actual damages sustained by reason of the violation.

**History:** Laws 2000, ch. 77, § 10; 2009, ch. 197, § 24.

**ANNOTATIONS**

**The 2009 amendment,** effective July 1, 2009, in Subsection A, after "enforced by the department", added "and the attorney general"; and in Subsection B, after "the department", added "or the attorney general".

# ARTICLE 2B
# Fire-Safer Cigarette and Firefighter Protection

## 57-2B-1. Short title.

This act [57-2B-1 to 57-2B-12 NMSA 1978] may be cited as the "Fire-Safer Cigarette and Firefighter Protection Act".

**History:** Laws 2009, ch. 265, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 1 effective January 1, 2010.

## 57-2B-2. Definitions.

As used in the Fire-Safer Cigarette and Firefighter Protection Act:

A. "agent" means any person authorized by the taxation and revenue department to purchase and affix stamps on packages of cigarettes;

B. "cigarette" means:

(1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or

(2) any roll of tobacco wrapped in any substance containing tobacco that, because of its appearance, the type of tobacco used in the filler or its packaging and labeling, is likely to be offered to or purchased by consumers as a cigarette as described in Paragraph (1) of this subsection;

C. "manufacturer" means:

(1) any entity that manufactures or otherwise produces cigarettes or causes cigarettes to be manufactured or produced that are intended to be sold in New Mexico, including cigarettes intended to be sold in New Mexico through an importer; or

(2) any entity that becomes a successor of an entity described in Paragraph (1) of this subsection;

D. "quality control and assurance program" means the laboratory procedures implemented to ensure that operator bias, systematic and nonsystematic methodological errors and equipment-related problems do not affect the results of the testing and that the testing repeatability remains within the required repeatability values in Subsection C of Section 3 [57-2B-3 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act for all test trials used to certify cigarettes under that act;

E. "repeatability" means the range of values within which the repeat results of cigarette test trials from a single laboratory will fall ninety-five percent of the time;

F. "retail dealer" means any person, other than a manufacturer or wholesale dealer, engaged in selling cigarettes or tobacco products;

G. "sale" or "sell" means a transfer of or an offer or agreement to transfer title or possession by exchange, barter or any other means. In addition to cash and credit sales, giving cigarettes as samples, prizes or gifts and exchanging cigarettes for any consideration other than money is a "sale"; and

H. "wholesale dealer" means any person other than a manufacturer who sells cigarettes or tobacco products to retail dealers or other persons for purposes of resale and any person who owns, operates or maintains one or more cigarette or tobacco product vending machines on premises owned or occupied by another person.

**History:** Laws 2009, ch. 265, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 2 effective January 1, 2010.

## 57-2B-3. Test method and performance standard.

A. Except as provided in Subsection K of this section, cigarettes shall not be sold or offered for sale in New Mexico unless:

(1) the cigarettes have been tested in accordance with the test method and meet the performance standard specified in this section;

(2) a written certification has been filed by the manufacturer with the state fire marshal in accordance with Section 4 [57-2B-4 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act; and

(3) the cigarettes have been marked in accordance with Section 5 [57-2B-5 NMSA 1978] of that act.

B. Testing of cigarettes shall be conducted in accordance with the American society of testing and materials standard E2187-04 standard test method for measuring the ignition strength of cigarettes and shall be conducted on ten layers of filter paper. No more than twenty-five percent of the cigarettes tested in a test trial in accordance with this section shall exhibit full-length burns. Forty replicate tests shall constitute a complete test trial for each cigarette tested. The performance standard required by this section shall only be applied to a complete test trial. Written certifications shall be based upon testing conducted by a laboratory that has been accredited pursuant to standard ISO/IEC 17025 of the international organization for standardization or other comparable accreditation standard required by the state fire marshal.

C. Laboratories conducting testing in accordance with this section shall implement a quality control and quality assurance program that includes a procedure that will determine the repeatability of the testing results. The repeatability value shall be no greater than 0.19.

D. Testing performed or sponsored by the state fire marshal to determine a cigarette's compliance with the performance standard required by this section shall be conducted in accordance with this section.

E. This section does not require additional testing if cigarettes are tested consistent with the Fire-Safer Cigarette and Firefighter Protection Act for any other purpose.

F. Each cigarette listed in a certification submitted pursuant to Section 4 of the Fire-Safer Cigarette and Firefighter Protection Act that uses lowered permeability bands in the cigarette paper to achieve compliance with the performance standard set forth in

this section shall have at least two nominally identical bands on the paper surrounding the tobacco column. At least one complete band shall be located at least fifteen millimeters from the lighting end of the cigarette. For cigarettes on which the bands are positioned by design, there shall be at least two bands fully located at least fifteen millimeters from the lighting end and ten millimeters from the filter end of the tobacco column or ten millimeters from the labeled end of the tobacco column for non-filtered cigarettes.

G. A manufacturer of a cigarette that the state fire marshal determines cannot be tested in accordance with the test method prescribed in Subsection B of this section shall propose a test method and performance standard for the cigarette to the state fire marshal. Upon approval of the proposed test method and a determination by the state fire marshal that the performance standard proposed by the manufacturer is equivalent to the performance standard prescribed in Subsection B of this section, the manufacturer may employ that test method and performance standard to certify the cigarette pursuant to Section 4 of the Fire-Safer Cigarette and Firefighter Protection Act. If the state fire marshal determines that another state has enacted reduced cigarette ignition propensity standards that include a test method and performance standard that are the same as those contained in the Fire-Safer Cigarette and Firefighter Protection Act, and the state fire marshal finds that the officials responsible for implementing those requirements have approved the proposed alternative test method and performance standard for a particular cigarette proposed by a manufacturer as meeting the fire safety standards of that state's law or regulation under a legal provision comparable to this section, the state fire marshal shall authorize that manufacturer to employ the alternative test method and performance standard to certify that cigarette for sale in New Mexico, unless the state fire marshal demonstrates a reasonable basis why the alternative test should not be accepted under the Fire-Safer Cigarette and Firefighter Protection Act. All other applicable requirements of this section shall apply to the manufacturer.

H. Each manufacturer shall maintain copies of the reports of all tests conducted on all cigarettes offered for sale for a period of three years and shall make copies of the reports available to the state fire marshal and the attorney general upon written request. Any manufacturer who fails to make copies of the reports available within sixty days of receiving a written request may be assessed a civil penalty not to exceed ten thousand dollars ($10,000) for each day after the sixtieth day that the manufacturer does not make the copies available.

I. The state fire marshal may adopt a subsequent American society of testing and materials standard test method for measuring the ignition strength of cigarettes upon a finding that the subsequent method does not result in a change in the percentage of full-length burns exhibited by any tested cigarette when compared to the percentage of full-length burns the same cigarette would exhibit when tested in accordance with the American society of testing and materials standard E2187-04 and the performance standard in Subsection B of this section.

J. The state fire marshal shall review the effectiveness of this section and report findings and make recommendations to the legislature every three years.

K. The requirements of Subsection A of this section shall not prohibit:

(1) wholesale or retail dealers from selling their existing inventory of cigarettes on or after the effective date of this section if the wholesale or retail dealer can establish that state tax stamps were affixed to the cigarettes prior to the effective date and the wholesale or retail dealer can establish that the inventory was purchased prior to the effective date in comparable quantity to the inventory purchased during the same period of the prior year; or

(2) the sale of cigarettes solely for the purpose of consumer testing. For purposes of this subsection, the term "consumer testing" means an assessment of cigarettes that is conducted by a manufacturer, or under the control and direction of a manufacturer, for the purpose of evaluating consumer acceptance of the cigarettes, utilizing only the quantity of cigarettes that is reasonably necessary for an assessment.

L. The Fire-Safer Cigarette and Firefighter Protection Act shall be interpreted and construed to effectuate its general purpose and to make that act uniform with the laws of those states that have enacted reduced cigarette ignition propensity laws as of the date that the Fire-Safer Cigarette and Firefighter Protection Act is enacted.

**History:** Laws 2009, ch. 265, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 3 effective January 1, 2010.

## 57-2B-4. Certification and product change.

A. Each manufacturer shall submit to the state fire marshal a written certification attesting that each cigarette listed in the certification has been tested in accordance with the test method and meets the performance standard in Section 3 [57-2B-3 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act.

B. Each cigarette listed in the certification shall be described with the following information:

(1) the brand or the trade name on the package;

(2) the style, such as light or ultralight;

(3) the length in millimeters;

(4) the circumference in millimeters;

(5) the flavor, such as menthol or chocolate, if applicable;

(6) whether the cigarette has a filter or is a nonfilter cigarette;

(7) the package description, such as soft pack or box;

(8) the marking pursuant to Section 5 [57-2B-5 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act;

(9) the name, address and telephone number of the laboratory, if different than the manufacturer that conducted the test; and

(10) the date that the testing occurred.

C. The state fire marshal shall verify that the manufacture's certifications have been received by the state fire marshal and shall make the verified certifications available to the attorney general for purposes consistent with the Fire-Safer Cigarette and Firefighter Protection Act and to the taxation and revenue department for the purposes of ensuring compliance with this section.

D. Each cigarette certified under this section shall be recertified every three years.

E. For each cigarette listed in a certification, a manufacturer shall pay to the state fire marshal a fee of two hundred fifty dollars ($250). The state fire marshal may adjust the amount of the fee by rule on an annual basis as necessary to defray the costs of processing, testing, enforcement and oversight activities required by the Fire-Safer Cigarette and Firefighter Protection Act, but in no case shall the fee exceed four hundred dollars ($400). The state fire marshal may establish the amount of the fee by rule on an annual basis.

F. If a manufacturer has certified a cigarette pursuant to this section, and thereafter makes any change to the cigarette that is likely to alter its compliance with the reduced cigarette ignition propensity standards required by the Fire-Safer Cigarette and Firefighter Protection Act, that cigarette shall not be sold or offered for sale in New Mexico until the manufacturer retests the cigarette in accordance with the testing standards set forth in Section 3 of that act and maintains records of that retesting as required by Section 3 of that act. Any altered cigarette that does not meet the performance standard set forth in Section 3 of that act shall not be sold in New Mexico.

**History:** Laws 2009, ch. 265, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 4 effective January 1, 2010.

## 57-2B-5. Marking of cigarette packaging.

A. Cigarettes that are certified by a manufacturer in accordance with the Fire-Safer Cigarette and Firefighter Protection Act shall be marked to indicate compliance with that act. The marking shall be in eight-point type or larger and consist of the letters "FSC", which signifies fire standard compliant, and shall be permanently printed, stamped, engraved or embossed on the package at or near the universal product code.

B. A manufacturer shall use only one marking and shall apply this marking uniformly for all packages, including packs, cartons and cases, and for brands marketed by that manufacturer.

C. A manufacturer certifying cigarettes in accordance with Section 4 [57-2B-4 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act shall provide a copy of the certifications to all wholesale dealers and agents to which it sells cigarettes. Wholesale dealers, agents and retail dealers shall permit the state fire marshal, the taxation and revenue department and the attorney general to inspect markings of cigarette packaging marked in accordance with this section.

**History:** Laws 2009, ch. 265, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 5 effective January 1, 2010.

## 57-2B-6. Penalties.

A. A manufacturer, wholesale dealer, agent or any other person who knowingly sells cigarettes, other than through retail sales, in violation of Section 3 [57-2B-3 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act may be assessed a civil penalty not to exceed one hundred dollars ($100) for each pack of the cigarettes sold; provided that in no case shall the penalty against any person or entity exceed one hundred thousand dollars ($100,000) for sales during any thirty-day period.

B. A retail dealer who knowingly sells cigarettes in violation of Section 3 of the Fire-Safer Cigarette and Firefighter Protection Act may be assessed a civil penalty not to exceed one hundred dollars ($100) for each pack of the cigarettes sold; provided that in no case shall the penalty against any retail dealer exceed twenty-five thousand dollars ($25,000) for sales during any thirty-day period.

C. In addition to any penalty prescribed by law, any corporation, partnership, sole proprietor, limited partnership or association engaged in the manufacture of cigarettes

that knowingly makes a false certification pursuant to Section 4 [57-2B-4 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act may be assessed a civil penalty of at least seventy-five thousand dollars ($75,000), not to exceed two hundred fifty thousand dollars ($250,000) for each false certification.

D. A person violating any other provision of the Fire-Safer Cigarette and Firefighter Protection Act may be assessed a civil penalty for a first offense not to exceed one thousand dollars ($1,000), and for a subsequent offense subject to a civil penalty not to exceed five thousand dollars ($5,000) for each violation.

E. Whenever a law enforcement agency or duly authorized representative of the state fire marshal discovers any cigarettes for which no certification has been filed as required by Section 4 of the Fire-Safer Cigarette and Firefighter Protection Act or that have not been marked as required by Section 5 [57-2B-5 NMSA 1978] of that act, the state fire marshal or law enforcement agency may seize and take possession of the cigarettes. Cigarettes seized pursuant to this section shall be destroyed; provided, however, that, prior to the destruction of any cigarette seized pursuant to these provisions, the attorney general and the true holder of the trademark rights in the cigarette brand shall be permitted to inspect the cigarettes.

F. In addition to any other remedy provided by law, the attorney general may file an action in district court for a violation of the Fire-Safer Cigarette and Firefighter Protection Act, including petitioning for preliminary or permanent injunctive relief or to recover costs, damages and attorney fees. Each violation of the Fire-Safer Cigarette and Firefighter Protection Act or of rules or regulations adopted under that act constitutes a separate civil violation for which the state fire marshal or attorney general may obtain relief. Upon obtaining judgment for injunctive relief under this section, the state fire marshal or attorney general shall provide a copy of the judgment to all wholesale dealers and agents to which a cigarette has been sold.

**History:** Laws 2009, ch. 265, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 6 effective January 1, 2010.

## 57-2B-7. Implementation.

A. The state fire marshal may promulgate rules pursuant to the Administrative Procedures Act [12-8-1 NMSA 1978], necessary to effectuate the purposes of the Fire-Safer Cigarette and Firefighter Protection Act and for inspection, seizure and destruction of cigarettes pursuant to the Forfeiture Act [31-27-1 NMSA 1978].

B. The taxation and revenue department in the regular course of conducting inspections of wholesale dealers, agents and retail dealers, pursuant to the Cigarette

Tax Act [7-12-1 NMSA 1978], may inspect cigarettes to determine if the cigarettes are marked as required by Section 5 [57-2B-5 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act. If the cigarettes are not marked as required, the taxation and revenue department shall notify the state fire marshal.

**History:** Laws 2009, ch. 265, § 7.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made the provisions of Laws 2009, ch. 265, § 7 effective June 19, 2009.

## 57-2B-8. Inspection.

To enforce the provisions of the Fire-Safer Cigarette and Firefighter Protection Act, the attorney general, the taxation and revenue department and the state fire marshal, their duly authorized representatives and other law enforcement personnel may examine the books, papers, invoices and other records of any person in possession, control or occupancy of premises where cigarettes are placed, stored, sold or offered for sale, as well as the stock of cigarettes on the premises. Every person in the possession, control or occupancy of premises where cigarettes are placed, sold or offered for sale is hereby directed and required to give the attorney general, the taxation and revenue department and the state fire marshal and other law enforcement personnel the means, facilities and opportunity for the examinations authorized by this section.

**History:** Laws 2009, ch. 265, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 8 effective January 1, 2010.

## 57-2B-9. Fire-Safer Cigarette and Firefighter Protection Act fund.

The "fire-safer cigarette and firefighter protection fund" is created in the state treasury. The fund consists of appropriations, income from investment of the fund, money otherwise accruing to the fund, certification fees paid under Section 4 [57-2B-4 NMSA 1978] of the Fire-Safer Cigarette and Firefighter Protection Act and money recovered as penalties under Section 6 [57-2B-6 NMSA 1978] of that act. Money in the fund shall not revert to any other fund at the end of a fiscal year. Money in the fund is appropriated to the state fire marshal to enforce the Fire-Safer Cigarette and Firefighter Protection Act and to support fire safety and prevention programs and shall be disbursed on warrants signed by the secretary of finance and administration pursuant to vouchers signed by the state fire marshal or the state fire marshal's authorized representative.

**History:** Laws 2009, ch. 265, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 9 effective January 1, 2010.

## 57-2B-10. Sale outside of New Mexico.

Nothing in the Fire-Safer Cigarette and Firefighter Protection Act shall be construed to prohibit a person or entity from manufacturing or selling cigarettes that do not meet the requirements of Section 3 [57-2B-3 NMSA 1978] of that act if the cigarettes are or will be stamped for sale in another state or are packaged for sale outside the United States and that person or entity has taken reasonable steps to ensure that the cigarettes will not be sold or offered for sale to persons located in New Mexico.

**History:** Laws 2009, ch. 265, § 10.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 10 effective January 1, 2010.

## 57-2B-11. Contingent repeal.

The Fire-Safer Cigarette and Firefighter Protection Act is repealed, effective on the date that the New Mexico compilation commission receives certification from the state fire marshal that the federal government has adopted or enacted a reduced cigarette ignition propensity standard and that the standard is in effect.

**History:** Laws 2009, ch. 265, § 11.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 11 effective January 1, 2010.

## 57-2B-12. State preemption.

Cities, counties, home rule municipalities and other political subdivisions of the state shall not adopt or continue in effect any ordinance, rule, regulation, resolution or statute on cigarette testing and standards. The Fire-Safer Cigarette and Firefighter Protection Act preempts any local law, ordinance or regulation that conflicts with any provision of that act or any policy of the state of New Mexico implemented in accordance with that act, and, notwithstanding any other provision of law, a governmental unit of the state of

New Mexico shall not enact or enforce an ordinance, local law or regulation conflicting with or preempted by that act.

**History:** Laws 2009, ch. 265, § 12.

**ANNOTATIONS**

**Effective dates.** — Laws 2009, ch. 265, § 13 made Laws 2009, ch. 265, § 12 effective June 19, 2009.

# ARTICLE 2C
# Nicotine Liquid

## 57-2C-1. Child-resistant packaging for nicotine liquid.

A. No person shall sell or offer to sell any nicotine liquid container at retail in this state unless such container is child-resistant.

B. The attorney general may institute a civil action in district court for a violation of the provisions of this section or to prevent a violation of the provisions of this section. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including a civil penalty not to exceed one thousand dollars ($1,000) for each violation.

C. As used in this section:

(1) "child-resistant" means a package or container that is designed or constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time and not difficult for normal adults to use properly, but does not mean a package or container that all such children cannot open or obtain a toxic or harmful amount within a reasonable time;

(2) "electronic delivery device" means any electronic device, whether composed of a heating element and battery or an electronic circuit, that provides a vapor of nicotine, the use or inhalation of which simulates smoking; and

(3) "nicotine liquid container":

(a) means a bottle or container of a liquid or other substance containing nicotine where the liquid or substance is sold, marketed or intended for use in an electronic delivery device; but

(b) does not include a liquid or other substance containing nicotine in a cartridge that is sold, marketed or intended for use in a cartridge that is sold, marketed

or intended for use in an electronic delivery device; provided that such cartridge is pre-filled and sealed by the manufacturer and is not intended to be opened by the consumer.

**History:** Laws 2015, ch. 76, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2015, ch. 76 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2015, 90 days after the adjournment of the legislature.

# ARTICLE 3
# Trademarks

## 57-3-1. Repealed.

**History:** 1953 Comp., § 49-4-6, enacted by Laws 1969, ch. 142, § 1; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-1 NMSA 1978, as enacted by Laws 1969, ch. 142, § 1, relating to the short title, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-2. Repealed.

**History:** 1953 Comp., § 49-4-7, enacted by Laws 1959, ch. 345, § 1; 1977, ch. 144, § 1; 1991, ch. 38, § 1; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-2 NMSA 1978, as enacted by Laws 1959, ch. 345, § 1, relating to application for registration, submission of printed facsimile and written description, acknowledgement, filing, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-3. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1991, ch. 38, § 3 repealed 57-3-3 NMSA 1978, as enacted by Laws 1977, ch. 144, § 2, relating to the issuance of certificate for trade name, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

## 57-3-4. Repealed.

**History:** 1953 Comp., § 49-4-8, enacted by Laws 1959, ch. 345, § 2; 1971, ch. 141, § 1; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-4 NMSA 1978, as enacted by Laws 1959, ch. 345, § 2, relating to filing application, fee, certificate of registration, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-5. Repealed.

**History:** 1953 Comp., § 49-4-8.1, enacted by Laws 1969, ch. 142, § 2; 1971, ch. 141, § 2; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-5 NMSA 1978, as enacted by Laws 1969, ch. 142, § 2, relating to assignment, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-6. Repealed.

**History:** 1953 Comp., § 49-4-9, enacted by Laws 1959, ch. 345, § 3; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-6 NMSA 1978, as enacted by Laws 1959, ch. 345, § 3, relating to items, packages or establishment to show mark or name, unlawful to use for purposes of deceit, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-7. Repealed.

**History:** 1953 Comp., § 49-4-10, enacted by Laws 1959, ch. 345, § 4; 1969, ch. 142, § 3; 1971, ch. 141, § 3; 1991, ch. 38, § 2; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-7 NMSA 1978, as enacted by Laws 1959, ch. 345, § 4, relating to duration of registration, renewal, fee, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-8. Repealed.

**History:** 1953 Comp., § 49-4-11, enacted by Laws 1969, ch. 142, § 4; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-8 NMSA 1978, as enacted by Laws 1969, ch. 142, § 4, relating to fraudulent registration, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-9. Repealed.

**History:** 1953 Comp., § 49-4-11.1, enacted by Laws 1969, ch. 142, § 5; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-9 NMSA 1978, as enacted by Laws 1969, ch. 142, § 5, relating to infringement, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-10. Repealed.

**History:** 1953 Comp., § 49-4-11.2, enacted by Laws 1969, ch. 142, § 6; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-10 NMSA 1978, as enacted by Laws 1969, ch. 142, § 6, relating to injury to business reputation, dilution, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on

*NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-11. Repealed.

**History:** 1953 Comp., § 49-4-11.3, enacted by Laws 1969, ch. 142, § 7; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-11 NMSA 1978, as enacted by Laws 1969, ch. 142, § 7, relating to remedies, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-12. Repealed.

**History:** 1953 Comp., § 49-4-12, enacted by Laws 1959, ch. 345, § 6; repealed by Laws 1997, ch. 197, § 17.

**ANNOTATIONS**

**Repeals.** — Laws 1997, ch. 197, § 17 repealed 57-3-12 NMSA 1978, as enacted by Laws 1959, ch. 345, § 6, relating to common-law rights unaffected, effective July 1, 1997. For provisions of former section, *see* the 1996 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* Chapter 57, Article 3B NMSA 1978.

## 57-3-13. Laundry service trademarks; registration.

A. Any person or firm supplying clean laundered articles which are the supplier's property, periodically exchanging clean articles for soiled for a fixed compensation, may adopt, register and use a trademark or trade name in accordance with the Trademark Act [57-3B-1 to 57-3B-17 NMSA 1978] and reproduce it as a mark of ownership on the laundered articles.

B. To qualify under this section, any person or firm using or intending to use a trademark or trade name for the purpose described in Subsection A of this section shall so notify the secretary of state. Upon the notification, which may be made at the time of application, the secretary of state or his authorized representative shall note the words "laundry service mark" on the application for initial issuance or renewal of the trademark or trade name registration.

The fee for such endorsement of the application for registration is ten dollars ($10.00) payable to the secretary of state. This fee is in addition to any other trademark

or trade name filing fee, and is due at the time of initial endorsement and at each renewal of the registration.

**History:** 1953 Comp., § 49-4-13, enacted by Laws 1971, ch. 218, § 1.

## 57-3-14. Laundry service trademarks; penalty.

A. It is a petty misdemeanor for any person or firm, except the registrant, any person or firm having the written consent of the registrant or any person or firm having purchased the articles from the registrant, to:

(1) sell, buy, rent, give, take or otherwise traffic in any articles provided as part of a laundry service bearing a trademark or trade name registered as a laundry service mark; or

(2) obliterate or otherwise conceal or remove from any articles provided as part of a laundry service a trademark or trade name registered as a laundry service mark.

B. The registrant's acceptance of any sum of money as a deposit to secure the safekeeping and return of any articles bearing a trademark or trade name registered as a laundry service mark does not constitute a sale of the articles.

C. The use or possession by any person or firm other than the registrant, without the written consent provided in this section, of any articles bearing a trademark or trade name registered as a laundry service mark is presumptive evidence of unlawful use of, or traffic in, such articles. Any person or any member of a firm, corporation or association which has acquired the articles, by purchase or otherwise, with the registrant's written consent is not required to register the trademark or trade name again, but acquires the same rights and benefits as the vendor.

**History:** 1953 Comp., § 49-4-14, enacted by Laws 1971, ch. 218, § 2.

# ARTICLE 3A
# Uniform Trade Secrets

## 57-3A-1. Short title.

Sections 1 through 7 [57-3A-1 to 57-3A-7 NMSA 1978] of this act may be cited as the "Uniform Trade Secrets Act".

**History:** Laws 1989, ch. 156, § 1.

**ANNOTATIONS**

**Law reviews.** — For article, "Secrecy and Innovation In Tort Law And Regulation," see 23 N.M.L. Rev. 1 (1993).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 1114 et seq.

Discovery of trade secret in state court action, 75 A.L.R.4th 1009.

What constitutes "trade secrets and commercial or financial information obtained from person and privileged or confidential," exempt from disclosure under Freedom of Information Act (5 USCS § 552 (b)(4)) (FOIA), 139 A.L.R. Fed. 225.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 13, 121, 122.

## 57-3A-2. Definitions.

As used in the Uniform Trade Secrets Act:

A. "improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means;

B. "misappropriation" means:

(1) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) disclosure of use of a trade secret of another without express or implied consent by a person who:

(a) used improper means to acquire knowledge of the trade secret; or

(b) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: 1) derived from or through a person who had utilized improper means to acquire it; 2) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or 3) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(c) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake;

C. "person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency or any other legal or commercial entity; and

D. "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

**History:** Laws 1989, ch. 156, § 2.

**ANNOTATIONS**

**Trade secret.** — A database of information about medical professionals and medical facilities, that was developed over many years and at considerable expense and that contained information that went beyond an employee's general skills and knowledge and recollection of client preferences, and what one could easily obtain by consulting a telephone directory, constituted a trade secret. *Rapid Temps, Inc. v. Lamon*, 2008-NMCA-122, 144 N.M. 804, 192 P.3d 799.

**The essential elements of a trade secret** are confidentiality and value. *Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982, *aff'd on other grounds*, 2008-NMSC-049, 144 N.M. 601, 190 P.3d 322.

**"Trade secrets".** — General skills and knowledge do not rise to the level of trade secrets. *Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, 128 N.M. 611, 995 P.2d 1053.

## 57-3A-3. Injunctive relief.

A. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

B. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

C. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by a court order.

**History:** Laws 1989, ch. 156, § 3.

**ANNOTATIONS**

**Injunctive relief was proper.** — Where plaintiffs sued defendant, a former employee, alleging he violated the New Mexico Uniform Trade Secrets Act, NMSA 1978, §§ 57-3A-1 through -7, and that he breached his employment agreement, his duty of good faith and fair dealing, and his fiduciary duty to plaintiffs, and where the district court entered a judgment and a permanent injunction requiring defendant to return any employer materials in his possession and preventing him from using or disclosing to others any of plaintiffs' trade secrets or confidential information, there was sufficient evidence to support injunctive relief where defendant possessed plaintiffs' trade secrets and wrongfully refused to return them after plaintiffs demanded their return. *Lasen, Inc. v. Tadjikov*, 2020-NMCA-006, cert. denied.

**Permanent injunction was improper.** — Where plaintiffs sued defendant, a former employee, alleging he violated the New Mexico Uniform Trade Secrets Act, §§ 57-3A-1 through -7 NMSA 1978, and that he breached his employment agreement, his duty of good faith and fair dealing, and his fiduciary duty to plaintiffs, and where the district court entered a judgment and a permanent injunction requiring defendant to return any employer materials in his possession and preventing him from using or disclosing to others any of plaintiffs' trade secrets or confidential information, the district court abused its discretion in issuing the permanent injunction because the parties' employment contract only imposed a five-year post-termination period of confidentiality. The injunction should not have extended defendant's obligation not to disclose plaintiffs' trade secrets and confidential information beyond the time that plaintiffs agreed was proper. *Lasen, Inc. v. Tadjikov*, 2020-NMCA-006, cert. denied.

## 57-3A-4. Damages.

A. Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complaintant [complainant] is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

B. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not to exceed twice any award made under Subsection A of this section.

**History:** Laws 1989, ch. 156, § 4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-3A-5. Attorneys' fees.

A. The court of proper jurisdiction may award reasonable attorneys' fees to the prevailing party if:

(1) a claim of misappropriation is made in bad faith;

(2) a motion to terminate an injunction is made or resisted in bad faith; or

(3) willful and malicious misappropriation exists.

**History:** Laws 1989, ch. 156, § 5.

**ANNOTATIONS**

**Compiler's notes.** — There is no Subsection B in this section as it appears in the 1989 printed act.

## 57-3A-6. Preservation of secrecy.

In an action under the Uniform Trade Secrets Act, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

**History:** Laws 1989, ch. 156, § 6.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** What constitutes "trade secrets and commercial or financial information obtained from person and privileged or confidential," exempt from disclosure under Freedom of Information Act (5 USCS § 552 (b)(4)) (FOIA), 139 A.L.R. Fed. 225.

## 57-3A-7. Statute of limitations.

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purpose of this section, a continuing misappropriation constitutes a single claim.

**History:** Laws 1989, ch. 156, § 7.

# ARTICLE 3B
# Trademarks

## 57-3B-1. Short title.

This act [57-3B-1 to 57-3B-17 NMSA 1978] may be cited as the "Trademark Act".

**History:** Laws 1997, ch. 197, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Trademark licensor's liability for injury or death allegedly due to defect in licensed product, 90 A.L.R.4th 981.

Application of secondary meaning test in action for trademark or tradename infringement under § 43(a) of the Lanham Act (15 USCS § 1125(a)), 86 A.L.R. Fed. 489.

Liability as vicarious or contributory infringer under Lanham Act - modern cases, 152 A.L.R. Fed. 573.

## 57-3B-2. Purpose and intent of act.

The purpose of the Trademark Act is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the Trademark Act of 1946, as amended. It is the intent that the construction given the federal act should be examined as persuasive authority for interpreting and construing the Trademark Act.

**History:** Laws 1997, ch. 197, § 2.

**ANNOTATIONS**

**Cross references.** — For the federal Trademark Act of 1946, *see* 15 U.S.C. § 1051 et seq.

**Scope of the article.** — Article 3B lacks any provision expressly retaining common-law trademark rights. It is thus likely that trademark infringement claims must be based on trademarks recognized under federal trademark law or the New Mexico Trademark Act. To the extent that such a claim exists, however, it is likely to have the same elements as a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1051 et seq. *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 708 F.Supp.2d 1209 (D.N.M. 2010).

## 57-3B-3. Definitions.

As used in the Trademark Act:

A. "applicant" includes the person filing an application for registration of a mark under the Trademark Act as well as the legal representatives, successors or assigns of the person;

B. "dilution" means the lessening of the capacity of the registrant's mark to identify and distinguish goods or services regardless of the presence or absence of:

(1) competition between the parties; or

(2) the likelihood of confusion, mistake or deception;

C. "mark" includes any trademark or service mark entitled to registration under the Trademark Act whether registered or not;

D. "person" and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of the Trademark Act, includes a juristic person as well as a natural person; "juristic person" includes a firm, partnership, corporation, union, association or other organization capable of suing and being sued in a court of law;

E. "registrant" includes the person to whom the registration of a mark under the Trademark Act is issued as well as the legal representative, successors or assigns of the person;

F. "secretary" means the secretary of state or the secretary's designee charged with the administration of the Trademark Act;

G. "service mark" means any word, name, symbol, device or any combination of these used by a person to identify and distinguish the services of one person, including a unique service, from the services of other persons and to indicate the source of the services, even if that source is unknown; provided, titles and character names used by a person and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they or the programs may advertise the goods of the sponsor;

H. "trademark" means any word, name, symbol, device or any combination of these used by a person to identify and distinguish the goods of the person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown;

I. "trade name" means any name used by a person to identify a business or vocation of the person; and

J. "use" means the bona fide use of a mark in the ordinary course of trade and not made merely to reserve a right in the mark. For the purposes of the Trademark Act, a mark is deemed to be in use:

(1) on goods when it is placed in any manner on the goods or on the containers or the displays associated with it or on the tags or labels affixed to them, or if the nature of the goods makes the placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

**History:** Laws 1997, ch. 197, § 3.

## 57-3B-4. Registrability.

A. A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it:

(1) consists of or comprises immoral, deceptive or scandalous matter;

(2) consists of or comprises matter that may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs or national symbols or that may bring them into contempt or disrepute;

(3) consists of or comprises the flag, coat of arms or other insignia of the United States or of any state, municipality, foreign nation or any simulation of these;

(4) consists of or comprises the name, signature or portrait identifying a particular living individual, except by the individual's written consent;

(5) consists of a mark that:

(a) when used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them;

(b) when used on or in connection with the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them;

(c) is primarily merely a surname; provided, however, nothing in this subsection shall prevent the registration of a mark used by the applicant that has become distinctive of the applicant's goods or services. The secretary may accept as evidence that the mark has become distinctive as used on or in connection with the applicant's goods or services, proof of continuous use of it as a mark by the applicant in

this state for the five years before the date on which the claim of distinctiveness is made; or

(d) consists of or comprises a mark that so resembles a mark registered in this state or a mark or trade name previously used by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake or to deceive.

B. A mark is deemed to be abandoned when either of the following occurs:

(1) when its use has been discontinued with intent not to resume that use. Intent not to resume may be inferred from circumstances; nonuse for two consecutive years shall constitute prima facie evidence of abandonment; or

(2) when any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.

**History:** Laws 1997, ch. 197, § 4.

## 57-3B-5. Application of registration.

A. Subject to the limitations set forth in the Trademark Act, any person who uses a mark may file in the office of the secretary on a form prescribed by the secretary an application for registration of that mark setting forth, but not limited to, the following information:

(1) the name and business address of the person applying for the registration; and if a corporation, the state of incorporation; if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the secretary;

(2) the goods or services on or in connection with which the mark is used and the mode or manner in which the mark is used on or in connection with the goods or services and the class in which the goods or services fall;

(3) the date when the mark was first used anywhere and the date when it was first used in this state by the applicant or a predecessor in interest;

(4) a written description of the mark; and

(5) a statement that the applicant is the owner of the mark, that the mark is in use and that, to the knowledge of the person verifying the application, no other person has registered, either federally or in this state, or has the right to use the mark either in the identical form of it or in the near resemblance thereto as to be likely, when applied to the goods or services of the other person, to cause confusion, mistake or to deceive.

B. The secretary may also require a statement as to whether an application to register the mark or portions of it or a composite of it, has been filed by the applicant or a predecessor in interest in the United States patent and trademark office; and, if so, the applicant shall provide full particulars with respect to it including the filing date, serial number of each application, its status and, if any application was finally refused registration or has otherwise not resulted in a registration, the reason for the refusal or for not being registered.

C. The secretary may also require that a drawing of the mark or three specimens showing the mark as it is actually used accompany the application and that it complies with the requirements specified by the secretary.

D. The application shall be signed and verified by oath, affirmation or declaration subject to perjury laws by the applicant or by a member of the firm or an officer of the corporation or association applying for registration.

E. The application shall be accompanied by a fee of twenty-five dollars ($25.00) for each application.

**History:** Laws 1997, ch. 197, § 5.

## ANNOTATIONS

**Federal trademark holder's rights not always superior to state holder's.** — While a generalization has sometimes been made that the holder of a federal trademark registration has rights superior to the holder of a state registered trademark and superior to one who uses a trademark without any registration, this generalization is much too inclusive and is incorrect with respect to certain fact situations. In the first place, if the state registrant or nonregistrant actually was the prior user in the United States, and the federal registrant was the second to use the mark, the superior right lies with the state registrant or nonregistrant. If the state registrant or nonregistrant was the second user in the United States, but was the first user in a certain geographical area with continuous use from at least July 5, 1947, the second user has the prior right in that area. Even if the federal registrant is the prior user of the mark, the state registrant or nonregistrant can continue to use the mark unless he is using it "in commerce within the control of congress." Finally, the second user, whether a state registrant or nonregistrant, is not infringing on the federal registrant's trademark unless there is such a confusing similarity between the marks that consumer confusion, consumer mistake or consumer deception occurs. Whether there is a likelihood of confusion is a question of fact. 1961 Op. Att'y Gen. No. 61-106.

**Federal trademarks prevail in interstate commerce.** — A trademark registered under the Federal Trademark Law in cases involving interstate commerce will generally prevail over the same trademark registered under the state law. 1957 Op. Att'y Gen. No. 57-45 (rendered under former law).

**State trademarks not given exclusive right of use in state.** — Trademarks registered under the state statute are not conferred any exclusive right to the use of a trademark in the state. 1957 Op. Att'y Gen. No. 57-45 (rendered under former law).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 74 Am. Jur. 2d Trademarks and Tradenames §§ 1 to 8, 12 to 14, 72.

Time as an element in determining whether a descriptive term has acquired a secondary meaning entitling it to protection against unfair competition, 40 A.L.R. 433.

Modern status of pendent federal jurisdiction, under 28 U.S.C.S. § 1338(b), over state claim of unfair competition when joined with related claim under federal trademark laws, 62 A.L.R. Fed. 428.

What constitutes abandonment of trademark by conduct causing mark to lose significance as indication of origin, under § 45 of Lanham Act (15 USC § 1127(b)), 81 A.L.R. Fed. 677.

Design on recreational object as valid trademark, 82 A.L.R. Fed. 9

What constitutes abandonment of trademark by discontinuance of use with intent not to resume it, under § 45 of Lanham Act (15 USC § 1127), 83 A.L.R. Fed. 295.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 21 to 28, 126 to 137.

## 57-3B-6. Filing of application.

A. Upon the filing of an application for registration and payment of the application fee, the secretary may cause the application to be examined for conformity with the Trademark Act.

B. The applicant shall provide any additional pertinent information requested by the secretary, including a description of a design mark and may make, or authorize the secretary in writing to make, any reasonable amendments to the application as may be requested by the secretary or deemed by the applicant to be advisable to respond to any objection or rejection of the application.

C. The secretary may require the applicant to disclaim an unregistrable component of a mark that would otherwise be registrable, and an applicant may voluntarily disclaim a component of a mark sought to be registered. No disclaimer shall prejudice or affect the applicant's or registrant's rights then existing or thereafter arising in the disclaimed matter or the applicant's or registrant's rights of registration on another application if the disclaimed matter is or becomes distinctive of the applicant's or registrant's goods or services.

D. The secretary may amend the application upon the applicant's written agreement, or the secretary may require a new application to be submitted.

E. If the applicant is found not to be entitled to registration, the secretary shall advise the applicant of the reasons for non-registration. The applicant shall have thirty days from the date of notification of non- registration from the secretary in which to reply or to amend the application for reexamination. This procedure may be repeated until the secretary makes a final refusal of registration of the mark or the applicant fails to reply or amend the application within the period specified by the secretary, in which case the application shall be deemed to have been abandoned.

F. The secretary shall grant priority to the applications in order of filing. In the case of any application rejected because of a prior-filed application of the same or confusingly similar mark for the same or related goods or services, the applicant may bring an action for cancellation of the registration on grounds of prior or superior rights to the mark as provided in Section 11 [57-3B-11 NMSA 1978] of the Trademark Act.

**History:** Laws 1997, ch. 197, § 6.

**ANNOTATIONS**

**Authority of secretary.** — Under the former act, the secretary of state did not have the duty or authority to review the validity of trademarks or trade names properly tendered for filing. The former act required the registrant to determine whether a name or mark is identical or similar to an existing registration and that he has the right to use such mark or name. 1988 Op. Att'y Gen. No. 88-57.

## 57-3B-7. Certificate of registration.

A. Upon compliance by the applicant with the requirements of the Trademark Act, the secretary shall issue and deliver a certificate of registration to the applicant. The certificate of registration shall be issued under the signature of the secretary and the seal of the state, and it shall show:

(1) the name and business address;

(2) if a corporation, limited liability company or partnership, the state of incorporation, or if a partnership, the state in which the partnership is organized;

(3) the date claimed for the first use of the mark anywhere;

(4) the date claimed for the first use of the mark in New Mexico;

(5) the class and description of goods or services on or in connection with which the mark is used; and

(6) the registration date and the term of registration.

B. A certificate of registration issued by the secretary or a copy of the certificate of registration duly certified by the secretary shall be admissible in evidence as competent and sufficient proof of the registration of the mark in any actions or judicial proceedings in this state.

**History:** Laws 1997, ch. 197, § 7.

**ANNOTATIONS**

**Generally speaking, trademarks are subject to assignment or transfer except** when such are identifiable as personal to an individual, exempli gratia, an artist's mark or signature. Thus, to enjoy the protection afforded under our registration laws, it would only be necessary that the fact of such assignment be made known to the specific recorder (secretary of state) by filing written and substantiated notice thereof. 1958 Op. Att'y Gen. No. 58-81 (rendered under former law).

**Failure to record notice of assignment leaves assignee unprotected.** — No period of time is provided for in which the assignee of trademark right must record or otherwise give public notice of the fact of transfer, but also, that a failure to effect such notice leaves the assignee without protection of the law as would otherwise be provided. 1958 Op. Att'y Gen. No. 58-81 (rendered under former law).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 74 Am. Jur. 2d Trademarks and Tradenames §§ 21, 26, 27.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 171 to 179.

## 57-3B-8. Duration and renewal.

A. A registration of a mark is effective for ten years from the date of registration. An application for renewal shall be filed within six months prior to its expiration in the manner required by the secretary. The renewed registration shall be effective for ten years from the date of expiration of the original registration. The application for renewal shall be accompanied by the renewal fee. A registration of a mark may be renewed for successive periods of ten years as provided in this section.

B. All applications for renewal, whether of registrations made under the Trademark Act or of registrations made under any act prior to the effective date of that act, shall include a verified statement that the mark has been and is still in use and include a specimen showing actual use of the mark on or in connection with the goods or services.

**History:** Laws 1997, ch. 197, § 8.

## 57-3B-9. Assignments; changes of name and other instruments.

A. A mark and its representation shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark. The assignment shall be by instruments in writing duly executed and may be recorded with the secretary upon payment of a twenty-five dollar ($25.00) recording fee. The secretary, upon recording the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or the last renewal of the registration. An assignment of a registration shall be void as against any subsequent purchaser for valuable consideration without notice unless it is recorded with the secretary within three months after its date or unless it is recorded prior to the subsequent purchase.

B. A registrant or applicant effecting a change of the name of the person to whom the mark was issued or for whom an application was filed may record a certificate of change of name of the registrant or applicant with the secretary upon payment of the recording fee specified in Subsection A of this section. The secretary may issue to the owner a certificate of amendment of registration for the remainder of the term of registration or the last renewal of that registration.

C. Other instruments that relate to a mark registered or a pending application include licenses, security interests or mortgages, and they may be recorded in the discretion of the secretary provided the instrument is in writing and has been duly executed.

D. Acknowledgment shall be prima facie evidence of the execution of an assignment or other instrument and, when recorded by the secretary, the record shall be prima facie evidence of execution. A photocopy of an instrument specified in this section shall be accepted for recording if it is certified by any of the parties thereto or their successors.

**History:** Laws 1997, ch. 197, § 9.

## 57-3B-10. Records.

The secretary shall keep for public examination a record of all marks registered or renewed under the Trademark Act and a record of all documents recorded pursuant to Section 9 [57-3B-9 NMSA 1978] of the Trademark Act.

**History:** Laws 1997, ch. 197, § 10.

## 57-3B-11. Cancellation.

The secretary shall cancel from the register, in whole or in part:

A. a registration where the secretary shall receive a voluntary request for cancellation from the registrant or the assignee of record;

B. a registration granted under the Trademark Act and not renewed in accordance with its provisions;

C. a registration of which a court of competent jurisdiction finds that:

(1) the registered mark has been abandoned;

(2) the registrant is not the owner of the mark;

(3) the registration was granted improperly;

(4) the registration was obtained fraudulently;

(5) the mark is or has become the generic name for the goods or services or a portion of them, for which it has been registered; or

(6) the registered mark is so similar as to likely cause confusion or mistake or to deceive, to a mark registered by another person in the United States patent and trademark office prior to the date of the filing of the application for registration by the registrant and not abandoned; or

D. when a court of competent jurisdiction orders the cancellation of a registration on any ground.

**History:** Laws 1997, ch. 197, § 11.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** When does product become generic term so as to warrant cancellation of registration of mark, pursuant to § 14 of Lanham Act (15 U.S.C.A. § 1064), 156 A.L.R. Fed. 131.

## 57-3B-12. Classification.

The secretary shall by regulation establish a classification of goods and services for convenience of administration of the Trademark Act but not to limit or extend the applicant's or registrant's rights. A single application for registration of a mark may include any or all goods upon which, or services with which, the mark is actually being used indicating the appropriate class or classes of goods or services. When a single application includes goods or services that fall within multiple classes, the secretary shall require payment of twenty-five dollars ($25.00) for each class. As far as practical the classification of goods and services should conform to the classification adopted by the United States patent and trademark office.

**History:** Laws 1997, ch. 197, § 12.

## 57-3B-13. Fraudulent registration.

A person who, for himself on or [or on] behalf of any other person, procures the filing or registration of any mark in the office of the secretary by knowingly making any false or fraudulent representation or declaration, orally or in writing or by any other fraudulent means, shall be liable to pay all damages sustained as a consequence of that filing or registration recoverable by or on behalf of the injured party in any court of competent jurisdiction.

**History:** Laws 1997, ch. 197, § 13.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-3B-14. Infringement.

Any person shall be liable in a civil action by the registrant for any and all of the remedies provided in Section 16 [57-3B-16 NMSA 1978] of the Trademark Act, who shall:

A. use, without the consent of the registrant, any reproduction, counterfeit, copy or colorable imitation of a mark registered under the Trademark Act in connection with the sale, distribution, offering for sale or advertising of any goods or services on or in connection with which the use is likely to cause confusion or mistake or to deceive as to the source of origin of the goods or services; or

B. reproduce, counterfeit, copy or colorably imitate any such mark and apply the reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of these goods or services.

The registrant shall not be entitled to recover profits or damages under Subsection B of this section unless the acts have been committed with the intent to cause confusion or mistake or to deceive.

**History:** Laws 1997, ch. 197, § 14.

**ANNOTATIONS**

**Within state, federal registrant inferior to prior state registrant.** — When plaintiff, doing business solely in the Northeast, applied for federal registration in the United States patent office in 1968 and received registration in 1969, and defendant, doing

business solely in New Mexico, applied for the same trademark under this act and received it in 1968, since defendant did not learn of plaintiff until 1971, and defendant did not adopt plaintiff's name to benefit from plaintiff's reputation, and there were no customers in common, plaintiff did not have exclusive nationwide rights, and in New Mexico defendant had the superior right to the mark. *Value House v. Phillips Mercantile Co.*, 523 F.2d 424 (10th Cir. 1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 74 Am. Jur. 2d Trademarks and Tradenames §§ 84 to 144.

Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 A.L.R. 784, 28 A.L.R. 114.

Territory of operation: right to protection against use of trademark or tradename beyond the territory in which plaintiff operates, 36 A.L.R. 922.

Protection of business or trading corporation against use of same or similar name by another corporation, 66 A.L.R. 948, 115 A.L.R. 1241, 72 A.L.R.3d 8.

Actual competition as necessary element of trademark infringement or unfair competition, 148 A.L.R. 12.

Conflict of laws, with respect to trademark infringement or unfair competition, including the area of conflict between federal and state law, 148 A.L.R. 139.

Unfair competition by imitation in sign or design of business place, 86 A.L.R.3d 884.

Liability of better business bureau or similar organization in tort, 50 A.L.R.4th 745.

Name appropriation by employer or former employer, 52 A.L.R.4th 156.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 A.L.R.5th 1.

Application of secondary meaning test in action for trade dress infringement under § 43(a) of the Lanham Act (15 USC § 1125(a)), 87 A.L.R. Fed. 15.

Parody as trademark or tradename infringement, 92 A.L.R. Fed. 25.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USC §§ 1063, 1114, and 1125), 98 A.L.R. Fed. 20.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 11125), 145 A.L.R. Fed. 407.

Liability as vicarious or contributory infringer under Lanham Act - modern cases, 152 A.L.R. Fed. 573.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 U.S.C.A. § 1125(a)) - Cases after Two Pesos, 161 A.L.R. Fed. 327.

Parody as trademark or tradename dilution or infringement, 179 A.L.R. Fed. 181.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 64 to 86, 135.

## 57-3B-15. Injury to business reputation; dilution.

A. The owner of a mark that is famous in this state shall be entitled, subject to the principles of equity, to an injunction against another's use of a mark, commencing after the owner's mark becomes famous, that causes dilution of the distinctive quality of the owner's mark and to obtain other relief as is provided in this section. In determining whether a mark is famous a court may consider factors such as, but not limited to:

(1) the degree of inherent or acquired distinctiveness of the mark in this state;

(2) the duration and extent of use of the mark in connection with the goods and services;

(3) the duration and extent of advertising and publicity of the mark in this state;

(4) the geographical extent of the trading area in which the mark is used;

(5) the channels of trade for the goods or services with which the owner's mark is used;

(6) the degree of recognition of the owner's mark in its trading area and in the other's trading area, and in the channels of trade in this state; and

(7) the nature and extent of use of the same or similar mark by third parties.

B. The owner shall be entitled only to injunctive relief in this state in an action brought under this section, unless the subsequent user willfully intended to trade on the owner's reputation or to cause dilution of the owner's mark. If willful intent is proven, the owner shall also be entitled to the remedies set forth in the Trademark Act, subject to the discretion of the court and the principles of equity.

**History:** Laws 1997, ch. 197, § 15.

**ANNOTATIONS**

**Proving famousness.** — With no evidence of the fame of the Thermafil mark in New Mexico, no argument why Thermafil would be considered famous under New Mexico law, and concessions that Thermafil is not famous outside the endodontic marketplace and that federal law requires such fame, the court dismissed the defendants' unfair competition claim based on trademark dilution. *Guidance Endodontics v. Dentsply Int'l, Inc.*, 708 F.Supp.2d 1209 (D.N.M. 2010).

**Section not limited to noncompeting products.** — Despite the "notwithstanding" clause at the end of former 57-3-10 NMSA 1978 could not be limited to cases involving noncompeting products. *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987).

**Association of trademarks for parody purposes** without corresponding association of manufacturers, which might confuse the consumer as to who is the actual manufacturer, does not tarnish or appropriate the good will of the manufacturer of the high quality similar product. *Jordache Enters., Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482 (10th Cir. 1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** What constitutes "famous mark" for purposes of federal Trademark Dilution Act, 15 U.S.C. § 1125(c), which provides remedies for dilution of famous marks, 165 A.L.R. Fed. 625.

## 57-3B-16. Remedies.

Any owner of a mark registered under the Trademark Act may proceed by suit to enjoin the manufacture, use, display or sale of any counterfeits or imitations of that mark and any court of competent jurisdiction may grant injunctions to restrain the manufacture, use, display or sale as may be deemed just and reasonable by the court. The court may require the defendants to pay to the owner all profits derived from or all damages suffered by reason of the wrongful manufacture, use, display or sale, or by both payment of all profits derived and damages suffered. The court may also order that any counterfeits or imitations in the possession or under the control of any defendant in the case be delivered to an officer of the court or to the complainant and that the counterfeits or imitations be destroyed. The court, in its discretion, may enter judgment for an amount not to exceed three times the profits and damages and for reasonable attorney fees of the prevailing party in those cases where the court finds the other party committed the wrongful acts with knowledge or in bad faith or as otherwise the circumstances of the case may warrant. The enumeration of any right or remedy in this section shall not affect a registrant's right to prosecute under any criminal law of this state.

**History:** Laws 1997, ch. 197, § 16.

**ANNOTATIONS**

**Prior good faith use superior to registration.** — Prior registration of a trade name under New Mexico's trademark statute does not foreclose another party from acquiring the right to use that name in good faith under the common law, and the trial court's determination that the plaintiff had the exclusive right to use a contested name for his video rental stores was correct, since the plaintiff established a good faith acquisition of a trade name at common law, and his rights became superior to those of the defendant, whose prior state registration was not accompanied by prior use in the market area in question. *S & S Invs., Inc. v. Hooper Enters., Ltd.*, 1993-NMCA-122, 116 N.M. 393, 862 P.2d 1252.

**Injunction granted even where plaintiff merely asserting right to use.** — While injunctive relief is most often granted against some actual use of the infringing mark in the disputed area, such relief is proper where the plaintiff is asserting the right to such use, but has not actively been using the mark in a disputed market. *Value House v. Phillips Mercantile Co.*, 523 F.2d 424 (10th Cir. 1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 74 Am. Jur. 2d Trademarks and Tradenames §§ 145 to 152.

Rights and remedies with respect to another's use of a deceptively similar advertising slogan, 2 A.L.R.3d 748.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 135, 188, 189.

## 57-3B-17. Applicability.

Any registration of a mark in force upon the effective date of the Trademark Act shall continue in effect for the remainder of its unexpired term and may be renewed under the provisions of that act within six months prior to the expiration specified in its registration. The provisions of the Trademark Act shall not affect any application, suit, proceeding or appeal pending on the effective date of the Trademark Act.

**History:** Laws 1997, ch. 197, § 19.

**ANNOTATIONS**

**Severability clauses.** — Laws 1997, ch. 197, § 18 provided for the severability of the act if any part or application thereof is held invalid.

# ARTICLE 3C
# Patents and Copyrights

## 57-3C-1. Short title.

This act [57-3C-1 to 57-3C-5 NMSA 1978] may be cited as the "Patent and Copyright Act".

**History:** Laws 2001, ch. 346, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 346 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-3C-2. Definitions.

As used in the Patent and Copyright Act:

A. "department" means the economic development department;

B. "patent" means the grant of certain property rights in an invention, as defined in federal patent laws, to an inventor that includes the right to exclude others from making, using, offering for sale, selling or importing the invention; and

C. "copyright" means the property rights, as defined in federal copyright laws, in original works of authorship.

**History:** Laws 2001, ch. 346, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 346 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-3C-3. Patents and copyrights as state property exception.

A. Inventions, innovations, works of authorship and their associated materials that are developed by a state employee, except an employee of a state educational institution, within the scope of his employment or when using state-owned or state-controlled facilities or equipment are the property of the state.

B. The provisions of Subsection A of this section do not apply to a state employee employed by a state educational institution designated in Article 12, Section 11 of the constitution of New Mexico.

**History:** Laws 2001, ch. 346, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 346 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-3C-4. Administration of act.

The department shall:

A. be responsible for the administration of the Patent and Copyright Act;

B. promulgate rules pursuant to the Patent and Copyright Act;

C. apply, on behalf of the state, for the patent protection or registration of copyright and pay the associated expenses;

D. share with the inventor, after expenses, fifty percent of the income collected on the invention or work; and

E. determine, after a cost-benefit analysis, whether to retain the patent or copyright for the state.

**History:** Laws 2001, ch. 346, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 346 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-3C-5. Fund created.

The "patent and copyright fund" is created in the state treasury. Income received by the state pursuant to the Patent and Copyright Act shall be deposited in the patent and copyright fund. Money in the patent and copyright fund is appropriated to the economic development department to carry out the provisions of the Patent and Copyright Act. Any unexpended or unencumbered balance remaining in the fund at the end of a fiscal year shall not revert to the general fund.

**History:** Laws 2001, ch. 346, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 346 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

# ARTICLE 4
# Protection of Copyrights (Repealed.)

(Repealed by Laws 1987, ch. 41, § 1.)

## 57-4-1 to 57-4-7. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1987, ch. 41, § 1, effective June 19, 1987, repealed 57-4-1 to 57-4-7 NMSA 1978, as enacted by Laws 1959, ch. 220, §§ 1 to 7, relating to the protection of copyrights.

# ARTICLE 5
# Motion Pictures

## 57-5-1. Definitions.

As used in Chapter 57, Article 5 NMSA 1978:

A. "corporation" means any subsidiary holding company, joint purchasing or selling association, business trust, joint stock association and officers and agents or employees serving in any capacity;

B. "person" means a natural person, partnership, firm of two or more persons having a joint or common interest or a corporation, association or business trust;

C. "producer" means all persons or their distributors or agents who make, manufacture, lease, license or sell motion pictures of any kind;

D. "distributor" means all persons or their agents who make, manufacture, buy, act as lessor, sell or traffic in motion pictures in any way;

E. "product" means any stated number of motion pictures, group, series or the annual output of motion pictures of any producer, manufacturer or distributor of motion pictures;

F. "theatre" means any auditorium, room, hall or place where motion pictures are exhibited, played or shown;

G. "exhibitor" means any person engaged in the showing and exhibition of motion pictures;

H. "competitive situation" means any municipality in which there are two or more persons engaged in the business of exhibiting motion pictures and each is a competitor of the other;

I. "competitive exhibitor" means any person owning or operating any motion picture show or theatre or who is in any way interested in the exhibition of motion pictures in any municipality where there are two or more competitive exhibitors engaged in the business;

J. "box office value" means the potential power of a motion picture to draw patronage;

K. "franchise" means any contract, agreement or understanding whereby a producer or distributor either grants or gives the exclusive right to use of its product to another producer, distributor, exhibitor or other person for a period of more than one year;

L. "first run pictures" means any motion picture that has not been previously exhibited or shown in a certain municipality;

M. "second run pictures" means any motion picture that has been previously exhibited or shown in one or more consecutive days in a certain municipality;

N. "first run theatre" means any theatre that exhibits first run pictures, and not more than two second run pictures in each calendar month, throughout the year;

O. "second run theatre" means any theatre that exhibits more than two second run pictures in any calendar month throughout the year;

P. "playing arrangement" means the number of days a motion picture is to be played, the admission price to be charged and the specific conditions governing the playing of a motion picture when any of these arrangements are specified in the contracts or leasing, licensing or renting arrangements between exhibitor and distributor;

Q. "play" means the exhibition, presentation or showing of motion pictures or productions in motion picture theaters; and

R. "state corporation commission" or "corporation commission" means the secretary of state.

**History:** Laws 1933, ch. 177, § 1; 1941 Comp., § 51-2701; 1953 Comp., § 49-5-1; 2013, ch. 75, § 15.

## ANNOTATIONS

**Cross references.** — For first and second run theaters being determined by public regulation commission, *see* 57-5-22 NMSA 1978.

For provisions relating to the showing of obscene films by outdoor theatres, *see* 30-38-1, 30-38-2 NMSA 1978.

**The 2013 amendment,** effective July 1, 2013, defined "state corporation commission" and "corporation commission" to mean the secretary of state; added the introductory sentence "As used in Chapter 57, Article 5 NMSA 1978"; in Subsections A through Q, deleted "The term" at the beginning of each subsection; in Subsections A through Q, deleted "when used in the act, includes", "when used in the act, shall mean", and "when used in this act, shall mean and include" and added "means"; in Subsection C, after "persons or" deleted "corporations", in Subsection D, after "persons", deleted "or corporations"; in Subsection E, after "number of", added "motion", in Subsection G, after "person", deleted "firm or corporation"; in Subsection P, after "number of days a", added "motion" and after "motion picture", deleted "or pictures, are" and added "is", and after "playing of a", added "motion"; and added Subsection R.

## 57-5-2. [Purpose of act; violations; penalty.]

The intent and purpose of this act [57-5-1 to 57-5-22 NMSA 1978] is to eliminate and prevent monopolies, restraint of trade, unfair combinations, favoritism, discrimination, overbuying or preference of any kind on the part of producers, distributors or any other person or persons, in favor of any person, corporation, firm or association owning or operating any motion picture theater or theaters, to the detriment of competitive owned and/or operated picture theater or theaters, or for any competitive exhibitor being discriminated against in favor of another competitive exhibitor or exhibitors; also, to prevent any person, firm or corporation operating any motion picture theater or theaters from acquiring, overbuying or having a monopoly or the pick of the product of any producer or distributor or any other person. Any person, firm or corporation conspiring or entering into a conspiracy to in any way defeat, violate or avoid the purpose of this act, or any of the provisions hereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than twenty thousand dollars ($20,000), and by imprisonment at hard labor of not less than or more than twelve months. It shall be the duty of the district attorney of the several judicial districts to enforce the collection of this and all other fines provided for in this act and otherwise prosecute those who violate the same.

**History:** Laws 1933, ch. 177, § 2; 1941 Comp., § 51-2702; 1953 Comp., § 49-5-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 27A Am. Jur. 2d Entertainment and Sports Law § 4 et seq.; 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 1205.

Protection of right of exclusive performance of photoplay, 19 A.L.R. 955.

Moving-picture distribution contracts, 19 A.L.R. 1004.

Monopoly in moving pictures, 26 A.L.R. 369.

Antitrust act, distribution of film as commerce within antitrust act, 47 A.L.R. 782.

58 C.J.S. Monopolies §§ 155 to 157.

## 57-5-3. [Restrictive contracts, combinations or monopolies illegal; penalty.]

Every contract, combination or monopoly of any kind which in any way prevents, restricts, prohibits or interferes with any competitive exhibitor or exhibitors from acquiring his or their proportionate share of any product or products of any producer and/or distributor, or any other person, as in this act [57-5-1 to 57-5-22 NMSA 1978] provided, is hereby declared to be illegal. Every person, firm or corporation violating any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars ($1,000) or more than twenty thousand dollars ($20,000) and by imprisonment at hard labor for not less than twelve months nor more than twelve months.

**History:** Laws 1933, ch. 177, § 3; 1941 Comp., § 51-2703; 1953 Comp., § 49-5-3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-4. [Contracts for excessive number of pictures unlawful; form of contracts of sale, license or lease; power of public regulation commission; penalty for violations.]

It shall be unlawful for any person, or persons, firm or corporation, who owns, operates or controls, either directly or indirectly, any motion picture theater, or room, hall, auditorium or place where motion pictures of any kind are exhibited in one or more towns or cities in this state, where competition exists, to contract for, lease, license, rent, buy or acquire more motion pictures or films than can and will be exhibited in their theater or theaters in such town or city within the twelve months next following the date of the purchase, rental or license contract for such motion pictures.

And it shall be unlawful for any exhibitor to buy, lease or otherwise acquire, or for any distributor, or any other person, to sell, lease or supply any picture or pictures in or for a competitive situation with the intention or knowledge that each or any of the picture or pictures will not be exhibited or used, and every exhibitor in a competitive situation shall exhibit all pictures under contract within six months after the producer and/or distributor announces such picture or pictures, ready for exhibition or showing. All contracts or agreements for the sale, license or rental of motion pictures shall be in writing, and shall be signed and either attested by two witnesses or sworn to by the parties thereto before some person authorized to administer an oath, and a copy thereof shall be filed by the producer and/or distributor in the office of the state corporation commission [public regulation commission] within ten days after the approval thereof, which said contracts or agreements shall contain a list of all pictures covered thereby; that the said corporation commission [public regulation commission] shall have the right to demand of any exhibitor a copy of his or its contract or contracts for the purchase, license or lease of any picture or pictures, which said copy shall be furnished by the exhibitor within fifteen days after the receipt of such notice; that said copy shall be identical with the original, together with the consideration paid or to be paid for each picture covered thereby. Any person, firm or corporation, who violates or fails to comply with any of the provisions of this section, shall be punished by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000).

**History:** Laws 1933, ch. 177, § 4; 1941 Comp., § 51-2704; 1953 Comp., § 49-5-4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Moving-picture distribution contracts, 19 A.L.R. 1004.

Monopoly in moving pictures, 26 A.L.R. 369.

58 C.J.S. Monopolies §§ 155 to 157.

## 57-5-5. [Division of products among exhibitors.]

Producers and/or distributors, or any person or corporation selling, leasing or supplying in any way motion pictures to exhibitors in any competitive situation, shall allot, divide or distribute their product in proportion to the kind and number of theaters in that town or city; first run pictures among exhibitors operating first run theaters and second run pictures to exhibitors operating second run theaters. In all towns and cities, where a competitive situation exists, each competitive exhibitor shall have the right to

purchase, rent or acquire his or their proportionate part of any announced group, series or annual product of any producer, distributor, or owner or lessee of motion pictures; that in the event two or more competitive exhibitors desire to rent, lease or acquire their proportionate share of the product of any producer or distributor, the division or allotment shall be made by permitting each competitive exhibitor to select a picture alternately from the product of the said distributor in proportion to the number of theaters owned by them. Should one exhibitor own or operate more than one theater in a competitive situation, the theater in which each picture or production is to be played or exhibited must be specified in separate applications for contracts for each theater at the time the apportionment or allotment of the picture or product is made, and the pictures must be exhibited or played in the theater so specified.

In the event an exhibitor in a competitive situation does not elect to purchase or contract for his proportionate part of the product of a producer or distributor, the producer and/or distributor shall procure from the exhibitor a written waiver of his or their right to purchase or rent his or their proportionate share of said product, and said proportionate share shall be allotted or divided among the remaining competitive exhibitors in the competitive situation. All waivers must be filed with the corporation commission [public regulation commission]. Provided, however, that if one or more of the competitive exhibitors refuse to rent or purchase his or their proportionate share of the product at a fair and reasonable rental price, and refuse to sign a waiver for his or their proportionate part of such product, then, and in that event, the distributor and/or other competitive exhibitor may appeal to the corporation commission [public regulation commission] for permission to allot or acquire the proportionate part, or parts, of the product in question to the other or appealing competitive exhibitor or exhibitors. All such appeals shall be determined by the corporation commission [public regulation commission], with right of appeal to the district court.

Any exhibitor, producer and/or distributor violating any of the provisions of this section shall, upon conviction thereof, be punished as provided in Section twelve [57-5-12 NMSA 1978] of this act.

**History:** Laws 1933, ch. 177, § 5; 1941 Comp., § 51-2705; 1953 Comp., § 49-5-5.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the corporation commission be construed as references to the public regulation commission.

**Cross references.** — For definitions of first and second run pictures and theaters, *see* 57-5-1 NMSA 1978.

For appeals from public regulation commission generally, *see* 53-18-2 NMSA 1978.

For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

For scope of review of the district court, *see* Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

## 57-5-6. [Announcement of pictures to be produced; contents of announcement; filing with public regulation commission; sale to competitor at less price unlawful; sale or lease to be by contract; penalty for violation.]

Whenever a producer and/or distributor announces a group or series of pictures or annual product to exhibitors, either made or to be made, it shall be filed immediately with the corporation commission [public regulation commission] and announced directly and simultaneously to all exhibitors in competitive situations. All pictures or productions shall be announced by either name, title, star, star series, series or by number and shall be classified in groups as to the price and/or box office value. Each group so classified shall be identified by letters A, B, C, D, etc.; Group "A" being the highest priced or best box office pictures or productions; Group "B" being the next highest priced or next best box office pictures or productions, and so on, and the number of pictures in each group shall be specified. In the event of any change or changes in the product made, or to be made, making it different from that in the announcement filed with the corporation commission [public regulation commission], notice of the nature of such change or changes made or to be made shall be filed with the corporation commission [public regulation commission] within ten days after such change or changes are made. After one competitive exhibitor has purchased, rented or contracted for his proportionate part of a product, it shall be unlawful for the producer and/or distributor to sell or lease the remainder of said product to the other competitive exhibitor or exhibitors, on a different playing arrangement or for a less price, for a period of six months. And all pictures sold or leased by producers and/or distributors shall be by written contract, in which the price paid or to be paid, and playing arrangement for each picture sold or leased shall be stated. Any producer or exhibitor violating any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars ($1,000) and not more than twenty thousand dollars ($20,000).

**History:** Laws 1933, ch. 177, § 6; 1941 Comp., § 51-2706; 1953 Comp., § 49-5-6.

### ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the corporation commission be construed as references to the public regulation commission.

## 57-5-7. [Contracts for sale, lease or license; revocation or disapproval; binding when not disapproved.]

In any competitive situation where there has been an executory contract entered into for the sale, lease or license of any product, or part thereof, the same shall be subject to revocation by the exhibitor signing said contract at any time prior to the acceptance of the same by the producer and/or distributor, or within a period of twenty days from the date of such contract. If not revoked by the exhibitor or disapproved by the producer and/or distributor within the period of twenty days from the date thereof, said contract shall, for all purposes, become valid and binding on the parties thereto. In case of revocation or disapproval on the part of any of the parties, the other party shall be given telegraphic notice thereof within twenty-four hours after such revocation or disapproval, and such revocation on the part of the exhibitor shall constitute a waiver as provided in Section five [57-5-5 NMSA 1978] of this act. The action of one competitive exhibitor shall in no way affect the rights of the other competitive exhibitors in, to or regarding any product.

**History:** Laws 1933, ch. 177, § 7; 1941 Comp., § 51-2707; 1953 Comp., § 49-5-7.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Breach of distribution contracts, 19 A.L.R. 1006.

58 C.J.S. Monopolies § 82.

## 57-5-8. [Secret rebates or arrangements unlawful; penalty.]

It shall be unlawful for any producer and/or distributor or any other person, either directly or indirectly, to give any secret refund, rebate or reward of any kind to any competitive exhibitor, or for any competitive exhibitor to receive, either directly or indirectly, any secret refund, rebate or reward of any character from any producer, distributor or any other person, or for any producer, distributor or any other person to sell, lease, license or supply any motion picture or pictures, or permit same to be done to any competitive exhibitor by or through any secret or undisclosed manner, method, contract, combination or arrangement of any kind, or for any competitive exhibitor to so receive or acquire same in such a manner, or to exhibit any such motion picture or pictures so received or acquired. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, punished by a fine of not less than one thousand dollars ($1,000) nor more than twenty thousand dollars ($20,000) for each offense and by imprisonment at hard labor of not less than one year or more than one year for each offense. Each and every picture

furnished, received or exhibited in violation of any of the provisions of this act [57-5-1 to 57-5-22 NMSA 1978] shall be deemed a separate offense.

**History:** Laws 1933, ch. 177, § 8; 1941 Comp., § 51-2708; 1953 Comp., § 49-5-8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 17 C.J.S. Contracts § 202.

## 57-5-9. [Contracts for more than one year unlawful; rights under former contracts; penalty for violation; invalidity of contract.]

It shall be unlawful from and after the passage of this act for any person, or corporation, to contract for, license, buy, own or control a franchise in or for a town or city, where competition exists, for the product of any producer, distributor or from any other person, for a period of time greater than one year, and it shall be unlawful for any producer, distributor or person to sell, rent or otherwise dispose of any picture to any competitive exhibitor for a period of time greater than one year. Provided that all the parties to any contract or contracts now in force for franchises for periods greater than one year between any producer and/or distributor, exhibitor or owner of any moving picture show or shows, or theaters, shall, within thirty days after this act becomes effective, file a copy of such franchise or franchises in the office of the state corporation commission [public regulation commission]; that there shall be attached to said contracts an affidavit, duly sworn to by the parties thereto, setting forth that said franchise was executed prior to the time that this act became effective, and that said franchise or contract, so filed or to be filed, has in no way been altered since this act became effective, and shall state the consideration paid and to be paid for each and every picture mentioned therein or to be furnished thereunder during the remainder of its life. Any person making any false statement in any such affidavit shall be deemed guilty of perjury, and upon conviction thereof, punished as provided by law. Provided, further, all contracts in force with competitive exhibitors in this state at the time of the passage of this act for franchises, for a period of time greater than one year, shall, if otherwise legal, not be interfered with, and shall remain in full force and effect and lived up to during the life thereof. Any person or corporation who violates the provisions of this section shall, upon conviction, be punished by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000). All contracts made in violation of any of the provisions of this act shall be void.

**History:** Laws 1933, ch. 177, § 9; 1941 Comp., § 51-2709; 1953 Comp., § 49-5-9.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

**Compiler's notes.** — The phrase "from and after the passage of this act", referred to in the first sentence, means from and after the passage and approval of Laws 1933, Chapter 177, which was approved on March 17, 1933.

## 57-5-10. [Exhibitor having contract running longer than year; rights in selection of pictures.]

Any competitive exhibitor or exhibitors having contracts or franchise, with any producer and/or distributor continuing for a period of more than one year, at the time of the passage of this act, such competitive exhibitor, or exhibitors, shall not participate in the alternative drawing or selection of pictures with the other competitive exhibitors, as provided in Section five [57-5-5 NMSA 1978] of this act, until such competitive exhibitor or exhibitors not having any such contract or franchise have acquired a number of pictures equal to that covered by said contract or franchise for a period of more than one year. In the acquiring of such pictures, same shall be done by taking the annual product of any one producer and/or distributor upon reasonable terms, and, if necessary, a sufficient number from another producer and/or distributor, upon reasonable terms each year during the remaining life of said contract or franchise, as to equal the number of pictures to be supplied under said contract or franchise for more than one year.

**History:** Laws 1933, ch. 177, § 10; 1941 Comp., § 51-2710; 1953 Comp., § 49-5-10.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The phrase "at the time of passage of this act", referred to in the first sentence, means at the time of passage and approval of Laws 1933, Chapter 177, which was approved on March 17, 1933.

## 57-5-11. [Producer- or distributor-controlled theaters; rights in choosing pictures; selling or leasing to competitors; penalty for violation.]

Producers and/or distributors or affiliated companies, owning and/or operating either directly or indirectly, any picture show or shows, theater or theaters, and exhibiting their own product therein, in one or more competitive situations, shall not participate in the

alternative drawing or selection of pictures as provided in Section five [57-5-5 NMSA 1978] of this act, or in any way acquire pictures until their competitor or competitors have each acquired a number of pictures equal to the total products of each producer and/or distributor, affiliated company or other person, and it shall be unlawful for any producer and/or exhibitor to either refuse, sell or license their product or any part thereof upon reasonable terms to such competitive exhibitor so as to place them on an equal basis with such exhibitor, producer and/or distributor or affiliated company. Any person, firm or corporation, either seller or sellee, lessor or lessee, violating any of the provisions of this act [57-5-1 to 57-5-22 NMSA 1978] shall, upon conviction thereof, be punished by a fine of not less than one thousand dollars ($1,000) nor more than twenty thousand dollars ($20,000).

**History:** Laws 1933, ch. 177, § 11; 1941 Comp., § 51-2711; 1953 Comp., § 49-5-11.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-12. [Refusing alternative selections; prima facie evidence of intent to violate act; penalty.]

The fact that any producer, distributor, owner or lessee of motion pictures fails, or refuses to permit exhibitors in competitive situations to make alternative selections in the presence of each other, each to either purchase or rent his proportionate share of a product, upon the same terms and conditions and as in this act [57-5-1 to 57-5-22 NMSA 1978] provided, shall be prima facie evidence of the intent of such producer, distributor, owner or lessee to violate or defeat the purposes, intent and provisions of this act, and such producer, distributor, owner or lessee shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than ten thousand dollars ($10,000) nor more than twenty thousand dollars ($20,000) and by imprisonment at hard labor of not less than nor more than twelve months.

**History:** Laws 1933, ch. 177, § 12; 1941 Comp., § 51-2712; 1953 Comp., § 49-5-12.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-13. [Date and place of alternative selections; contracts made outside state unlawful; exception.]

In all competitive situations where there is to be an alternative selection of motion pictures by competitive exhibitors, the producer and/or distributor shall set the date for

such alternative selection in each competitive situation, and each exhibitor shall be notified simultaneously in writing, by registered mail by the producer and/or distributor. The selection shall take place in the town or city where such competition exists, and it shall be unlawful for any producer, exhibitor or any other person having traveling or district agents, to make or close in any place, other than in New Mexico, any contract for the sale or lease of any motion picture or pictures for any competitive situation in New Mexico, unless all competitive exhibitors mutually agree otherwise in writing.

**History:** Laws 1933, ch. 177, § 13; 1941 Comp., § 51-2713; 1953 Comp., § 49-5-13.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-14. [Civil liability for violation.]

Any person, or persons, or corporation, who shall violate any of the provisions of this act [57-5-1 to 57-5-22 NMSA 1978], shall be civilly liable in both actual and punitive damages to the person or persons injured, damaged or discriminated against for any and all damages occasioned thereby, either directly or indirectly, and including all costs and attorney's fees.

**History:** Laws 1933, ch. 177, § 14; 1941 Comp., § 51-2714; 1953 Comp., § 49-5-14.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-15. [Misrepresentation of box office value; civil liability.]

Any producer and/or distributor, who misrepresents, either orally or otherwise, the merit or box office value of any motion picture or pictures, at the time of sale or lease of any product, or part thereof, shall be held accountable therefor and if such producer and/or distributor shall refuse or fail to make adjustment, the producer and/or distributor shall be civilly liable in damages, both actual and punitive, to the person or persons damaged, including all costs and attorneys' fees.

**History:** Laws 1933, ch. 177, § 15; 1941 Comp., § 51-2715; 1953 Comp., § 49-5-15.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-5-16. [Fair and equitable adjustments of contracts permitted.]

The provisions of this act [57-5-1 to 57-5-22 NMSA 1978] shall not prohibit fair and equitable adjustments or changes in any contract for pictures in any competitive situation between producers, distributors and exhibitors, provided the same is openly arrived at, and each exhibitor in a competitive situation is accorded the same treatment under like or similar conditions. The provisions of this section shall not apply to franchises in force at the time of the passage of this act.

**History:** Laws 1933, ch. 177, § 16; 1941 Comp., § 51-2716; 1953 Comp., § 49-5-16.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — The phrase "at the time of the passage of this act", referred to at the end of the section, means the time of the passage and approval of Laws 1933, Chapter 177, which was approved on March 17, 1933.

## 57-5-17. [Existing contracts to be filed with public regulation commission.]

Attested copies of all contracts for motion pictures now in force in competitive situations shall be filed with the corporation commission [public regulation commission] within thirty days after this act becomes effective, and hereafter when competition begins in any town or city all existing contracts for motion pictures shall be immediately filed with the corporation commission [public regulation commission] by the exhibitors, and the provisions of this act [57-5-1 to 57-5-22 NMSA 1978] shall apply to the new competitors as of the day he or they begin to function or acquire motion pictures in or for the new competitive situation.

**History:** Laws 1933, ch. 177, § 17; 1941 Comp., § 51-2717; 1953 Comp., § 49-5-17.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the corporation commission be construed as references to the public regulation commission.

**Compiler's notes.** — The phrase "within thirty days after this act becomes effective", appearing near the beginning of the section, means within thirty days of the effective date of Laws 1933, Chapter 177, which was March 17, 1933.

## 57-5-18. [Public regulation commission as agent for service of process.]

Every producer and/or distributor, manufacturer or seller of motion pictures in the state of New Mexico, and of leases, rights and contracts and agreements of every kind and nature by which motion pictures are exhibited in the state of New Mexico, shall appoint the chairman of the corporation commission [public regulation commission] and his successors in office, his, its or their true and lawful attorney upon whom may be served all lawful process in any action or legal process against it, in favor of a resident of the state of New Mexico, and therein shall agree that any such lawful process against it so served shall be of the same force and validity as if served on the company, person or firm personally in the state of New Mexico, and the authority thereof shall continue in force irrevocably so long as any contract, lease, agreement or liability of such person, firm or corporation remains outstanding in the state of New Mexico. Such process shall be served by leaving the same in duplicate with the chairman of the state corporation commission [public regulation commission] and depositing with him a fee of $2.00, and the service thereof on such attorney shall be deemed service on the principal. The chairman of the state corporation commission [public regulation commission] shall forthwith forward such process by registered mail, prepaid, to the person, firm or corporation at the address given by such person, firm or corporation in the appointment required to be filed hereby, and such service of process shall not be complete until the same has been so mailed, and the registry receipt shall be prima facie evidence of the completion of such service.

**History:** Laws 1933, ch. 177, § 18; 1941 Comp., § 51-2718; 1953 Comp., § 49-5-18.

### ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Requisite of service upon, or delivery to, designated public official, as a condition of substituted service of process on him, 148 A.L.R. 975.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

16 C.J.S. Constitutional Law §§ 124 to 132; 16D C.J.S. Constitutional Law §§ 1156 to 1161.

## 57-5-19. [Failure to designate agent for service of process; penalty; pictures barred.]

The requirements in Section eighteen [57-5-18 NMSA 1978] are hereby made a prerequisite to the right of any person, firm or corporation to sell, lease or otherwise distribute motion pictures within the state of New Mexico. Any person, firm or corporation selling, distributing or exhibiting pictures in the state of New Mexico without first designating the chairman of the state corporation commission [public regulation commission] as its true and lawful attorney for the purpose of service of process as hereinbefore required, shall be subject to a fine of not more than one thousand dollars ($1,000) and all pictures, produced, manufactured or distributed by such person, firm or corporation shall be barred and excluded from exhibiting [exhibition] within the state of New Mexico until the provisions of this act [57-5-1 to 57-5-22 NMSA 1978] have been complied with by such person, firm or corporation.

**History:** Laws 1933, ch. 177, § 19; 1941 Comp., § 51-2719; 1953 Comp., § 49-5-19.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

## 57-5-20. [Venue of prosecutions.]

The venue in an indictment or information for conspiracy in violation of the provisions of this act [57-5-1 to 57-5-22 NMSA 1978], may be laid in the county in which the agreement was entered into, or in any county in which any overt act was done by any of the conspirators in furtherance of the common design or conspiracy. If the conspiracy is entered into within the jurisdiction of any court of this state, the parties thereto are triable in that jurisdiction, notwithstanding that the offense is to be committed outside the jurisdiction, or in another state. And if the conspiracy is formed outside the jurisdiction of any court of this state, and an overt act is performed in the furtherance of said conspiracy in the jurisdiction of any such court, the conspirators shall be tried and punished in the court wherein the overt act was committed.

**History:** Laws 1933, ch. 177, § 20; 1941 Comp., § 51-2720; 1953 Comp., § 49-5-20.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 92 C.J.S. Venue §§ 77, 78.

## 57-5-21. [Contracts filed with public regulation commission; fees; filing copies of blank forms; penalty for violation.]

All contracts for the purchase, leasing or acquirement of motion pictures by producers and/or distributors, in competitive situations, from producers and/or exhibitors or anyone else, shall be filed as in this act [57-5-1 to 57-5-22 NMSA 1978] provided with the state corporation commission [public regulation commission] at Santa Fe, New Mexico, within ten days after same have been approved or become operative; and all adjustments, modifications or changes in contracts shall be in writing and shall be executed as in this act provided for original contracts, and shall be filed likewise and within ten days thereafter; all instruments so filed shall be sworn to by the parties thereto. The corporation commission [public regulation commission] shall receive a fee of two dollars ($2.00) for every instrument filed under the provisions of this act, and shall charge a fee of two dollars ($2.00) for all copies of instruments furnished upon request. When forms are used by producers and exhibitors in sales and lease contracts, blank copies thereof shall be furnished to the corporation commission [public regulation commission] by producers and/or exhibitors. Any person, firm or corporation who fails or refuses, after notice, to comply with any of the provisions of this section shall be punished by a fine as provided in Section four [57-5-4 NMSA 1978] of this act.

**History:** Laws 1933, ch. 177, § 21; 1941 Comp., § 51-2721; 1953 Comp., § 49-5-21.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the state corporation commission be construed as references to the public regulation commission.

## 57-5-22. [Determination of first and second run theaters by public regulation commission.]

All matters requiring a decision as to whether a theater should be classified as a "first" or "second" run theater or a picture show shall be determined by the corporation commission [public regulation commission].

**History:** Laws 1933, ch. 177, § 22; 1941 Comp., § 51-2722; 1953 Comp., § 49-5-22.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1998, ch. 108, § 80 provided that references to the corporation commission be construed as references to the public regulation commission.

**Cross references.** — For the definitions of first and second run theaters, *see* 57-5-1 NMSA 1978.

# ARTICLE 5A
# Motion Picture Fair Competition

## 57-5A-1. Short title.

This act [57-5A-1 to 57-5A-5 NMSA 1978] may be cited as the "Motion Picture Fair Competition Act".

**History:** Laws 1979, ch. 189, § 1.

## 57-5A-2. Purposes.

The purpose of the Motion Picture Fair Competition Act is to establish fair and open procedures for the bidding and negotiation of motion pictures within New Mexico in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the state, to promote fair and effective competition in that business and to benefit the movie-going public by holding down admission prices to motion picture theaters, thereby expanding the choice of motion pictures available to the public and preventing exposure of the public to objectionable or unsuitable pictures by ensuring that exhibitors have the opportunity to view a picture before committing themselves to exhibiting it.

**History:** Laws 1979, ch. 189, § 2.

## 57-5A-3. Definitions.

As used in the Motion Picture Fair Competition Act:

A. "theater" means any establishment in which motion pictures are regularly exhibited to the public for a charge;

B. "distributor" means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale or licensing;

C. "exhibitor" means any person engaged in the business of operating one or more theaters;

D. "exhibit" or "exhibition" means showing a motion picture to the public for a charge;

E. "invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid or negotiate for the right to exhibit a motion picture;

F. "bid" means a written or oral offer or proposal by an exhibitor to a distributor, in response to an invitation to bid or otherwise, stating the terms under which the exhibitor will agree to exhibit a motion picture;

G. "license agreement" means any contract, agreement, understanding or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor;

H. "trade screening" means the showing of a motion picture by a distributor in the exchange center serving New Mexico which is open to any exhibitor interested in exhibiting the motion picture;

I. "blind bidding" means the bidding for, negotiating for or offering or agreeing to terms for the licensing or exhibition of a motion picture, if the motion picture has not been trade screened in the exchange center before any such event has occurred; and

J. "run" means the continuous exhibition of a motion picture in a defined geographical area for a specified period of time. A "first run" is the first exhibition of a motion picture in the designated area, a "second run" is the second exhibition and "subsequent runs" are subsequent exhibitions after the second run.

**History:** Laws 1979, ch. 189, § 3; 1980, ch. 49, § 1.

## 57-5A-4. Blind bidding.

A. Blind bidding shall not be required of exhibitions in New Mexico. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place and no license agreement or any of its terms shall be agreed to for the exhibition of any motion picture within the state before the motion picture has been offered for trade screening in the exchange center.

B. A distributor shall include in each invitation to bid for a motion picture for exhibition within New Mexico, if such motion picture has not already been trade screened in the exchange center, the date, time and place of the proposed trade screening of the motion picture in the exchange center.

C. A distributor shall provide reasonable and uniform notice to exhibitors within New Mexico of motion pictures he is distributing.

D. If, within fifteen days of the date of transmission of the invitation to bid, no exhibitor has notified the distributor that it will attend the proposed trade screening, then no trade screening shall be required prior to the acceptance of bids.

E. Any purported waiver of the requirements of this section shall be void and unenforceable.

**History:** Laws 1979, ch. 189, § 4; 1980, ch. 49, § 2.

## 57-5A-5. Bidding procedures.

If bids are solicited from exhibitors for the licensing of a motion picture within New Mexico, then:

A. the invitation to bid shall specify:

(1) the number and length of runs for which the bid is being solicited, whether it is a first, second or subsequent run and the geographic area for each run;

(2) the names of all exhibitors or their designated agents who are being solicited;

(3) the date and hour the invitation to bid expires; and

(4) the location, including the address, where the bids will be opened, which shall be in the exchange center;

B. all bids shall be submitted in writing and shall be opened at the same time and in the presence of exhibitors, or their agents, who submitted bids and are present at such time;

C. after being opened, bids shall be subject to examination by exhibitors, or their agents, who submitted bids. Within ten business days after a bid is accepted, the distributor shall notify in writing each exhibitor who submitted a bid of the name of the winning bidder; and

D. once bids are solicited, the distributor shall have the option to license the motion picture by competitive negotiation if he does not accept any of the submitted bids.

**History:** Laws 1979, ch. 189, § 5; 1980, ch. 49, § 3.

# ARTICLE 6
# Hotels

## 57-6-1. [Liability of hotelkeeper; limitation.]

Hotelkeepers shall be liable to their guests for loss of property brought by such guests into the hotel when such loss is caused by the theft or negligence of a hotelkeeper or his servants, not to exceed the sum of one thousand dollars [($1,000)];

provided, however, that any hotelkeeper who shall provide a suitable safe in his hotel for safekeeping of any money, jewels, ornaments or other valuables belonging to his guests and shall notify them thereof by posting a printed notice conspicuously in the rooms of such hotel that such safe has been provided for said purpose, shall not be liable for the loss of any money, jewels, ornaments or other valuables by theft or otherwise which any guest who has neglected to deposit same in such safe, may sustain.

**History:** Laws 1921, ch. 104, § 1; C.S. 1929, § 67-101; 1941 Comp., § 51-2501; 1953 Comp., § 49-6-1.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**This section is not unconstitutional under N.M. Const., art. II, § 18.** *Weiser v. Albuquerque Oil & Gasoline Co.*, 1958-NMSC-061, 64 N.M. 137, 325 P.2d 720.

**Section liberally construed since it ameliorates harsh common-law rule.** — This section was obviously enacted to ameliorate the effect of the harsh common-law rule that an innkeeper was an insurer of the property of his guests, and is therefore to be given a liberal construction. *Albuquerque Hilton Inn v. Haley*, 1977-NMSC-051, 90 N.M. 510, 565 P.2d 1027.

**Former liability of innkeeper was that of insurer.** — Prior to 1921, the liability of an innkeeper for the property of his guests was that of an insurer, and except for acts of God, the public enemy or the guest, he could be held for the value of rings stolen by employees. *Landrum v. Harvey*, 1922-NMSC-045, 28 N.M. 243, 210 P. 104 (decided under former law).

**Services offered and facilities available determine status as hotel.** — Neither the physical plant nor the name by which the establishment is known controls its status as a hotel. It is the services offered and facilities available that are determinative. *Weiser v. Albuquerque Oil & Gasoline Co.*, 1958-NMSC-061, 64 N.M. 137, 325 P.2d 720.

**Lodge offering services of "downtown" hotel subject to section.** — Where lodge offered service and facilities that one might expect to find at any one of the well-known "downtown" hotels, it meets the definition of a hotel and comes under this section. *Weiser v. Albuquerque Oil & Gasoline Co.*, 1958-NMSC-061, 64 N.M. 137, 325 P.2d 720.

**Hotelkeeper's liability limited to $1000 for property in his care.** — When a guest leaves property with a hotelkeeper at the desk and a subsequent loss takes place, this section clearly and unambiguously states that the hotelkeeper's liability is limited to

$1,000. *Weiser v. Albuquerque Oil & Gasoline Co.*, 1958-NMSC-061, 64 N.M. 137, 325 P.2d 720.

**Section limits hotel's liability even when luggage delivered by airline.** — This statute was not limited in its application to property brought physically into a hotel by a guest or his agent, and therefore was applied to limit the liability of a hotel for loss of a guest's luggage which had been delivered to the hotel by her airline. *Albuquerque Hilton Inn v. Haley*, 1977-NMSC-051, 90 N.M. 510, 565 P.2d 1027.

**Railroad conductor, renting hotel room by month, was not guest.** *Horner v. Harvey*, 1885-NMSC-005, 3 N.M. (Gild.) 307, 5 P. 329 (decided under former law).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 40 Am. Jur. 2d Hotels, Motels and Restaurants §§ 157 et seq.

Payment for accommodation by week, month, or the like as affecting question whether one is a guest or a boarder at an inn, 12 A.L.R. 261, 145 A.L.R. 363.

What constitutes an hotel or inn, 19 A.L.R. 517, 53 A.L.R. 988.

Liability of innkeeper for property left by departing guest who intends to return, 22 A.L.R. 1194.

Information which must be given by a guest upon delivering articles into custody of innkeeper, 53 A.L.R. 1048.

Authority of clerk or other employee to waive innkeeper's regulation as to baggage or valuables, 56 A.L.R. 316.

Loss of or damage to guest's baggage while being transported to or from hotel, 76 A.L.R. 1106.

Description of property in statute limiting liability of innkeeper to guest for loss of or damage to property, scope and application of, 115 A.L.R. 1088.

Safety receptacles for valuables of guests, necessity of complying with statutory provision as to place of posting, and contents of notice by innkeeper as to safety receptacles for valuables of guests, 119 A.L.R. 796.

Effect of notice limiting liability for valuables or effects of guest in hotel, 9 A.L.R.2d 818.

Tort liability of master for theft by servant, 15 A.L.R.2d 829, 39 A.L.R.4th 543.

Liability of innkeeper to guest for injuries occasioned by defects in furnishings or other conditions in room or suite, 18 A.L.R.2d 973, 91 A.L.R.3d 483, 93 A.L.R.3d 253.

Liability of innkeeper for injury to guest caused by pushing, crowding, etc., of other guests, 20 A.L.R.2d 8.

Liability for injury to customer or patron from defect in or fall of seat, 21 A.L.R.2d 420.

Maintenance or regulation by public authorities of tourist or trailer camps, motor courts or motels, 22 A.L.R.2d 774.

Liability of bailee for hire of automobile for loss of, or damage to, contents, 27 A.L.R.2d 796.

Liability of innkeeper for injury to guest using hall or similar passageway, 27 A.L.R.2d 822.

Liability of employer, other than carrier, for a personal assault by an employee upon customer, patron, or other invitee, 34 A.L.R.2d 372.

Liability of innkeeper to guest injured while using ramp or similar inclined surface, 58 A.L.R.2d 1173.

Liability of innkeeper for injury to guest using steps or stairs, 58 A.L.R.2d 1178.

Liability of innkeeper for loss of or damage to property of a guest resulting from fire, 63 A.L.R.2d 495.

Liability of innkeeper or restauranteur for injury to guest or patron inflicted on or about premises by person other than proprietor or his servant, 70 A.L.R.2d 628, 28 A.L.R.3d 80, 43 A.L.R.3d 281.

Liability of innkeeper for injury by object thrown or falling because of conduct of guest, 74 A.L.R.2d 1241.

Liability of innkeeper for loss of or damage to automobile of guest or boarder, 52 A.L.R.3d 433.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 A.L.R.4th 80.

Liability of hotel or motel for guest's loss of money from room by theft or robbery committed by person other than defendant's servant, 28 A.L.R.4th 120.

43A C.J.S. Inns, Hotels and Eating Places §§ 44 to 48.

# ARTICLE 7
# Junk Dealers

## 57-7-1. ["Junk dealers" defined.]

That all persons, firms or corporations engaged in the business of purchasing or selling secondhand or castoff material of any kind, which is commonly known and is hereinafter designated and referred to as "junk" - such as old iron, copper, brass, lead, zinc, tin, steel and other metals, metallic cables, wires, ropes, cordage, bottles, bagging, rags, rubber, paper and other like materials, shall be and hereby are defined, and held to be junk dealers within the meaning of this act [57-7-1 to 57-7-7 NMSA 1978].

**History:** Laws 1921, ch. 25, § 1; C.S. 1929, § 77-101; 1941 Comp., § 51-2601; 1953 Comp., § 49-7-1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions §§ 1, 4, 15.

Regulation of junk dealers, 30 A.L.R. 1427, 45 A.L.R.2d 1391.

## 57-7-2. [Records of purchases.]

Every junk dealer shall keep a book in which shall be written in ink at the time of their purchase a full and accurate description of each and every article purchased, together with the full name, residence and general description of the person or persons selling the same, and said book shall at all times be open to inspection by the sheriff of the county, or any of his deputies and any member of the police force in the city or town, and any constable or other municipal or county official in the county, in which said junk dealer does business. No entry in said book shall be erased, mutilated or changed.

**History:** Laws 1921, ch. 25, § 2; C.S. 1929, § 77-102; 1941 Comp., § 51-2602; 1953 Comp., § 49-7-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions § 9.

Validity and construction of regulation requiring keeping of records, 30 A.L.R. 1436, 45 A.L.R.2d 1391.

## 57-7-3. [Report concerning lost or stolen articles; inspection of articles.]

If any material, goods, articles or thing whatsoever shall be advertised as having been lost or stolen, and the same, or any material, goods, articles or things answering to the description advertised, or any part or portion thereof, shall then be in, or subsequently come into, the possession of any junk dealer, he shall immediately give information thereof in writing to the sheriff of the county, or the chief of police or constable, of the city, town or village in which the junk dealer does business, and state when and from whom the same was received. Any junk dealer who shall receive, or shall have in his possession any goods, article or thing that has been lost, or shall be alleged or supposed to have been lost or stolen from the owner thereof, shall exhibit the same on demand to the sheriff of the county, or any of his deputies, or to any member of the police force or constable, or other municipal or county official, of the city, town or village, or county in which said junk dealer does business, or to any person duly authorized in writing by any magistrate to inspect property in the possession of said junk dealer, who shall exhibit such authorization to said dealer.

**History:** Laws 1921, ch. 25, § 3; C.S. 1929, § 77-103; 1941 Comp., § 51-2603; 1953 Comp., § 49-7-3.

### ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-7-4. [Lost or stolen property returned without payment.]

When any person, firm or corporation is found to be the owner of lost or stolen property, which has been purchased by, or is in the possession of any junk dealer, the said property shall be returned to the owner thereof by said junk dealer without the payment of any money by the owner to said junk dealer, or any other person, firm or corporation.

**History:** Laws 1921, ch. 25, § 4; C.S. 1929, § 77-104; 1941 Comp., § 51-2604; 1953 Comp., § 49-7-4.

### ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-7-5. [Dealer to obtain statement from vendor; filing.]

At the time of purchase by any junk dealer of any pig or pigs of metal, copper wire or brass car jurnals [journals] or of any junk said junk dealer shall cause to be subscribed by the person or persons vending the same a statement as to when, where and from whom the vendor or vendors obtained such property; also a statement as to the vendor's or vendors' age or ages, residence or residences: i.e., the city, village or town, and the street and number, if any, of said residence or residences, and such other information as is reasonably necessary to enable said residence or residences to be located, also the name of the employer or employers, if any, of said vendor or vendors, and the place of business or employment of said employer or employers, and the junk dealer shall forthwith file the original of said statement subscribed by said vendor or vendors in the office of the chief of police or marshal, in the city, town or village in which the purchase was made, if made in a city or incorporated village; otherwise said statement shall forthwith be filed by the junk dealer in the office of the sheriff of the county in which said purchase was made.

**History:** Laws 1921, ch. 25, § 5; C.S. 1929, § 77-105; 1941 Comp., § 51-2605; 1953 Comp., § 49-7-5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions §§ 4, 15.

## 57-7-6. [Violation of act; penalties.]

Any junk dealer who shall be found guilty of a violation of any of the provisions of this act [57-7-1 to 57-7-7 NMSA 1978], shall be guilty of a misdemeanor, and shall be fined or [and] imprisoned, either or both, in the discretion of the court, provided, however, that for the first offense the fine shall be not less than fifty dollars ($50.00) or more than two hundred dollars ($200), and the imprisonment shall be for not more than sixty (60) days; and further provided, that for the second, and for each subsequent conviction or violation of any of the provisions of this act, the fines shall be not less than one hundred dollars ($100) or more than three hundred dollars ($300) and the imprisonment not less than thirty (30) days or more than ninety (90) days.

**History:** Laws 1921, ch. 25, § 6; C.S. 1929, § 77-106; 1941 Comp., § 51-2606; 1953 Comp., § 49-7-6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-7-7. [Statements by vendor; penalty.]

Any vendor who in making his statement as contemplated by this act [57-7-1 to 57-7-7 NMSA 1978] or in making any other written statement relative to junk which he either has sold or is trying to sell shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars [($10.00)] and costs nor more than one hundred dollars [($100)] and costs, or by imprisonment in the county jail for not less than ten nor more than ninety days, or by both such fine and imprisonment in the discretion of the court.

This act shall not be construed as impairing in anywise the power of cities or incorporated towns in this state to license, tax and to regulate any person, firm or corporation now engaged in, or hereafter engaged in the buying and selling of junk, provided, that such regulations are not inconsistent herewith.

**History:** Laws 1921, ch. 25, § 7; C.S. 1929, § 77-107; 1941 Comp., § 51-2607; 1953 Comp., § 49-7-7.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For statements and records required to be kept by the junk dealer, *see* 57-7-2, 57-7-3, 57-7-5 NMSA 1978.

**Compiler's notes.** — This section is apparently incomplete in its description of the offense in the first paragraph.

# ARTICLE 8
# Trading Stamps

## 57-8-1. [Definitions.]

As used in this act [57-8-1 to 57-8-6 NMSA 1978]:

A. the term "trading stamp" means any stamp or similar device issued in connection with the retail sale of merchandise or service, as a cash discount or for any other marketing purpose, which entitles the rightful holder, on its due presentation for redemption, to receive merchandise, service or cash. This term, however, shall not mean any redeemable device used by the manufacturer or packer of an article, in advertising or selling it, or any redeemable device issued and redeemed by a newspaper, magazine or other publication;

B. the term "trading stamp company" means any person engaged in distributing trading stamps for retail issuance by others, or in redeeming trading stamps for retailers in any way or under any guise;

C. the term "person" means any individual, partnership, corporation, association or other organization.

**History:** 1953 Comp., § 49-9-1, enacted by Laws 1959, ch. 79, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Junior stamp plan not subject to New Mexico Trading Stamp Act.** 1962 Op. Att'y Gen. No. 62-35.

**Retail store issuing own stamps not subject to act.** — A retail store which issues its own trading stamps and redeems them at its own store is not within the purview of the act. 1959 Op. Att'y Gen. No. 59-141.

**Several stores establishing stamp system subject to act.** — When several stores establish a trading stamp system where the stamps may be redeemed at any one of the several issuing stores, then each store is redeeming for the other and is subject to this statute. 1959 Op. Att'y Gen. No. 59-141.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions §§ 79 to 88.

Constitutionality of trading stamp legislation, 26 A.L.R. 707, 124 A.L.R. 345, 133 A.L.R. 1087.

Giving of trading stamps, premiums, or the like, as violation of Fair Trade Law, 22 A.L.R.2d 1212.

Giving of trading stamps, premiums, or the like, as violation of statute prohibiting sales below costs, 70 A.L.R.2d 1080.

87 C.J.S. Trademarks, Tradenames and Unfair Competition §§ 244, 257.

## 57-8-2. [Fraud, false representation and lottery prohibited.]

No trading stamp company shall commit any fraud or shall make any false representation or shall resort to any lottery in distributing or redeeming trading stamps in this state.

**History:** 1953 Comp., § 49-9-2, enacted by Laws 1959, ch. 79, § 2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions §§ 81, 83 to 87.

38 C.J.S. Gaming § 2 et seq.; 54 C.J.S. Lotteries § 9.

## 57-8-3. [Redemption value in cents to be shown.]

No trading stamp company shall distribute trading stamps in this state or shall redeem trading stamps hereafter issued therein unless:

A. each stamp has legibly printed upon its face in cents or any fraction thereof a cash value determined by the company; and

B. the rightful holders may, at their option, redeem the stamps in cash when duly presented to the company for redemption in a number having an aggregate cash value of not less than twenty-five cents [($.25)].

**History:** 1953 Comp., § 49-9-3, enacted by Laws 1959, ch. 79, § 3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**At least one redemption center must be located within state.** — It must be implied from the requirements set forth that each such company must have at least one redemption center located within the state of New Mexico. 1959 Op. Att'y Gen. No. 59-141.

**Must redeem and provide for optional cash redemption within state.** — A trading stamp company must redeem stamps in this state and must, in addition to offering to redeem for services or merchandise, provide for optional cash redemption in this state. 1959 Op. Att'y Gen. No. 59-141.

## 57-8-4. [Conditions of issue; registration statement; bond; claims of holders; filing of claims; determination of validity; distribution of proceeds; amount of bond; new bond; registration fee.]

No trading stamp company shall distribute trading stamps in this state or shall redeem trading stamps hereafter issued therein until it has filed with the secretary of state:

A. a statement of registration accompanied by representative samples of its stamps, stamp collection books, stamp redemption catalogues and stamp distribution and redemption agreement forms currently used in this state. Each such statement shall provide the following information:

(1) the name and principal address of the company;

(2) the state of its incorporation or origin;

(3) the names and addresses of its principal officers, partners or proprietors;

(4) the address of its principal office in this state;

(5) the name and address of its principal officer, employee or agent therein;

(6) the addresses of the places where its stamps are redeemable within the state;

(7) a short form of its balance sheet, as at the end of its last fiscal year prior to such filing, certified by an independent public accountant; and

(8) unless the principal sum of the bond hereinafter required to be fied [filed] by the company is the maximum amount hereinafter required, a statement of the gross income from its business in this state as a trading stamp company during such last fiscal year, certified by an independent public accountant; and, simultaneously therewith;

B. a bond payable to this state and duly executed by the company and a corporate surety qualified to do business therein, which is conditioned upon the performance by the company of the obligation to redeem trading stamps issued by the retailers in this state, when they are duly presented for redemption by the rightful owners and holders.

In the event the trading stamp company defaults in performing such obligation, all rightful holders of trading stamps of such company shall be entitled to make claim against said bond. Retailers in possession of trading stamps for issuance to their customers shall also be deemed rightful holders entitled to make such claim.

In the event the trading stamp company defaults in the performance of its obligation to redeem trading stamps, any rightful holder may file within three months after such default a complaint with the secretary of state. Upon the filing of any such compaint [complaint] the secretary of state shall forthwith make a determination whether there has been a default. If the secretary of state shall determine that there has been such a

default he shall give notice of such determination to the trading stamp company and if such default is not corrected within 10 days he shall publish notice of such default in three consecutive publications of one or more newspapers having general circulation throughout this state and therein require that proof of all claims for redemption of the trading stamps of the company shall be filed with him, together with the trading stamps upon which the claim is based, within three months after the date of the first such publication. The secretary of state promptly after the expiration of such period shall determine the validity of all claims so filed. Thereupon the secretary of state shall be paid by the surety such amount as shall be necessary to satisfy all valid claims so filed, together with reasonable administrative costs incident to the determination and payment of said claims, not exceeding the aggregate, however, of the principal sum of the bond. The secretary of state shall promptly thereafter make an equitable distribution of the proceeds of the bond, less such reasonable administrative costs, to such claimants and shall destroy the trading stamps so surrendered.

The principal sum of the bond shall be as follows:

If the issuer has not previously done business as a trading stamp company in this state, or if the company's gross income from such business in this state during its last fiscal year was not in excess of one hundred thousand dollars ($100,000): ten thousand dollars ($10,000); if such gross income exceeded one hundred thousand dollars ($100,000) but was not in excess of two hundred and fifty thousand dollars ($250,000): twenty-five thousand dollars ($25,000); if such gross income exceeded two hundred and fifty thousand dollars ($250,000) but was not in excess of five hundred thousand dollars ($500,000): fifty thousand dollars ($50,000); if such gross income exceeded five hundred thousand dollars ($500,000) but was not in excess of seven hundred fifty thousand dollars ($750,000): seventy-five thousand dollars ($75,000); and if such gross income exceeded seven hundred and fifty thousand dollars ($750,000): one hundred thousand dollars ($100,000).

On the effective date of each such new bond any and all liability on all bonds previously filed hereunder shall terminate and all rightful holders of trading stamps who shall prosecute their claims hereunder shall prosecute such claims solely against the new bond and only by filing proofs of claim with the secretary of state in the manner hereinbefore provided.

The statement of registration and the bond shall be filed with the secretary of state on or before the effective date of this act and annually thereafter on or before July 1 of each year. The trading stamp company shall pay a registration fee as follows: if the issuer has not previously done business as a trading stamp company in this state or if the company's gross income from such business in this state during its last fiscal year was not in excess of one hundred thousand dollars ($100,000): one hundred dollars ($100); if such gross income exceeded one hundred thousand dollars ($100,000) but was not in excess of two hundred and fifty thousand dollars ($250,000): two hundred and fifty dollars ($250); if such gross income exceeded two hundred and fifty thousand dollars ($250,000) but was not in excess of five hundred thousand dollars ($500,000):

five hundred dollars ($500); if such gross income exceeded five hundred thousand dollars ($500,000): one thousand dollars ($1,000) to the secretary of state at the time of filing such registration statement.

**History:** 1953 Comp., § 49-9-4, enacted by Laws 1959, ch. 79, § 4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Domestic corporation issuing own stamps has no duty to file.** — A domestic corporation engaged in the retail trade and which issues its own trading stamps only to its customers, and which are redeemable only by it, does not have the duty of filing with the secretary of state the information and the bond required by Subsections A and B of this section. 1959-60 Op. Att'y Gen. No. 59-126.

**Duty of filing prerequisite to doing business.** — It is clear from the language of the act (57-8-1 to 57-8-6 NMSA 1978) that no trading stamp company shall distribute trading stamps in this state or shall redeem trading stamps issued within this state until it has filed with the secretary of state, the registration statement required by this section. 1959 Op. Att'y Gen. No. 59-141.

**Independent public accountant must certify short form balance sheet.** — From the language of Subparagraphs 7 and 8, of Subsection A of this section, it is apparent the statute specifically provides that a short form of balance sheet of a trading stamp company has to be certified by an independent public accountant before same is turned over to the secretary of state. 1959 Op. Att'y Gen. No. 59-127.

**Accountant's certificate not limited to comparison of statement and ledgers.** — This section provides clearly that the audit has to be made by an independent accountant. Further, the certificate cannot be limited to comparison of statements with amounts shown upon the ledgers of the filing stamp company. 1959 Op. Att'y Gen. No. 59-127.

**Approval of bond mandatory requirement.** — Each trading stamp company must submit a short form of balance sheet, certified by an independent accountant after a thorough audit is made and inventories are verified. The approval of the bond is a mandatory requirement and must be done under Subsection B, of this section, which provides for giving of the bond, the kind of bond, amount of bond and approval of same as to form and maximum amount. 1959 Op. Att'y Gen. No. 59-127.

## 57-8-5. [Ceasing or suspending redemption; notice of intention.]

No trading stamp company shall cease or suspend the redemption of trading stamps in this state without filing with the secretary of state at least ninety days' prior written

notice of its intention so to do and concurrently mailing a copy of such notice to each retailer within this state which has at any time theretofore within one year issued trading stamps which the company is obligated to redeem.

**History:** 1953 Comp., § 49-9-5, enacted by Laws 1959, ch. 79, § 5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Contractual obligation to redeem extends beyond 90-day notice period.** — This section is not intended to affect the contractual rights of the holders of stamps issued by either the trading stamp company or its contract retailers. The obligation to redeem remains even after the 90 days have elapsed. A failure to redeem after that period is a default and would constitute a breach of contract, at least as to those who receive stamps prior to the notice and as to those who were without actual knowledge of the intention of the trading stamp company to cease redemption and who were issued stamps by the retailer after he has received such notice. 1959 Op. Att'y Gen. No. 59-127.

**Obligation to redeem unwritten contract with four-year limitation.** — The obligation to redeem, being based on an unwritten contract between the stamp company and the rightful holder, is governed by the statute of limitations for such unwritten contracts, which is four years (*see* 37-1-4 NMSA 1978). 1959 Op. Att'y Gen. No. 59-127.

## 57-8-6. [Violation of act; penalty; injunction.]

Any person violating any provision of this act [57-8-1 to 57-8-6 NMSA 1978] shall be punished by a fine of not more than five thousand dollars ($5,000), and the district court shall have jurisdiction in equity on the complaint of the secretary of state, the attorney general or any rightful holder of stamps of the offering company to restrain the violation of any of said provisions.

**History:** 1953 Comp., § 49-9-6, enacted by Laws 1959, ch. 79, § 6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

# ARTICLE 9
# Used Merchandise

## 57-9-1. Short title.

This act [57-9-1 to 57-9-3, 57-9-4, 57-9-5 NMSA 1978] may be cited as the "Used Merchandise Act".

**History:** 1953 Comp., § 49-13-1, enacted by Laws 1967, ch. 155, § 1.

**ANNOTATIONS**

**Cross references.** — For authority of municipalities generally, *see* 3-17-1 and 3-18-1 NMSA 1978.

**Act did not withdraw authority of municipalities to regulate pawnbrokers.** — Since there may be double regulation, the later state law and the prior municipal authority to regulate are reconcilable. The Used Merchandise Act did not withdraw the authority of municipalities to regulate pawnbrokers. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

**Municipal ordinance may duplicate or complement statutory regulations.** — With the enactment of the Used Merchandise Act, there is regulation of pawnbrokers by both the state and the municipality. The fact of double regulation does not result in the withdrawal of the municipality's authority to regulate. An ordinance may duplicate or complement statutory regulations. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

**Municipal ordinance requiring recording amount of purchase price or loan** not in conflict with the Used Merchandise Act. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability on implied warranties in sale of used motor vehicle, 47 A.L.R.5th 677.

## 57-9-2. Definitions.

As used in the Used Merchandise Act:

A. "store" means any pawnshop, second hand store, junkshop, automobile salvage or wreckage establishment or any place of operation for dealing in or purchasing gold, silver or platinum, but does not include any shop or establishment insofar as it purchases or deals in paper products or used beverage containers, other than those made of gold, silver or platinum; and

B. "identification" means a valid New Mexico driver's license, a federal social security card, a valid armed forces identification card, a federal census number, a valid medicare identification card, a valid passport or any valid juvenile identification card issued by a municipality of this state.

**History:** 1953 Comp., § 49-13-2, enacted by Laws 1967, ch. 155, § 2; 1981, ch. 323, § 1.

**ANNOTATIONS**

**Municipal ordinance imposing stricter identification and description of article requirements** not in conflict with this section. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

## 57-9-3. Prohibited acts.

It is unlawful for the owner of any store, or the manager or employee thereof, to purchase or to loan money secured by any used merchandise, article or thing without first requiring identification from the seller or borrower and recording the name of the seller or borrower, his address and date of birth or social security number, a complete description of the merchandise, article or thing sold or loaned on the date of such transaction and the identification number and type of identification shown.

**History:** 1953 Comp., § 49-13-3, enacted by Laws 1967, ch. 155, § 3; 1981, ch. 323, § 2.

**ANNOTATIONS**

**Municipal ordinance requiring both date and time be recorded not** in conflict with this section. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 58 Am. Jur. 2d Occupations, Trades and Professions §§ 4, 9, 15.

## 57-9-3.1. Weighing devices.

All devices used to weigh precious metals by an owner of a store shall have been inspected and approved for use by a weights and measures officer of this state within a period of twelve months immediately preceding the date of the weighing.

**History:** 1978 Comp., § 57-9-3.1, enacted by Laws 1981, ch. 323, § 3.

## 57-9-3.2. Records.

An owner of a store shall:

A. keep a record in which he shall note the time of each transaction, a description of the goods purchased, the name and address of the person selling the goods and the date and hour the goods were received; and

B. retain all gold, silver and platinum in the form in which purchased in his possession for a period of not less than five days.

**History:** 1978 Comp., § 57-9-3.2, enacted by Laws 1981, ch. 323, § 4.

## 57-9-3.3. Receipts.

The owner of a store shall issue a serialized receipt for each purchase or statement of appraisal of gold, silver or platinum which shall contain the following:

A. the legal name and address of the store or appraiser;

B. the name and address of the seller;

C. the date of the transaction;

D. the net weight in terms of pounds troy or avoirdupois, ounces troy or avoirdupois, pennyweight troy or avoirdupois or kilograms or grams; and

E. the fineness of the precious metal in terms of karat for gold and sterling or coin for silver.

The merchant shall retain copies of each receipt or statement of appraisal for not less than one year.

**History:** 1978 Comp., § 57-9-3.3, enacted by Laws 1981, ch. 323, § 5.

## 57-9-4. Inspection of record.

The record as provided in Section 3 [57-9-3 NMSA 1978] of the Used Merchandise Act shall be open to inspection of law enforcement officers of the county, municipality and state at all times.

**History:** 1953 Comp., § 49-13-4, enacted by Laws 1967, ch. 155, § 4.

**ANNOTATIONS**

**Municipal ordinance permitting inspection by persons not police officers not** in conflict with this section. *City of Hobbs v. Biswell*, 1970-NMCA-086, 81 N.M. 778, 473 P.2d 917, cert. denied, 81 N.M. 772, 473 P.2d 911.

## 57-9-5. Penalty.

A. The first violation of the Used Merchandise Act is a misdemeanor.

B. Second and all subsequent violations of the Used Merchandise Act which occur after the date of conviction for the first offense are fourth degree felonies.

**History:** 1953 Comp., § 49-13-5, enacted by Laws 1967, ch. 155, § 5; 1981, ch. 323, § 6.

**ANNOTATIONS**

**Cross references.** — For sentencing authority with respect to petty misdemeanors, *see* 31-19-1 NMSA 1978.

# ARTICLE 9A
# Unused Merchandise Ownership Protection

## 57-9A-1. Short title.

This act [57-9A-1 to 57-9A-6 NMSA 1978] may be cited as the "Unused Merchandise Ownership Protection Act".

**History:** Laws 1999, ch. 247, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, made the Unused Merchandise Ownership Protection Act effective July 1, 1999.

## 57-9A-2. Definitions.

As used in the Unused Merchandise Ownership Protection Act:

A. "open market" may include a "swap meet", an "indoor swap meet" or a "flea market" and means an event at which two or more persons offer personal property for sale or exchange and either:

(1) a fee is charged for those persons selling or exchanging personal property or a fee is charged to the public for admission to the event; or

(2) the event is held more than six times in a twelve-month period;

B. "unused merchandise" means tangible personal property that, since its original production or manufacturing, has never been used or consumed and, if placed in a package or container, is still in its original and unopened package or container; and

C. "vendor of unused merchandise" means a person who offers unused merchandise for sale or exchange at an open market, except a person who offers five or less items of the same unused merchandise for sale or exchange at an open market.

**History:** Laws 1999, ch. 247, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, made the Unused Merchandise Ownership Protection Act effective July 1, 1999.

## 57-9A-3. Prohibited sales; certain merchandise.

A. It is a violation of the Unused Merchandise Ownership Protection Act for a vendor of unused merchandise to sell or offer for sale any baby food or infant formula, cosmetic, drug or medical device at an open market without displaying a written valid authorization from the manufacturer or distributor of the merchandise. The authorization shall identify the vendor of unused merchandise and shall specify the merchandise and expiration date of the merchandise that the vendor is authorized to sell.

B. As used in this section:

(1) "baby food or infant formula" means unused merchandise consisting of a food product manufactured, packaged and labeled specifically for consumption by a child less than two years of age;

(2) "cosmetic" means unused merchandise, other than soap, that is:

(a) intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance; or

(b) intended for use as a component of any articles enumerated in Subparagraph (a) of this paragraph;

(3) "drug" means unused merchandise, other than food, that:

(a) is recognized in an official compendium;

(b) affects the structure or any function of the body of man or other animals; or

(c) is intended for use as a component of Subparagraph (a) or (b) of this paragraph, but does not include medical devices or their component parts or accessories;

(4) "medical device" means unused merchandise that is an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article, including any component, part or accessory, and that is:

(a) recognized in an official compendium;

(b) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment or prevention of disease, in man or other animals; or

(c) intended to affect the structure or function of the body of man or other animals and which does not achieve its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for achievement of its principal intended purposes; and

(5) "official compendium" means the official United States pharmacopoeia national formulary or the official homeopathic pharmacopoeia of the United States or any supplement to either of them.

**History:** Laws 1999, ch. 247, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, made the Unused Merchandise Ownership Protection Act effective July 1, 1999.

## 57-9A-4. Recordkeeping requirements; violations.

A. A vendor of unused merchandise shall maintain receipts for the vendor's purchase of any unused merchandise sold or offered for sale by the vendor at an open market. The receipts shall be kept at the open market in which the unused merchandise is offered for sale and at the vendor's residence or principal place of business for two years after the merchandise is sold. Each receipt shall specify:

(1) the date of the purchase;

(2) the name and address of the person from whom the unused merchandise was acquired;

(3) a description of the unused merchandise purchased, including any specific lot numbers or other identifying characteristics;

(4) the amount paid for the unused merchandise; and

(5) the signature of the buyer and the seller of the unused merchandise.

B. It is a violation of the Unused Merchandise Ownership Protection Act for a person to knowingly:

(1) falsify, obliterate or destroy any receipt required to be kept pursuant to this section;

(2) at the request of a police officer, as defined in Section 29-7-7 NMSA 1978, fail or refuse to produce any receipt required to be kept pursuant to this section; and

(3) fail to maintain any receipt as required by this section.

**History:** Laws 1999, ch. 247, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, makes the Unused Merchandise Ownership Protection Act effective on July 1, 1999.

## 57-9A-5. Exemptions.

A. The following persons are exempt from the provisions of the Unused Merchandise Ownership Protection Act:

(1) a vendor at an event organized or operated for religious, educational, charitable or other nonprofit purposes if no part of any admission fee or parking fee charged vendors or prospective purchasers and no part of the gross receipts or net earnings from the sale of merchandise at the event is paid to a private person for participating in the organization or operation of the event;

(2) a vendor at an industry or association trade show;

(3) a vendor at an event at which all of the merchandise offered for sale is new and at which all vendors are manufacturers or authorized representatives of manufacturers or distributors; and

(4) a vendor selling by sample, catalog or brochure for future delivery.

B. The requirements of the Unused Merchandise Ownership Protection Act do not apply to sales or offers for sale of the following unused merchandise:

(1) firewood, sand, gravel, flagstone, building stone or other natural product;

(2) live animals;

(3) vehicles subject to registration pursuant to Section 66-3-1 NMSA 1978;

(4) food intended for human consumption at the open market immediately after sale;

(5) merchandise offered for sale as an antique or otherwise historical item and, although never used, the style, packaging, material or appearance of which clearly indicates that the merchandise was not produced or manufactured within recent times;

(6) food offered for sale that was grown, harvested or processed by the vendor or the grower;

(7) art, crafts or handicrafts that were produced by the vendor or the grower; and

(8) fresh produce.

**History:** Laws 1999, ch. 247, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, made the Unused Merchandise Ownership Protection Act effective July 1, 1999.

## 57-9A-6. Penalties.

A person who violates any provision of the Unused Merchandise Ownership Protection Act is guilty of a misdemeanor and shall be sentenced in accordance with Section 31-19-1 NMSA 1978.

**History:** Laws 1999, ch. 247, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 247, § 7, made the Unused Merchandise Ownership Protection Act effective July 1, 1999.

# ARTICLE 10
# Distress Sales

## 57-10-1. Short title.

This act [57-10-1 to 57-10-12 NMSA 1978] may be cited as the "Distress Sales Act".

**History:** 1953 Comp., § 49-14-1, enacted by Laws 1967, ch. 205, § 1.

## 57-10-2. Definitions.

As used in the Distress Sales Act:

A. "distress merchandise sale" shall mean any offer to sell to the public, or sale to the public, of goods, wares or merchandise on the implied or direct representation that such sale is in anticipation of the termination of a business at its present location or that the sale is being held other than in the ordinary course of business. Distress merchandise sales shall include but are not limited to any sale advertised either specifically or in substance as a "fire sale," "smoke and water damage sale," "adjustment sale," "liquidation sale," "creditor's sale," "insolvent sale," "trustee's sale," "bankrupt sale," "save us from bankruptcy sale," "insurance salvage sale," "mortgage sale," "assignee's sale," "adjuster's sale," "must vacate sale," "quitting business sale," "receiver's sale," "loss of lease sale," "forced out of business sale," "removal sale," "change of ownership sale" or "new location sale."

B. "person" means any individual, estate, trust, receiver, cooperative association, association, club, corporation, company, firm, partnership, joint venture, syndicate or other entity.

**History:** 1953 Comp., § 49-14-2, enacted by Laws 1967, ch. 205, § 2.

## 57-10-3. Licenses.

It shall be unlawful for any person to advertise or conduct a distress merchandise sale without having first obtained a license to do so in accordance with the provisions of the Distress Sales Act.

**History:** 1953 Comp., § 49-14-3, enacted by Laws 1967, ch. 205, § 3.

## 57-10-4. Application for license.

Any person desiring to conduct a distress merchandise sale shall make a written application verified under oath to the municipal governing body if the sale is to be held within the boundaries of an incorporated municipality or to the county governing body if the sale is to be held outside the boundaries of an incorporated municipality, at least fifteen days prior to the date on which the sale is to commence unless the merchandise to be sold consists of perishable goods, or goods damaged by smoke, fire or water in which case the fifteen-day time period will not be applicable. Each application shall contain the following information and such other information as the municipal or county governing body shall require:

A. the name and address of the owner of the goods, wares or merchandise to be sold;

B. a description of the place where such sale is to be held;

C. the nature of the occupancy of the place where such sale is to be held, whether by lease or otherwise, and the effective date of the termination of the occupancy of the premises;

D. the commencement and termination dates of the distress merchandise sale;

E. a full and complete statement of the facts regarding the reasons why the distress merchandise sale is being conducted, the manner in which the sale is to be conducted, the means to be employed in advertising the sale, together with the content of any proposed advertisement or advertising themes, or copies thereof;

F. if a defunct business is involved, the name and address of the defunct business, and the owner or former owner thereof;

G. a complete and detailed inventory of the goods, wares and merchandise including goods received on consignment to be offered at the distress merchandise sale, the terms and conditions of the acquisition of the property, the amount and description of the goods, wares or merchandise to be sold and the location of the goods, wares and merchandise at the time of the filing of the application;

H. a statement that the applicant has not in contemplation of the distress merchandise sale ordered, purchased or received on consignment any goods, wares or merchandise for the purpose of selling them at the sale within ninety days prior to the filing of the application;

I. a statement that no goods will be added to the inventory after the application is made or during the sale;

J. a statement that the applicant or its principal officers or agents have not been convicted of a violation of the Distress Sales Act or had a license issued under this act revoked within five years of the filing of this application.

**History:** 1953 Comp., § 49-14-4, enacted by Laws 1967, ch. 205, § 4.

## 57-10-5. Examination and investigation; grounds for denial of license.

The municipal or county governing body may upon the filing of an application investigate the applicant and examine his affairs in relation to the proposed sale and may examine the inventory and records of the applicant. No license shall be issued if it is found that:

A. the applicant has held a sale subject to regulation under the Distress Sales Act at the location described in the application, within three years from the date of the application; or

B. the application states that the applicant or any of its principal officers or agents have been convicted of a violation of the Distress Sales Act or has had a license issued under this act revoked within five years of the filing of this application; or

C. the inventory submitted with the application includes goods, wares or merchandise purchased or held on consignment by the applicant or added to his stock in contemplation of such sale and for the purpose of selling the stock at the distress sale. Any unusual addition to the stock of goods, wares or merchandise which is made within ninety days prior to the filing of the application shall be prima facie evidence that the addition was made in contemplation of the sale and for the purpose of selling the goods at the sale; or

D. the applicant, in ticketing the goods, wares or merchandise for sale has misrepresented the original retail price or value thereof; or

E. the advertisement or advertising themes are false, fraudulent, deceptive or misleading in any respect; or

F. the sales methods to be used by the applicant in conducting the sale will work a fraud upon the purchasers; or

G. the information set forth in the application is insufficient; or

H. representations made in the application are false; or

I. the applicant has acquired bankrupt stock or other distress sale merchandise from another area within six months of the application.

**History:** 1953 Comp., § 49-14-5, enacted by Laws 1967, ch. 205, § 5.

## 57-10-6. Issuance of license; conditions.

If the application which has been submitted complies with the provisions of the Distress Sales Act and if the required license fee has been paid, the municipal or county governing body shall issue the applicant a license to advertise and conduct the sale described in the application subject to the following conditions:

A. the sale shall be held at the place named in the application;

B. the sale shall be held by the licensee for a period of not more than ninety days following the date set forth in the license;

C. only goods, wares and merchandise included in the inventory attached to the application shall be displayed on the premises and sold at the sale;

D. the license shall be prominently displayed at the location of the sale at all times;

E. the licensee shall keep suitable books at the sale location which shall be open for inspection by the municipal or county governing body during normal business hours.

**History:** 1953 Comp., § 49-14-6, enacted by Laws 1967, ch. 205, § 6.

## 57-10-7. License fee; renewal.

A. The fee for any license issued pursuant to the Distress Sales Act shall be fifty dollars ($50.00) or 1/4 of 1% of the inventory cost value of the goods, wares or merchandise to be sold at the sale, whichever is more. In no case, however, shall the license fee exceed two hundred dollars ($200).

B. If during the period that the license is in effect it appears to the municipal or county governing body that all of the goods in the original inventory have not been sold, the municipal or county governing body may upon application and for good cause shown extend the license for a period not to exceed thirty days.

**History:** 1953 Comp., § 49-14-7, enacted by Laws 1967, ch. 205, § 7.

## 57-10-8. Revocation of license.

The municipal or county governing body shall revoke any license issued pursuant to the Distress Sales Act if he finds that the license has:

A. violated any provision of the Distress Sales Act; or

B. violated any condition of the license; or

C. made any material misstatement in the application for the license; or

D. failed to include in the inventory required by the Distress Sales Act all the goods, wares or merchandise being offered for sale; or

E. offered or permitted to be offered at the sale any goods, wares or merchandise not included in the inventory attached to the application; or

F. failed to keep suitable records of the sale; or

G. made or permitted to be made any false or misleading statements or representations in advertising the sale or in displaying, ticketing or pricing goods, wares or merchandise offered for sale; or

H. been guilty of any fraudulent practice in the conduct of the sale authorized by the license.

**History:** 1953 Comp., § 49-14-8, enacted by Laws 1967, ch. 205, § 8.

## 57-10-9. Confidentiality requirements.

The filing of an application for a license, the contents of the application and the issuance of the license shall be confidential information and no disclosure thereof shall be made except that which is necessary in the administration of this act [57-10-1 to 57-10-12 NMSA 1978]. However, disclosure of the above-mentioned information may be made with the consent of the applicant. The filing of the application and the issuance of the license shall not be confidential after public notice of the proposed sale has been given by the applicant.

**History:** 1953 Comp., § 49-14-9, enacted by Laws 1967, ch. 205, § 9.

## 57-10-10. Applicability of Distress Sales Act.

A. The Distress Sales Act shall not apply to any sale conducted by a public officer as a part of his official duties, to any sale for which an accounting must be made to a court of law or to any sale conducted pursuant to an order of a court of law.

B. The Distress Sales Act does not apply to seasonal sales, clearance sales or similar special sales of nondistress merchandise.

**History:** 1953 Comp., § 49-14-10, enacted by Laws 1967, ch. 205, § 10.

## 57-10-11. Penalty.

Any person violating any provision of the Distress Sales Act shall upon conviction be punished by a fine not to exceed three hundred dollars ($300) or by imprisonment not to exceed ninety days or both.

**History:** 1953 Comp., § 49-14-11, enacted by Laws 1967, ch. 205, § 11.

## 57-10-12. Distribution of fees.

The license fees collected under the Distress Sales Act, shall be deposited in the general fund of the county, city, town or village which has issued the license for the distress sale.

**History:** 1953 Comp., § 49-14-12, enacted by Laws 1967, ch. 205, § 14.

# ARTICLE 11
# Financing of Automobile Sales

## 57-11-1. [Agreements restricting financing of sales to certain persons prohibited.]

It shall be unlawful for any person who is engaged, either directly or indirectly, in the manufacture or distribution of motor vehicles, to sell or enter into a contract to sell motor vehicles, whether patented or unpatented, to any person who is engaged or intends to engage in the business of selling such motor vehicles at retail in this state, on the condition or with an agreement or understanding, either express or implied, that such person so engaged in selling motor vehicles at retail shall in any manner finance the purchase or sale of any one or number of motor vehicles only with or through a designated person or class of persons or shall sell and assign the conditional sales contracts, chattel mortgages or leases arising from the sale of motor vehicles or any one or number thereof only to a designated person or class of persons, when the effect of the condition, agreement or understanding so entered into may be to lessen or eliminate competition, or create or tend to create a monopoly in the person or class of persons who are designated, by virtue of such condition, agreement or understanding to finance the purchase or sale of motor vehicles or to purchase such conditional sales contracts, chattel mortgages or leases, and any such condition, agreement or understanding is hereby declared to be void and against the public policy of this state.

**History:** Laws 1937, ch. 75, § 1; 1941 Comp., § 68-1601; 1953 Comp., § 64-31-1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For provision declaring it unlawful to require dealer to provide installment financing with specified financial institution, *see* 57-16-5 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 781 et seq.

Validity and construction of statute regulating dealings between automobile manufacturers, distributors, and dealers, 7 A.L.R.3d 1173, 82 A.L.R.4th 624, 51 A.L.R. Fed. 812.

58 C.J.S. Monopolies §§ 95, 97, 173.

## 57-11-2. [Threat of refusal to sell unless sales financed by certain persons; prima facie evidence of violation.]

Any threat, expressed or implied, made directly or indirectly to any person engaged in the business of selling motor vehicles at retail in this state by any person engaged, either directly or indirectly, in the manufacture or distribution of motor vehicles, that such person will discontinue or cease to sell, or refuse to enter into a contract to sell, or will terminate a contract to sell motor vehicles, whether patented or unpatented, to such person who is so engaged in the business of selling motor vehicles at retail, unless such person finances the purchase or sale of any one or number of motor vehicles only with

or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages or leases arising from his retail sales of motor vehicles or any one or number thereof only to a designated motor vehicles or any one or any number thereof [sic] only to such person or class of persons shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on condition or with the agreement or understanding prohibited in Section 1 [57-11-1 NMSA 1978] of this act.

**History:** Laws 1937, ch. 75, § 2; 1941 Comp., § 68-1602; 1953 Comp., § 64-31-2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-3. [Threat to terminate contract unless sales financed by certain persons; prima facie evidence of violation.]

Any threat, expressed or implied, made directly or indirectly, to any person engaged in the business of selling motor vehicles at retail in this state by any person, or any agent of any person, who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles in this state and is affiliated with or controlled by any person engaged, directly or indirectly, in the manufacture or distribution of motor vehicles, that such person so engaged in the manufacture or distribution shall terminate his contract with or cease to sell motor vehicles to such person engaged in the sale of motor vehicles at retail in this state unless such person finances the purchase or sale of any one or number of motor vehicles only or through a designated person or class of persons or sells and assigns the conditional sales contracts, chattel mortgages or leases arising from his retail sale of [motor vehicles or any one or any number thereof only to such per]son so engaged in financing the purchase or sale of motor vehicles or in buying conditional sales contracts, chattel mortgages or leases on motor vehicles, shall be presumed to be made at the direction of and with the authority of such person so engaged in such manufacture or distribution of motor vehicles, and shall be prima facie evidence of the fact that such person so engaged in the manufacture or distribution of motor vehicles has sold or intends to sell the same on the condition or with the agreement or understanding prohibited in Section 1 [57-11-1 NMSA 1978] of this act.

**History:** Laws 1937, ch. 75, § 3; 1941 Comp., § 68-1603; 1953 Comp., § 64-31-3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed words near the middle of the section were inserted by the compiler, as they were missing from Laws 1937, ch. 75, § 3. They were not enacted by the legislature and are not part of the law.

## 57-11-4. [Payments to eliminate competition or create monopoly in financing sales prohibited.]

It shall be unlawful for any person who is engaged, directly or indirectly, in the manufacture or wholesale distribution only of motor vehicles, whether patented or unpatented, to pay or give, or contract to pay or give anything or service of value to any person who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail within this state if the effect of any such payment or the giving of any such thing or service of value may be to lessen or eliminate competition, or tend to create or create a monopoly in the person or class of persons who receive or accept such thing or service of value.

**History:** Laws 1937, ch. 75, § 4; 1941 Comp., § 68-1604; 1953 Comp., § 64-31-4.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-5. [Acceptance by persons engaged in financing sales of payments tending to eliminate competition prohibited.]

It shall be unlawful for any person who is engaged in the business of financing the purchase or sale of motor vehicles or of buying conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail within this state to accept or receive, or contract or agree to accept or receive, either directly or indirectly, any payment, thing or service of value from any person who is engaged, either directly or indirectly, in the manufacture or wholesale distribution only of motor vehicles, whether patented or unpatented, if the effect of the acceptance or receipt of any such payment, thing or service of value may be to lessen or eliminate competition, or to create or tend to create a monopoly in the person who accepts or receives such payment, thing or service of value, or contracts or agrees to accept or receive the same.

**History:** Laws 1937, ch. 75, § 5; 1941 Comp., § 68-1605; 1953 Comp., § 64-31-5.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-6. [Violators of 57-11-5 NMSA 1978 forbidden to carry on business.]

It shall be unlawful for any person who hereafter so accepts or receives, either directly or indirectly, any payment, thing or service of value, as set forth in Section 5 [57-11-5 NMSA 1978] of this act, or hereafter so contracts, either directly or indirectly, to receive any such payment or thing or service of value to thereafter finance or attempt to finance the purchase or sale of any motor vehicle or buy or attempt to buy any conditional sales contracts, chattel mortgages or leases on motor vehicles sold at retail in this state.

**History:** Laws 1937, ch. 75, § 6; 1941 Comp., § 68-1606; 1953 Comp., § 64-31-6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-7. [Suits or proceedings against violators of act.]

For a violation of any of the provisions of this act [57-11-1 to 57-11-13 NMSA 1978] by any corporation or association mentioned herein, it shall be the duty of the attorney general or the district attorney of the proper county, to institute proper suits or quo warranto proceedings in any court of competent jurisdiction for the forfeiture of its charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the same under the general statutes of the state.

**History:** Laws 1937, ch. 75, § 7; 1941 Comp., § 68-1607; 1953 Comp., § 64-31-7.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For proceedings in quo warranto, generally, *see* 44-3-1 to 44-3-16 NMSA 1978.

## 57-11-8. [Foreign corporations as violators of act; revocation of license to do business in state.]

Every foreign corporation, as well as every foreign association, exercising any of the powers, franchises or functions of a corporation in this state, violating any of the provisions of this act [57-11-1 to 57-11-13 NMSA 1978], is hereby denied the right [of] and prohibited from doing any business in this state, and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings by injunction or otherwise. The secretary of the state shall be authorized to revoke the license of any such corporation or association heretofore authorized by him to do business in this state.

**History:** Laws 1937, ch. 75, § 8; 1941 Comp., § 68-1608; 1953 Comp., § 64-31-8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-9. [Penalties.]

Any person who violates any of the provisions of this act [57-11-1 to 57-11-13 NMSA 1978], any person who is a party to any agreement or understanding, or to any contract prescribing any condition prohibited by this act, and any employee, agent or officer of any such person who shall participate, in any manner, in making, executing, enforcing, performing or in urging, aiding or abetting in the performance of any such contract, condition, agreement or understanding and any person who pays or gives or contracts to pay or give anything or service of value prohibited by this act, and any person who receives or accepts or contracts to receive or accept anything or service of value prohibited by this act, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than $50 [fifty dollars ($50.00)] nor more than $5,000 [five thousand dollars ($5,000)] or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment. Each day's violation of this provision shall constitute a separate offense.

**History:** Laws 1937, ch. 75, § 9; 1941 Comp., § 68-1609; 1953 Comp., § 64-31-9.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-10. [Contract in violation of act void.]

Any contract or agreement in violation of the provisions of this act [57-11-1 to 57-11-13 NMSA 1978] shall be absolutely void and shall not be enforceable either in law or equity.

**History:** Laws 1937, ch. 75, § 10; 1941 Comp., § 68-1610; 1953 Comp., § 64-31-10.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-11. [Provisions of act cumulative.]

The provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state.

**History:** Laws 1937, ch. 75, § 11; 1941 Comp., § 68-1611; 1953 Comp., § 64-31-11.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-12. [Action for damages by violation of act.]

In addition to the criminal and civil penalties herein provided, any person who is injured in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act [57-11-1 to 57-11-13 NMSA 1978], may sue therefor in any court having jurisdiction thereof in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover twofold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act is [are] pending, that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether they reside in the county where such action is pending, or not.

**History:** Laws 1937, ch. 75, § 12; 1941 Comp., § 68-1612; 1953 Comp., § 64-31-12.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-11-13. [Definitions.]

A. The term "person," as used in this act [57-11-1 to 57-11-13 NMSA 1978], means any individual, firm, corporation, partnership, association, trustee, receiver or assignee for the benefit of creditors.

B. The terms "sell," "sold," "buy" and "purchase," as used in this act, include exchange, barter, gift and offer or contract to sell or buy.

**History:** Laws 1937, ch. 75, § 13; 1941 Comp., § 68-1613; 1953 Comp., § 64-31-13.

# ARTICLE 12
# Unfair Trade Practices

## 57-12-1. Short title.

Chapter 57, Article 12 NMSA 1978 may be cited as the "Unfair Practices Act".

**History:** 1953 Comp., § 49-15-1, enacted by Laws 1967, ch. 268, § 1; 2003, ch. 167, § 8; 2003, ch. 168, § 1.

**ANNOTATIONS**

**Cross references.** — For provisions relating to unfair insurance practices, *see* Chapter 59A, Article 16 NMSA 1978.

**The 2003 amendment,** effective June 20, 2003, substituted "Chapter 57, Article 12 NMSA 1978" for "This act".

Laws 2003, ch. 167, § 8, effective July 1, 2003, enacted identical amendments to this section. The section was set out as amended by Laws 2003, ch. 168 § 1. *See* 12-1-8 NMSA 1978.

**Application to hospitals.** — In an unfair practices claim for medical negligence, the inquiry hinges on whether the medical negligence and the unfair practices claims are coterminous or indistinguishable, that is, whether they rely on the same facts and rely on a judgment as to the actual competence of the medical practitioner for resolution. If they do, an unfair practices claim is not appropriate. If they do not, an unfair practices claim may be viable, depending on the facts. *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, 150 N.M. 283, 258 P.3d 1075, cert. denied, 2011-NMCERT-002.

Where plaintiff claimed damages against a hospital for medical malpractice and unfair practices; the unfair practices claim was based on the hospital's billboard and internet advertising that described the hospital's team of physicians, nurses and technicians and the hospital's emergency room goal to provide 24-hour, seven-day-a-week access to qualified physicians, the resolution of the issue whether the advertising was materially misleading did not rely on the actions of the medical personnel and the unfair practices claim was sufficiently separate from the medical competence of the doctors and nurses to allow the unfair practice claim to proceed. *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, 150 N.M. 283, 258 P.3d 1075, cert. denied, 2011-NMCERT-002.

**Authority to determine burial arrangements.** — Where a cemetery sold two adjoining burial plots to a husband and wife; in the course of excavating the burial plot for the deceased husband the cemetery discovered the remains of a unidentified body in the wife's burial plot; the wife elected to convert the husband's single burial plot into a double burial plot, the cemetery did not violate the Unfair Practices Act when it sold the burial plots because the cemetery did not knowingly make a misrepresentation of fact that both burial plots were available. *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, 146 N.M. 179, 207 P.3d 1156, cert. denied, 2009-NMCERT-004, 146 N.M. 641, 213 P.3d 791.

**Conflict with federal law.** — In action against moving company for fraud, breach of contract, and unfair practices, the specific preclusion of punitive damages under the Carmack Amendment to the Interstate Commerce Act, former 49 U.S.C. § 11707 created a conflict with the Unfair Trade Practices Act (Chapter 57, Article 12 NMSA 1978) and therefore federal law controlled. *Margetson v. United Van Lines*, 785 F. Supp. 917 (D.N.M. 1991).

**Uniform Deceptive Trade Practices Act.** — The Unfair Practices Act is modeled after the Uniform Deceptive Trade Practices Act. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, 112 N.M. 97, 811 P.2d 1308.

**Liberal construction.** — Because the Unfair Practices Act constitutes remedial legislation, its provisions are liberally interpreted to facilitate and accomplish its purposes and intent. *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, 105 N.M. 803, 737 P.2d 1180, cert. denied, 105 N.M. 781, 737 P.2d 893.

**Remedies not exclusive.** — Causes of action may be maintained under both the New Mexico Unfair Trade Practices Act and the New Mexico Unfair Insurance Practices Act. *N.M. Life Ins. Guar. Ass'n v. Quinn & Co.*, 1991-NMSC-036, 111 N.M. 750, 809 P.2d 1278.

**Claims must be based on regular course of trade or commerce.** — Claims made under the Unfair Practices Act must be based on conduct occurring in defendant's regular course of trade or commerce. *Klein v. Bronstein*, 39 B.R. 20 (Bankr. D.N.M. 1984).

**Conduct complained of must have occurred in the regular course of business.** — Where plaintiffs filed a complaint seeking a determination that a debt arising from a prepetition state court default judgment against bankruptcy debtors in connection with their sale of a mobile home to plaintiffs was non-dischargeable, and where the default judgment included an award of treble damages under the New Mexico Unfair Practices Act (UPA), §§ 57-12-1 through § 57-12-26 NMSA 1978, treble damages were not proper because the UPA does not apply to the purchase and sale of the mobile home on which the default judgment was based. The sale was an isolated consumer transaction and one of the requirements of the UPA to apply is that the conduct complained of must have occurred in the regular course of business. *In re Crespin*, 551 B.R. 886 (2016).

**A business has standing under the Unfair Practices Act to sue a competitor for misrepresentation.** — A business has standing under the New Mexico Unfair Practices Act to sue a competitor for misrepresentations that damage the business by misleading or confusing the consuming public when the unfair practice occurs in connection with the sale of goods or services. *First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261 (D.N.M. 2014).

Where it was alleged that defendants, an investment services firm, confused and misled former and potential customers of plaintiff, a competitor investment firm, by using a name confusingly similar to plaintiff's name, by creating a website that was confusingly similar to plaintiff's website, and by making misleading statements to plaintiff's existing or potential customers, denial of defendants' motion to dismiss was appropriate because plaintiff was likely to be damaged and may have suffered monetary losses due to defendants' misrepresentations. *First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261 (D.N.M. 2014).

**Preemption by federal law.** — Claim under the New Mexico Unfair Practices Act was preempted by the federal Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. *Nechero v. Provident Life & Accident Ins. Co.*, 795 F. Supp. 374 (D.N.M. 1992).

The Employee Retirement Income Security Act of 1974 (ERISA) did not preempt an insured's pre-plan fraud claims against its insurer. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999).

**Claims against Medicare program operator not preempted.** — Plaintiffs' claims under the Unfair Practices Act that alleged a "Medicare Plus Choice" program operator disseminated knowingly false and misleading statements and representations to thousands of elderly and disabled beneficiaries regarding rates and benefits in order to induce them to enroll, and that the recipients relied on the statements and misrepresentations to enroll but then saw their benefits unilaterally reduced by the operator, were not preempted either expressly by former 42 U.S.C. § 1396w-26(b)(3)(B) or by the doctrine of conflict preemption. *Palmer v. St. Joseph Healthcare P.S.O., Inc.*, 2003-NMCA-118, 134 N.M. 405, 77 P.3d 560, cert. dismissed, 2004-NMCERT-010, 136 N.M. 542, 101 P.3d 808.

**Failure of evidence to support claim.** — Where evidence was never presented that a party knowingly made any false or misleading statement of any kind in connection with the negotiation of an oral agreement, the evidence failed to present or support an issue essential to the legal sufficiency of the asserted claim, and the trial court erred when it denied a motion for a directed verdict on an Unfair Practices Act violation claim. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, 112 N.M. 97, 811 P.2d 1308; *Aetna Fin. Co. v. Gaither*, 1994-NMSC-082, 118 N.M. 246, 880 P.2d 857; *Parker v. E.I. Du Pont de Nemours & Co.*, 1995-NMCA-086, 121 N.M. 120, 909 P.2d 1.

**Misrepresentation claim was a viable claim.** — Where, in January 2006, plaintiff retained defendant to file suit against a high school and a school district under the premises liability provision of the Tort Claims Act; defendant never filed suit within the statute of limitations; plaintiff sued defendant for legal malpractice and misrepresentation; the statute of limitations ran in September 2006; in October 2006, defendant assured plaintiff that the statute of limitations had not run; in August 2007, defendant realized that the case was barred, but did not disclose this fact to plaintiff until the spring of 2008; plaintiff claimed that defendant failed to inform plaintiff that

defendant had not done any work on the case; and plaintiff did not allege any damages other than the loss of the underlying suit against the high school and school district, plaintiff could pursue the misrepresentation claim both because plaintiff might have suffered actual damages as a result of defendant's misrepresentations and because fraudulent misrepresentation does not require actual damages. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, *rev'g* 2013-NMCA-003, 294 P.3d 1245.

**Evidence did not support plaintiff's claim.** — Where plaintiff retained defendant to file a tort claim against a school district; defendant failed to file the lawsuit within the statute of limitations; plaintiff sued defendant for violation of the Unfair Practices Act based on allegedly misleading advertisements about defendant's abilities made on a magnet in a phone book and in a television commercial; in the television commercial, defendant was featured as saying "don't accept a quick check until you check with me" and mentioned car accidents; and the phone book magnet had the same language printed on it and listed defendant's areas of practice as "serious injuries, auto accidents, and wrongful death", plaintiff failed to make a prima facie case for a claim under the act. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, 294 P.3d 1245, cert. granted, 2012-NMCERT-012, *rev'd*, 2013-NMSC-045.

**Act does not apply.** — Several developers' action under the New Mexico Unfair Trade Practices Act, was properly dismissed for failure to state a claim because the developers failed to show that the UTPA applied to opponents of a shopping center. *Saylor v. Valles*, 2003-NMCA-037, 133 N.M. 432, 63 P.3d 1152.

**Dismissal of claim in error.** — Where, under the facts pleaded, it is possible that plaintiffs could show that defendant failed to deliver the quality or quantity of goods or services contracted for, dismissal of claim for violation of Unfair Practices Act was in error. *Dellaria & Carnes v. Farmers Ins. Exch.*, 2004-NMCA-132, 136 N.M. 552, 102 P.3d 111.

**Whether bank breached its duty under the Unfair Practices Act** by failing to disclose a new policy to its customers, and whether that omission was made in bad faith will require proof of whether and when members received notice of the policy. *Brooks v. Norwest Corp.*, 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M. L. Rev. 49 (1973).

For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M. L. Rev. 265 (1977).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

For annual survey of New Mexico insurance law, 19 N.M.L. Rev. 717 (1990).

For annual survey of New Mexico Commercial Law, see 20 N.M.L. Rev. 239 (1990).

For survey of 1990-91 commercial law, see 22 N.M.L. Rev. 661 (1992).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices § 1151.

Unfair competition by imitation in sign or design of business place, 86 A.L.R.3d 884.

Liability for interference with at will business relationship, 5 A.L.R.4th 9.

Recovery based on tortfeasor's profits in action for procuring breach of contract, 5 A.L.R.4th 1276.

Liability in tort for interference with physician's contract or relationship with hospital, 7 A.L.R.4th 572.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 A.L.R.4th 1257.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes, 72 A.L.R.4th 282.

Coverage of insurance transactions under state consumer protection statutes, 77 A.L.R.4th 991.

Coverage of leases under state consumer protection statutes, 89 A.L.R.4th 854.

Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 A.L.R.5th 631.

87 C.J.S. Trademarks, Tradenames and Unfair Competition § 237 et seq.

## 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, lease or rental of goods or services in which the seller or the seller's representative solicits the sale by telephoning the prospective purchaser and in which the sale is consummated entirely by telephone or mail, but does not include a transaction:

(1) in which a person solicits a sale from a prospective purchaser who has previously made an authorized purchase from the seller's business; or

(2) in which the purchaser is accorded the right of rescission by the provisions of the federal Consumer Credit Protection Act, 15 U.S.C. 1635, or regulations issued pursuant thereto;

C. “trade" or "commerce" includes the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state;

D. “unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person and includes:

(1) representing goods or services as those of another when the goods or services are not the goods or services of another;

(2) causing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection or association with or certification by another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that the person does not have;

(6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or secondhand;

(7) representing that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model if they are of another;

(8) disparaging the goods, services or business of another by false or misleading representations;

(9) offering goods or services with intent not to supply them in the quantity requested by the prospective buyer to the extent of the stock available, unless the purchaser is purchasing for resale;

(10) offering goods or services with intent not to supply reasonable expectable public demand;

(11) making false or misleading statements of fact concerning the price of goods or services, the prices of competitors or one's own price at a past or future time or the reasons for, existence of or amounts of price reduction;

(12) making false or misleading statements of fact for the purpose of obtaining appointments for the demonstration, exhibition or other sales presentation of goods or services;

(13) packaging goods for sale in a container that bears a trademark or trade name identified with goods formerly packaged in the container, without authorization, unless the container is labeled or marked to disclaim a connection between the contents and the trademark or trade name;

(14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

(15) stating that a transaction involves rights, remedies or obligations that it does not involve;

(16) stating that services, replacements or repairs are needed if they are not needed;

(17) failing to deliver the quality or quantity of goods or services contracted for;

(18) violating the Tobacco Escrow Fund Act [6-4-14 through 6-4-24 NMSA 1978];

(19) offering or providing unposted or unadvertised pricing or service based on the buyer's gender or perceived gender identity; provided, however, that this provision does not apply to persons regulated by the office of superintendent of insurance pursuant to the New Mexico Insurance Code [Chapter 59A NMSA 1978, except for 59A-30A-1 to 59A-30A-18 NMSA 1978, and 59A-42A-1 to 59A-42A-9 NMSA 1978]; or

(20) charging an applicant a fee in violation of the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-52 NMSA 1978]; and

E. “unconscionable trade practice" means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or

loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

**History:** 1953 Comp., § 49-15-2, enacted by Laws 1967, ch. 268, § 2; 1969, ch. 208, § 1; 1971, ch. 240, § 1; 1987, ch. 187, § 1; 1989, ch. 309, § 1; 1995, ch. 18, § 2; 1999, ch. 171, § 1; 2003, ch. 167, § 9; 2009, ch. 197, § 25; 2019, ch. 214, § 1; 2025, ch. 122, § 8.

## ANNOTATIONS

**The 2025 amendment,** effective June 20, 2025, provided that charging an applicant a fee in violation of the Uniform Owner-Resident Relations Act is an "unfair or deceptive trade practice" as used in the Unfair Practices Act; and in Subsection D, added Paragraph D(20).

**The 2019 amendment,** effective June 14, 2019, revised the definition of "unfair or deceptive trade practice" as used in the Unfair Practices Act, prohibited differential pricing or service based on the buyer's gender or perceived gender identity, and provided an exception; and added Paragraph D(19).

**The 2009 amendment,** effective July 1, 2009, added Paragraph (18) of Subsection D.

**The 2003 amendment,** effective July 1, 2003, substituted "means" for "includes" near the beginning of Subsection A; inserted "federal" preceding "Consumer Credit Protection" in Paragraph B(2); in Subsection D, substituted "an act specifically declared unlawful pursuant to the Unfair Practices Act, a" for "any" preceding "false or misleading" and deleted "but is not limited to" at the end.

**The 1999 amendment,** effective June 18, 1999, inserted "including services provided by licensed professionals" in Subsection E.

**The 1995 amendment,** effective June 16, 1995, added "unless the purchaser is purchasing for resale" at the end of Subsection D(9).

**The 1989 amendment,** effective June 16, 1989, added Subsection B and redesignated Subsections B through D as Subsections C through E.

**The 1987 amendment,** effective June 19, 1987, added "but is not limited to" at the end of the introductory paragraph of Subsection C and made minor stylistic changes throughout the section.

**Compiler's notes.** — This section is similar to §§ 1 and 2 of the Uniform Deceptive Trade Practices Act.

**Pleading.** — Section 57-12-2D NMSA 1978 does not set forth separate claims but rather sets forth a non-exhaustive list of conduct which might, independently, constitute a violation of the NMUPA. *Guidance Endodontics LLC v. Dentsply Int'l, Inc.*, 728 F.Supp.2d 1170 (D.N.M. 2010).

**The New Mexico lottery is not a person under the Unfair Practices Act, 57-12-1 NMSA 1978.** *Stansell v. N.M. Lottery*, 2009-NMCA-062, 146 N.M. 417, 211 P.3d 214.

**A viable Unfair Practices Act claim** need not allege a direct representation by the defendant to the claimant or to the public, a commercial transaction between the claimant and the defendant, or detrimental reliance by the claimant on a deceptive statement by the defendant. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, 142 N.M. 437, 166 P.3d 1091, cert. denied, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259.

**Plaintiff did not prove a viable claim.** — Where plaintiff asked defendant, who was an art appraiser, to determine whether the art owned by an estate was valuable; before viewing the art and after defendant explained the purpose of an appraisal and the fees associated with the process, it was apparent that plaintiff did not want to hire defendant to appraise the art, but wanted to dispose of the art; defendant purchased two paintings from plaintiff for $4,500, and later sold the paintings for $35,000 to an art dealer; the paintings were later sold to an art collector who sold the paintings at auction for $600,000; and plaintiff sued defendant for violation of the Unfair Practices Act, plaintiff did not prove a viable claim under the Unfair Practices Act because an essential element of a claim under the Unfair Practices Act that gives standing to a buyer is that a buyer purchase goods or services from a seller and plaintiff never acquired any goods or services from defendant. *Hicks v. Eller*, 2012-NMCA-061, 280 P.3d 304, cert. denied, 2012-NMCERT-005.

**Standing.** — The Unfair Practices Act provides standing only to buyers of goods and services. *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot USA, Inc.*, 2005-NMCA-051, 137 N.M. 524, 113 P.3d 347, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**Violation of act not shown.** — Defendant's Home Depot's activities in marketing plaintiff's shutters and installation services to defendant's own customers was not a sale of marketing services to plaintiff for purposes of Subsection D of this section. *Santa Fe Custom Shutters & Doors, Inc. v. Home Depot USA, Inc.*, 2005-NMCA-051, 137 N.M. 524, 113 P.3d 347, cert. denied, 2005-NMCERT-005, 137 N.M. 522, 113 P.3d 345.

**A business has standing under the Unfair Practices Act to sue a competitor for misrepresentation.** — A business has standing under the New Mexico Unfair Practices Act to sue a competitor for misrepresentations that damage the business by misleading

or confusing the consuming public when the unfair practice occurs in connection with the sale of goods or services. *First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261 (D.N.M. 2014).

Where it was alleged that defendants, an investment services firm, confused and misled former and potential customers of plaintiff, a competitor investment firm, by using a name confusingly similar to plaintiff's name, by creating a website that was confusingly similar to plaintiff's website, and by making misleading statements to plaintiff's existing or potential customers, denial of defendants' motion to dismiss was appropriate because plaintiff was likely to be damaged and may have suffered monetary losses due to defendants' misrepresentations. *First Nat'l Bancorp Inc. v. Alley*, 76 F.Supp.3d 1261 (D.N.M. 2014).

**Knowing and willful use of ambiguity as to material fact constituted an unfair or deceptive trade practice.** — In a class action lawsuit, where individuals who purchased a Black & Decker coffeemaker at a New Mexico Wal-Mart store from 2009 to 2013 claimed that a trademark licensing agreement, whereby Applica Consumer Products, Inc. (Applica) paid royalties to Black & Decker in exchange for Applica's ability to use the Black & Decker name and trademarks in the sale of small kitchen appliances, including the coffeemaker at issue, but where there was no corporate affiliation between Black & Decker and Applica, and Black & Decker did not design, manufacture, distribute, or warrant the coffeemaker, was an unfair or deceptive trade practice, and where defendants argued that under the federal Lanham Act, the ultimate source or manufacturer of a product need not be identified by a brand name as long as the trademark owner exercises sufficient oversight over the nature and quality of the goods sold under its licensed mark and that if the Lanham Act allowed Applica to market the coffeemaker, the arrangement could not constitute a violation of the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26, the district court did not err in concluding that Applica's use of the Black & Decker trademark on the coffeemaker constituted an unfair or deceptive trade practice, because the New Mexico legislature did not intend to require courts to apply Lanham Act precedent in deciding UPA claims, and the Black & Decker name on the product packaging would tend to deceive a reasonable consumer, and defendants should have known that potential purchasers of the coffeemaker would likely regard information about the coffeemaker being a Black & Decker product as material. *Puma v. W-Mart Stores East*, 2023-NMCA-005, cert. granted.

**The district court did not abuse its discretion in refusing to order disgorgement of unjust gains for defendants' unfair trade practices.** — In a class action lawsuit, where individuals who purchased a Black & Decker coffeemaker at a New Mexico Wal-Mart store from 2009 to 2013 claimed that a trademark licensing agreement, whereby Applica Consumer Products, Inc. (Applica) paid royalties to Black & Decker in exchange for Applica's ability to use the Black & Decker name and trademarks in the sale of small kitchen appliances, including the coffeemaker at issue, but where there was no corporate affiliation between Black & Decker and Applica, and Black & Decker did not design, manufacture, distribute, or warrant the coffeemaker, was an unfair or deceptive trade practice, and where defendants argued that under the federal Lanham Act, the

ultimate source or manufacturer of a product need not be identified by a brand name as long as the trademark owner exercises sufficient oversight over the nature and quality of the goods sold under its licensed mark and that if the Lanham Act allowed Applica to market the coffeemaker, the arrangement could not constitute a violation of the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -26, and where the district court concluded that Applica's use of the Black & Decker trademark on the coffeemaker constituted an unfair or deceptive trade practice, the district court did not abuse its discretion in refusing to order disgorgement of unjust gains for defendants' unfair trade practices, because Plaintiffs failed to meet their burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. *Puma v. W-Mart Stores East*, 2023-NMCA-005, cert. granted.

**Many factors figure into issue of materiality.** *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Unfair Practices Act imposes duty to disclose material facts** reasonably necessary to prevent any statements from being misleading. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Existence of duty is dependent on materiality** of the facts. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Degree of deception required.** — Subsection D(14) of this section does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only tends to deceive. *Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Intentional and unintentional statements.** — This article applies to all misleading or deceptive statements, whether intentionally or unintentionally made. *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

**Intent to deceive not element of "unfair or deceptive trade practice"** but a knowing representation is required. *Richardson Ford Sales, Inc. v. Johnson*, 1984-NMCA-007, 100 N.M. 779, 676 P.2d 1344.

When a debt collection agency knowingly sent letters to the plaintiff containing deceptive representations, whether or not the agency intended to deceive the plaintiff was irrelevant. *Russey v. Rankin*, 911 F. Supp. 1449 (D.N.M. 1995).

An attorney who, by the practice and procedure of collection he employed in his dealings with a debt collection agency, knowingly effectuated the sending of letters containing deceptive representations, and thus violated the Unfair Trade Practices Act. *Russey v. Rankin*, 911 F. Supp. 1449 (D.N.M. 1995).

**The "knowingly made" requirement** is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable due diligence should have been aware that the statement was false or misleading. *Stevenson v. Louis Dreyfus Corp.*, 1991-NMSC-051, 112 N.M. 97, 811 P.2d 1308.

**The "knowingly made" requirement** in Subsection D is met if a party was actually aware that the statement was false or misleading when made or, in the exercise of reasonable diligence, should have been aware that the statement was false or misleading. *Russey v. Rankin*, 911 F. Supp. 1449 (D.N.M. 1995).

Plaintiff did not establish a violation of the Unfair Practices Act where no proof was offered that defendant knew that misrepresentations as to insurance coverage were false or misleading. *Teague-Strebeck Motors, Inc. v. Chrysler Ins. Co.*, 1999-NMCA-109, 127 N.M. 603, 985 P.2d 1183, cert. denied, 127 N.M. 391, 981 P.2d 1209.

A claim under this act was supported by evidence that defendant insurer knew that the rates were inadequate prior to the time the agreement went into effect and did not disclose its method for deciding whether to add a surcharge to the preliminary premium or increase annual rates, and that plaintiff would not have contracted with defendant if it had that information. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999).

**Insufficient evidence of unfair trade practices.** — In an action for breach of contract, where plaintiff hired defendant to design and construct a replacement irrigation well on plaintiff's property, and although a written contract was not executed, plaintiff's understanding of the agreement, as told to him by defendant, was that defendant would construct a well that would be fully adequate for plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least fifty years, and where, after three-and-a-half years, the well stopped working, the district court did not err in denying plaintiff's claim for unfair trade practices, because, although plaintiff established that defendant made false or misleading misrepresentations, there was no evidence that the false or misleading representations were knowingly made. *Robey v. Parnell*, 2017-NMCA-038.

**Insufficient evidence of unconscionable trade practices.** — In an action for breach of contract, where plaintiff hired defendant to design and construct a replacement irrigation well on plaintiff's property, and although a written contract was not executed, plaintiff's understanding of the agreement, as told to him by defendant, was that defendant would construct a well that would be fully adequate for plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least fifty years, and where, after three-and-a-half years, the well stopped working, the district court did not err in denying plaintiff's claim for unconscionable trade practices, because plaintiff did not meet his burden of providing evidence that the value received was grossly disproportionate to the price paid, other than arguing that he received less than 10 percent of the longevity he was promised. *Robey v. Parnell*, 2017-NMCA-038.

**Jury instruction as to knowing misrepresentation.** — Jury instruction stating that plaintiff had the burden of proving that defendant had knowingly made misrepresentations, including failing to deliver the quantity of goods and services contracted for, while inartfully drafted, accurately stated the law; it did not equate simple breach of contract with knowing misrepresentation, but required plaintiff to establish a knowing misrepresentation by defendant in relation to the goods and services contracted for. *Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, 125 N.M. 748, 965 P.2d 332.

**Refusal to acknowledge liability.** — Bank's refusal to acknowledge liability, pursuant to the "FTC Holder Rule", on a contract for a mobile home assigned to it from the original seller was an unfair practice under Subsection D(15). *Jaramillo v. Gonzales*, 2002-NMCA-072, 132 N.M. 459, 50 P.3d 554, cert. denied, 132 N.M. 288, 47 P.3d 447.

**Single or multiple instances.** — This article makes no distinction between single or multiple instances of prohibited conduct. *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

The Unfair Trade Practices Act does not require a showing of multiple violations. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**Failure to deliver contracted services.** — Where a bank advertised through the mail and in the newspapers that it would provide an interest-bearing account, the advertisements were representations knowingly made by the bank in connection with the offering of a service, as a direct result of the advertising and of subsequent discussions with a bank employee, the plaintiff transferred monies into an account for the express purpose of earning such interest, and the plaintiff sued because of the bank's failure to pay interest as advertised and as was indicated to him by the bank when his funds were transferred, since the entire series of acts clearly occurred in the regular course of the bank's business, the bank's refusal to remedy the situation patently resulted in its failure to deliver the quality of services contracted for, contrary to Subsection D(17). *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

**Failure to defend or indemnify in qui tam actions.** — Claims under the Unfair Practices Act failed where defendant insurance companies had no duty to defend nor indemnify plaintiff against a qui tam action that the federal government brought, and plaintiff did not allege any facts tending to show that defendants knowingly misled it or made any false statement. *New Mem. Assocs. v. Credit Gen. Ins. Corp.*, 973 F. Supp. 1027 (D.N.M. 1997).

**"New demonstrator" is not deceptive.** — Car dealer's statement that a vehicle was a "new demonstrator" was not intended to suggest that the vehicle was unused or "new,"

and therefore did not violate the Unfair Trade Practices Act. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**Claim of unconscionable trade practice requires some duty of defendant.** — Even if Unfair Practices Act applies to insurance companies, insured failed to present evidence to support claim that failure to explain policy to insured constituted unconscionable trade practice where insured had duty to read and familiarize himself with the policy and insurer had no duty to explain that insured was not covered while driving girlfriend's car. *State Farm Fire & Cas. Co. v. Price*, 1984-NMCA-036, 101 N.M. 438, 684 P.2d 524, cert. denied, 101 N.M. 362, 683 P.2d 44, *overruled on other grounds by Ellingwood v. N.N. Investors Life Ins. Co.*, 1991-NMSC-006, 111 N.M. 301, 805 P.2d 70.

**Allegations sufficient to go forward.** — Allegations that a bank engaged in an unconscionable trade practice by taking advantage of the defendants' lack of ability and capacity due to their advancing age, by charging excessive overdraft fees, by misrepresenting the nature of an advance note, by allegedly thwarting the defendants' attempt at obtaining financing elsewhere, and by attempting foreclosure on the defendants' ranch were sufficient to go forward on defendants' broad counterclaim of unconscionable trade practices. *Portales Nat'l Bank v. Ribble*, 2003-NMCA-093, 134 N.M. 238, 75 P.3d 838.

**Negligent failure to obtain insurance coverage.** — The claim of negligent failure to obtain insurance coverage presupposes that there was no coverage. Since the jury determined that the property was in fact covered, the claim of negligent failure to obtain coverage fails. *Paiz v. State Farm Fire & Cas. Co.*, 1994-NMSC-079, 118 N.M. 203, 880 P.2d 300.

**Abuse by counselor did not create claim under this act.** — In an action against a hospital for damages sustained as the result of a sexual assault by a counselor, where plaintiff failed to show that the hospital's advertising was false or misleading in connection with the sale of its goods and services, she failed to establish a claim under the Unfair Practices Act. *Eckhardt v. Charter Hosp.*, 1998-NMCA-017, 124 N.M. 549, 953 P.2d 722.

**Because alleged misrepresentations are unconnected to good or service,** the claim does not fall within the parameters of the Unfair Practices Act. *Eden v. Voss*, 105 Fed. Appx. 234 (10th Cir. 2004).

**Sale of completed house is not sale of goods or services** for purposes of Subsection D of this section. *McElhannon v. Ford*, 2003-NMCA-091, 134 N.M. 124, 73 P.3d 827.

**Construction services rendered prior to completion of a residential home are "any services" as defined in this section.** — In a dispute between parties to a contract for the construction of a new home, where construction company, after experiencing

financial difficulties, ceased operations and failed to construct and deliver the home to plaintiffs, the district court erred in dismissing as a matter of law plaintiff's claim for unfair trade practices, because in the absence of language expressly including or excluding construction services, construction services rendered prior to the completion of a residential home are "any services" as defined in this section. *Fogelson v. Wallace*, 2017-NMCA-089, cert. granted.

**Royalties.** — The payment of royalties, including any associated deductions for post-production oil and gas costs, is not connected to goods and services but to realty, and claim alleging underpayment of royalties does not fall within the ambit of the Unfair Practices Act. *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091 (10th Cir. 2005).

**Erroneous financial advice.** — Where defendant provided financial services to plaintiff, which included management of plaintiff's securities account; at defendant's recommendation, plaintiff purchased a deferred variable annuity; defendant subsequently erroneously advised plaintiff that plaintiff could withdraw money from the annuity to purchase an office building without incurring any tax liability; plaintiff withdrew the money from the annuity; the IRS determined that the withdrawal was subject to income tax, increased plaintiff's tax liability by the amount withdrawn, and assessed additional taxes, interest and penalties; and plaintiff would not have withdrawn money from the annuity but for defendant's misrepresentation that the withdrawal would be tax free, defendant's erroneous advise was given in connection with the sale of financial services to plaintiff and was subject to the Uniform Practices Act. *Maese v. Garrett*, 2014-NMCA-072, cert. denied, 2014-NMCERT-006.

**Evidence of good faith.** — The mere fact of a bad result and breach of warranty by a defendant contracted to perform repairs did not require a finding that the defendant acted in violation of this article, where the defendant acted in good faith and there was substantial evidence that the defendant did not knowingly make any false or misleading statement or other misrepresentation of any kind. *Hubbard v. Albuquerque Truck Ctr. Ltd.*, 1998-NMCA-058, 125 N.M. 153, 958 P.2d 111.

**Violation of act shown.** — Substantial evidence existed of violations of this act, where the aggrieved party testified that the signature on a construction contract was not his own, and the jury was allowed to compare it to authentic samples of his signature, and where testimony was given that the contractor billed for material used on other construction projects, that the invoices were illegible and that other problems existed. The fact that any errors in the billings may have been unintentional does not remove the conduct from the prohibitions of this act. *Page & Wirtz Constr. Co. v. Solomon*, 1990-NMSC-063, 110 N.M. 206, 794 P.2d 349.

**Signature loans were substantively and procedurally unconscionable.** — Where defendants marketed and originated unsecured signature loans of between $50 and $300 to the working poor who provided proof of steady employment but who were either unbanked or underbanked and who were significantly less-educated than the general

population and financially unsophisticated individuals; the loans carried APRs of between 1,147.14 and 1,500 percent and were payable in biweekly installments over a year; defendants exploited the borrower's disadvantage by describing loans in terms of a misleading daily rate, advertising loans for 50 percent off when the discount was the interest on the first installment on the loan, encouraged borrowers to increase the principal of their loans or to take out another loan, withheld amortization schedules from customers which revealed that the loans were interest-only loans for extended periods of time, and leveraged borrowers' cognitive and behavioral weakness that caused borrowers to focus in the promise of quick cash rather than on the long-term costs of the loans and the borrowers' ability to repay the loans; and the terms of defendants' loan contracts were non-negotiable, the loans were substantively and procedurally unconscionable under the common law and violated the Unfair Practices Act. *State ex rel. King v. B&B; Inv. Grp. Inc.*, 2014-NMSC-024.

**Violation of act not shown.** — Granting of the company's counterclaim for malicious abuse of process was proper in part pursuant to where the district court could have found that the builder lacked a reasonable basis for believing that the company made a knowing misrepresentation about the deposit because the company merely offered the builder the option of receiving either a partial cash refund, less the cost of the time-study door, or the full amount in store credit. *Dawley v. La Puerta Architectural Antiques, Inc.*, 2003-NMCA-029, 133 N.M. 389, 62 P.3d 1271.

**Plaintiff failed to plausibly state a claim under the NMUPA.** — Where plaintiff, an eye surgery center that reduced its operations as a result of the COVID-19 pandemic, brought an action against defendant, an insurance company that issued to plaintiff a commercial property policy, for violation of the New Mexico Unfair Practices Act, §§ 57-12-1 to -26 NMSA 1978, alleging that defendant used ambiguity as to the offered coverage, offered, and charged a premium for, first-party all-risk insurance coverage, and then denied coverage, and withheld coverage on a basis it failed to disclose to plaintiff, the claim was dismissed, because plaintiff's complaint did not identify which statement or statements at issue were false or misleading, failed to allege facts in its complaint to show that any misrepresentation tended to deceive or mislead any person, and failed to allege facts to show that such defendant's conduct occurred in the regular course of defendant's business. A complaint must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory. *Albuquerque Ambulatory Eye Surgery Ctr. LLC v. Transportation Ins. Co.*, 566 F. Supp.3d 1178 (D. N.M. 2021)

**Summary judgment proper.** — In an action alleging unconscionable trade practices, summary judgment upheld where plaintiff failed to meet his burden to rebut bank's prima facie evidence that the overdraft fee was not grossly disproportionate to the value received. *Hernandez v. Wells Fargo Bank New Mexico*, 2006-NMCA-018, 139 N.M. 68, 128 P.3d 496.

**Act not in conflict with federal law.** — The Unfair Practices Act (this article) and federal legislation are not in conflict, and 15 U.S.C. § 57b (e) has not preempted the

New Mexico act. *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

**Federal court definitions inapplicable to terms defined in this section.** — Since this section defines both "unfair or deceptive" and "unconscionable" trade practices, relying on 57-12-4 NMSA 1978 to apply federal court definitions of those terms would not be giving effect to the statute. *Richardson Ford Sales, Inc. v. Johnson*, 1984-NMCA-007, 100 N.M. 779, 676 P.2d 1344.

**Claim preempted by federal law.** — Plaintiff's action seeking to prevent defendants from selling furniture "deceptively similar" to that of the plaintiff did not involve a state claim of unfair competition, where the protection plaintiff sought was protection against copying designs and his claim was therefore preempted by federal law. *Ernest Thompson Fine Furniture Maker, Inc. v. Youart*, 1990-NMCA-012, 109 N.M. 572, 787 P.2d 1255.

**Nonunique items must be offered in amounts related to demand.** — Pursuant to Subsection D(10), nonunique items or commodities must be offered in supplies to satisfy reasonably expected public demand, and of course, the test for determining the expected public demand is subjective and would depend on variable factors concerning the type of sale and the commodity involved. 1971 Op. Att'y Gen. No. 71-123.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

For annual survey of New Mexico Commercial Law, see 20 N.M.L. Rev. 239 (1990).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability for interference with franchise, 97 A.L.R.3d 890.

Refusal to pay debt as economic duress or business compulsion avoiding compromise or release, 9 A.L.R.4th 942.

What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 A.L.R.4th 1192.

Who is a "consumer" entitled to protection of state deceptive trade practice and consumer protection acts, 63 A.L.R.5th 1.

## 57-12-3. Unfair or deceptive and unconscionable trade practices prohibited.

Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful.

**History:** 1953 Comp., § 49-15-3, enacted by Laws 1967, ch. 268, § 3; 1971, ch. 240, § 2.

## ANNOTATIONS

**Claims must be based on regular course of trade or commerce.** — Claims made under the Unfair Practices Act must be based on conduct occurring in defendant's regular course of trade or commerce. *Klein v. Bronstein*, 39 B.R. 20 (Bankr. D.N.M. 1984).

**Three essential elements of a claim under the Unfair Practices Act.** — A successful plaintiff must prove (1) the defendant made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) the false or misleading representation was knowingly made in connection with the sale, lease, rental, or loan of goods or services in the regular course of the defendant's business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person. *Dollens v. Wells Fargo Bank*, 2015-NMCA-096.

Where defendant bank, as the agent of its borrower and as the licensed agency representing an insurance company in the sale of mortgage accidental death insurance policies for which it is a policyholder and beneficiary, knowingly created the perception that it would have a system in place or take some active role in the claims process to protect decedent's family's financial security in the event of an accidental death, decedent's family had a reasonable expectation that defendant bank would honor a request of the insurer, whose policy it sold, not to foreclose on decedent's house while a claim is pending or to otherwise credit back to the account any fees that were incurred while the insurer processed the claim. Where defendant bank failed to challenge evidence that it created a reasonable expectation that it would communicate and work together with the insurance company to prevent foreclosure during a pending accidental death claim, the district court did not err in finding a violation of the Unfair Practices Act. *Dollens v. Wells Fargo Bank*, 2015-NMCA-096.

**Insufficient evidence of unfair trade practices.** — In an action for breach of contract, where plaintiff hired defendant to design and construct a replacement irrigation well on plaintiff's property, and although a written contract was not executed, plaintiff's understanding of the agreement, as told to him by defendant, was that defendant would construct a well that would be fully adequate for plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least fifty years, and where, after three-and-a-half years, the well stopped working, the district court did not err in denying plaintiff's claim for unfair trade practices, because, although plaintiff established that defendant made false or misleading misrepresentations, there was no evidence that the false or misleading representations were knowingly made. *Robey v. Parnell*, 2017-NMCA-038.

**Insufficient evidence of unconscionable trade practices.** — In an action for breach of contract, where plaintiff hired defendant to design and construct a replacement

irrigation well on plaintiff's property, and although a written contract was not executed, plaintiff's understanding of the agreement, as told to him by defendant, was that defendant would construct a well that would be fully adequate for plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least fifty years, and where, after three-and-a-half years, the well stopped working, the district court did not err in denying plaintiff's claim for unconscionable trade practices, because plaintiff did not meet his burden of providing evidence that the value received was grossly disproportionate to the price paid, other than arguing that he received less than 10 percent of the longevity he was promised. *Robey v. Parnell*, 2017-NMCA-038.

**Establishing an unfair or deceptive practice by misrepresentation.** — To establish an unfair or deceptive trade practice by misrepresentation, a plaintiff must show that defendant made a false statement, the defendant made the statement in connection with the sale of services and knew that the statement was false, the defendant made the statement in the regular course of trade or commerce, and the statement was one which may, tends to, or does deceive or mislead any person. *OR&L Const. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035.

Where plaintiff, a construction business that conducts, among other things, roof repair, including "torch-down" roofing, a technique which uses a flaming torch to heat and seal tar paper onto a roof, purchased a general commercial liability insurance policy through an insurance broker, who was authorized to sell insurance products supplied by defendant, an insurance company, and where defendant transmitted to the broker a copy of the insurance policy, which specifically precluded coverage for damages caused by torch-down roofing, and where plaintiff, unaware of the exclusion, submitted a claim for coverage after a fire occurred at a home while plaintiff was performing torch-down roofing, and where defendant denied plaintiff's insurance claim relying on the torch-down roofing exclusion, and where plaintiff claimed that defendant made several material misrepresentations, the district court did not err in denying plaintiff's claim, because defendant failed to point to anywhere in the record demonstrating that defendant made any false statements or material misrepresentations. Defendant was entitled to rely on the torch-down roofing exclusion because the plaintiff had notice of the exclusion as a matter of law. *OR&L Const. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035.

**Summary judgment was proper where plaintiff's claim was not connected to any goods or services she purchased.** — Where in 2010, defendants began manufacturing and selling several products, including magnets, flasks, and cards, bearing plaintiff's image with the caption, "I'm going to be the most popular girl in rehab!", and where in 2014, plaintiff filed an action under the Unfair Practices Act (UPA), §§ 57-12-1 through § 57-12-26 NMSA 1978, the district court did not err in granting defendants' motion for summary judgment because the UPA gives standing only to buyers of goods or services, and plaintiff failed to demonstrate how her claim, which is not connected to any goods or services she purchased, falls with the purview of the UPA. *Vigil v. Taintor*, 2020-NMCA-037, cert. denied.

**Car dealer's representation** that car was a demonstrator and failure to disclose prior ownership that car was actually a rental car states a claim under the Unfair Practices Act, the Motor Vehicle Dealers Franchise Act and for common law fraud. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314 (D.N.M. 2003).

**A buyer-seller relationship is ordinarily not fiduciary in nature.** — Where plaintiff, a grower and harvester of chile peppers, and defendant, a dehydration chile plant that purchases, processes, and dehydrates different varieties of chile, entered into a contract where plaintiff would deliver raw chile peppers to defendant, which would then wash, dehydrate, weigh and pay for the chile, and where plaintiff filed a lawsuit against defendant when there was a dispute as to how much chile was delivered and how much was paid for, the district court did not err in granting summary judgment to defendant on plaintiff's claim that defendant breached its fiduciary duty, because an essential feature and consequence of a fiduciary relationship is that the fiduciary becomes bound to act in the interests of its beneficiary and not itself, and this dynamic does not inhere in the ordinary buyer-seller relationship. *Valerio v. San Mateo Enterprises, Inc.*, 2017-NMCA-059.

**Knowing and willful use of ambiguity as to material fact constituted an unfair or deceptive trade practice.** — In a class action lawsuit, where individuals who purchased a Black & Decker coffeemaker at a New Mexico Wal-Mart store from 2009 to 2013 claimed that a trademark licensing agreement, whereby Applica Consumer Products, Inc. (Applica) paid royalties to Black & Decker in exchange for Applica's ability to use the Black & Decker name and trademarks in the sale of small kitchen appliances, including the coffeemaker at issue, but where there was no corporate affiliation between Black & Decker and Applica, and Black & Decker did not design, manufacture, distribute, or warrant the coffeemaker, was an unfair or deceptive trade practice, and where defendants argued that under the federal Lanham Act, the ultimate source or manufacturer of a product need not be identified by a brand name as long as the trademark owner exercises sufficient oversight over the nature and quality of the goods sold under its licensed mark and that if the Lanham Act allowed Applica to market the coffeemaker, the arrangement could not constitute a violation of the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, the district court did not err in concluding that Applica's use of the Black & Decker trademark on the coffeemaker constituted an unfair or deceptive trade practice, because the New Mexico legislature did not intend to require courts to apply Lanham Act precedent in deciding UPA claims, and the Black & Decker name on the product packaging would tend to deceive a reasonable consumer, and defendants should have known that potential purchasers of the coffeemaker would likely regard information about the coffeemaker being a Black & Decker product as material. *Puma v. W-Mart Stores East*, 2023-NMCA-005, cert. granted.

**The district court did not abuse its discretion in refusing to order disgorgement of unjust gains for defendants' unfair trade practices.** — In a class action lawsuit, where individuals who purchased a Black & Decker coffeemaker at a New Mexico Wal-Mart store from 2009 to 2013 claimed that a trademark licensing agreement, whereby Applica Consumer Products, Inc. (Applica) paid royalties to Black & Decker in exchange

for Applica's ability to use the Black & Decker name and trademarks in the sale of small kitchen appliances, including the coffeemaker at issue, but where there was no corporate affiliation between Black & Decker and Applica, and Black & Decker did not design, manufacture, distribute, or warrant the coffeemaker, was an unfair or deceptive trade practice, and where defendants argued that under the federal Lanham Act, the ultimate source or manufacturer of a product need not be identified by a brand name as long as the trademark owner exercises sufficient oversight over the nature and quality of the goods sold under its licensed mark and that if the Lanham Act allowed Applica to market the coffeemaker, the arrangement could not constitute a violation of the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, and where the district court concluded that Applica's use of the Black & Decker trademark on the coffeemaker constituted an unfair or deceptive trade practice, the district court did not abuse its discretion in refusing to order disgorgement of unjust gains for defendants' unfair trade practices, because Plaintiffs failed to meet their burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. *Puma v. W-Mart Stores East*, 2023-NMCA-005, cert. granted.

**Descriptors on cigarette label were deceptive to a reasonable consumer.** — Where consumers brought consolidated actions against a cigarette manufacturer alleging that the manufacturer's labeling of its cigarettes as natural, organic, and additive-free deceived them into believing that the cigarettes were safer and healthier than other cigarettes, and where defendant claimed that a disclaimer on the label of the cigarette package expressly stated that the lack of additives does not mean a safer cigarette, the natural and organic descriptors were found to be deceptive to a reasonable consumer, because the disclaimer was limited to the lack of additives, but said nothing about natural or organic which are descriptors that convey a message that the cigarettes are less harmful than other cigarettes. *In re Santa Fe Natural Tobacco Co. Mktg. & Sales*, 288 F.Supp.3d 1087 (2017).

**Wrongful conduct rule barred unfair trade practices claim.** — Where plaintiffs brought an action against defendant pharmacist who allegedly filled prescriptions for plaintiffs for improper and dangerous amounts of opioids and other controlled substances, asserting claims for unfair, deceptive, and unconscionable trade practices in violation of the New Mexico Unfair Practices Act (NMUPA), 57-12-1 to 57-12-26 NMSA 1978, and where plaintiffs admitted in court pleadings that they worked in concert with a nurse practitioner to present fraudulent prescriptions to defendant's pharmacy and to share those drugs with the nurse practitioner, plaintiffs were barred from asserting their claims because they are based on plaintiffs' own illegal conduct, acquiring narcotics through fraudulent prescriptions. Claims under the NMUPA may be dismissed under the wrongful conduct rule if the plaintiff's conduct is prohibited under a criminal statute, there is a sufficient causal nexus between the plaintiff's illegal conduct and plaintiff's damages, and the defendant's culpability is not greater than the plaintiff's. *Inge v. McClelland*, 257 F.Supp.3d 1158 (D. N.M. 2017).

**Transportation motor carriers may bring a competitive injury claim under the Unfair Practices Act.** — Where taxi company brought a diversity action against

defendant, a ride-share service, on the theory that the ride-share service should have, but did not, comply with the New Mexico Motor Carrier Act (MCA), §§ 65-2A-1 through 65-2A-41 NMSA 1978, when it first entered the city market, and where defendant moved to dismiss, arguing that New Mexico law bars plaintiff from pursuing a cause of action for competitive injury damages under the Unfair Practices Act (UPA), §§ 57-12-1 through 57-12-26 NMSA 1978, the district court denied defendant's motion to dismiss, because the UPA generally precludes companies from asserting a cause of action against their competitors, but the legislature carved out an exception to the UPA's general prohibition of competitive injury lawsuits. The plain language of § 65-2A-33(J) of the MCA demonstrates that the legislature intended to allow an authorized transportation service carrier to sue a transportation services carrier who operates without authorization. *Albuquerque Cab Co., Inc. v. Lyft, Inc.*, 460 F. Supp. 3d 1215 (D. N.M. 2020).

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M. L. Rev. 49 (1973).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability for interference with franchise, 97 A.L.R.3d 890.

When is termination of insurance agency contract wrongful so as to make insurer liable to agent, 5 A.L.R.4th 1080.

Recovery based on tortfeasor's profits in action for procuring breach of contract, 5 A.L.R.4th 1276.

Liability in tort for interference with physician's contract or relationship with hospital, 7 A.L.R.4th 572.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 A.L.R.4th 1257.

Automobile repairman's duty to provide customer with information, estimates, or replaced parts, under automobile repair consumer protection act, 25 A.L.R.4th 506.

Landlord's liability for injury or death of tenant's child from lead paint poisoning, 19 A.L.R.5th 405.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 A.L.R.5th 1.

Modern status of pendent federal jurisdiction, under 28 USC § 1338(b), over state claim of unfair competition when joined with related claim under federal patent laws, 57 A.L.R. Fed. 418.

Modern status of pendent federal jurisdiction, under 28 USC § 1338(b), over state claim of unfair competition when joined with related claim under federal copyright laws, 58 A.L.R. Fed. 875.

Modern status of pendent federal jurisdiction, under 28 U.S.C. § 1338(b), over state claim of unfair competition when joined with related claim under federal trademark laws, 62 A.L.R. Fed. 428.

## 57-12-3.1. Unauthorized use of delivery container prohibited.

A. It shall be an unlawful practice within the meaning of the Unfair Practices Act for any person to:

(1) remove the owner's container from the owner's or a recipient's premises or parking area without the permission of the owner or recipient;

(2) possess or use the owner's container if it has been removed from the owner's or recipient's premises or parking area without the permission of the owner or recipient;

(3) alter, convert, destroy or tamper with the owner's container without permission of the owner or recipient; or

(4) sell the owner's container to or purchase the owner's container from someone other than the owner without the permission of the owner.

B. As used in this section:

(1) "bakery rack" means a metal frame that holds bakery trays or other bakery products and that is used by a bakery, distributor or retailer or its agent as a means to transport, store or carry bakery products;

(2) "bakery tray" means a wire or plastic receptacle that holds bread, buns or other baked goods and that is used by a bakery, distributor or retailer or its agent as a means to transport, store or carry bakery products;

(3) "container" means a bakery rack, bakery tray, dairy case, egg basket, poultry box, shopping cart or pallet;

(4) "dairy case" means a plastic receptacle that holds sixteen quarts or more of beverage and that is used by a dairy, distributor or retailer or its agent as a means to transport, store or carry dairy products;

(5) "pallet" means a wooden or plastic base that allows stacks of merchandise to be placed upon it and that provides a space and support beneath the stack for forklift handling;

(6) "parking area" means a lot or other property provided by a recipient for the use of its customers to park vehicles while at the recipient's establishment;

(7) "poultry box" means a permanent type of container that is used by a processor, distributor, retailer or food service establishment or an agent of one of those persons to transport, store or carry poultry;

(8) "recipient" means a person, firm, corporation or association that is authorized by the owner to use an owner's container; and

(9) "shopping cart" means a basket that is mounted on wheels, or a similar device, that is generally used in a retail establishment by a customer to transport goods of any kind.

C. No civil action shall be maintained pursuant to this section against any person who returns to its owner within sixty days after the effective date of this section a container that was unlawfully obtained.

**History:** Laws 1991, ch. 28, § 1.

## 57-12-4. Interpretation.

It is the intent of the legislature that in construing Section 3 [57-12-3 NMSA 1978] of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts.

**History:** 1953 Comp., § 49-15-4, enacted by Laws 1967, ch. 268, § 4.

**ANNOTATIONS**

**Federal court definitions inapplicable to terms defined in Section 57-12-2 NMSA 1978.** — Since 57-12-2 NMSA 1978 defines both "unfair or deceptive" and "unconscionable" trade practices, relying on this section to apply federal court definitions of those terms would not be giving effect to the statute. *Richardson Ford Sales, Inc. v. Johnson*, 1984-NMCA-007, 100 N.M. 779, 676 P.2d 1344.

## 57-12-5. Chain referral sales technique; prohibited.

The use or employment of any chain referral sales technique, plan, arrangement or agreement whereby the buyer is induced to purchase merchandise or services upon the seller's representation or promise that if the buyer will furnish the seller names of other prospective buyers of like or identical merchandise that the seller will contact the named prospective buyers and the buyer will receive a reduction in the purchase price by means of a cash rebate, commission, credit toward balance due or any other consideration, is declared to be an unlawful practice within the meaning of the Unfair Practices Act.

**History:** 1953 Comp., § 49-15-5, enacted by Laws 1967, ch. 268, § 5.

## 57-12-6. Misrepresentation of motor vehicles; penalty.

A. The willful misrepresentation of the age or condition of a motor vehicle by any person, including regrooving tires or performing chassis repair, without informing the purchaser of the vehicle that the regrooving or chassis repair has been performed, is an unlawful practice within the meaning of the Unfair Practices Act, unless the alleged misrepresentation is based wholly on repair of damage, the disclosure of which was not required pursuant to Subsection C of this section. The failure to provide an affidavit pursuant to Subsection B of this section when there has been repair for which disclosure is required shall constitute prima facie evidence of willful misrepresentation.

B. Except as provided in Subsections C and D of this section, a seller of a motor vehicle shall furnish at the time of sale of a motor vehicle an affidavit that:

(1) describes the vehicle; and

(2) states to the best of the seller's knowledge whether there has been an alteration or chassis repair due to wreck damage.

C. No affidavit shall be required pursuant to this section if the flat rate manual cost of the alteration or chassis repair is less than six percent of the sales price of the vehicle.

D. In the case of a private-party sale of a vehicle, an affidavit shall be furnished only upon the request of the purchasing party.

E. Notwithstanding the provisions of Subsection D of Section 57-12-10 NMSA 1978, the award of three times actual damages as provided for in that section shall be in lieu of any award of punitive damages based only on those facts constituting the unfair or deceptive trade practice or unconscionable trade practice.

F. Any person who violates this section is guilty of a misdemeanor.

**History:** 1953 Comp., § 49-15-5.1(B), enacted by Laws 1971, ch. 274, § 1, and recompiled as 1953 Comp., § 49-15-5.1 by Laws 1977, ch. 181, § 4; 1981, ch. 361, § 1; 1991, ch. 232, § 1; 1995, ch. 10, § 1.

**ANNOTATIONS**

**The 1995 amendment,** effective June 16, 1995, substituted "Subsections C and D of this section" for "this subsection" in the introductory paragraph of Subsection B; in Subsection C, substituted the language beginning "the flat rate manual" for "the vehicle is a new vehicle and the cost of the alteration or chassis repair is less than three hundred dollars ($300)" and deleted the former second sentence, defining "new

vehicle"; and deleted "to another private party" following "vehicle" and "private" following "purchasing" in Subsection D.

**The 1991 amendment,** effective June 14, 1991, in Subsection A, added the language beginning with "unless the alleged misrepresentation" at the end of the first sentence and added the second sentence; added Subsections C and E; redesignated Subsection C as Subsection D and Subsection D as Subsection F; and made a minor stylistic change in Subsection B.

**An affidavit is required to ensure that sellers disclose the age or condition of a motor vehicle and to provide evidence to that effect.** — Where the parties brought claims against each other arising from the sale of a used car, and where, prior to trial, the district court granted partial summary judgment to plaintiff on a claim arising under the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, that defendant willfully misrepresented the age or condition of the used vehicle, and where, after the parties presented evidence at trial, the district court granted plaintiff's motion for judgment as a matter of law on defendant's counterclaim for breach of contract and the jury found for defendant on plaintiff's other UPA claims, but awarded no damages, the district court did not err in granting partial summary judgment to plaintiff on the claim that defendant failed to disclose the age or condition of the motor vehicle, because under 57-12-6 NMSA 1978, the undisputed material facts showed that an affidavit from the dealer as to the age and condition of the car was required, and because plaintiff did not receive an affidavit from defendant as to whether there had been an alteration or chassis repair due to wreck damage, plaintiff established as a matter of law that defendant violated 57-12-6 NMSA 1978. *Hernandez v. Outwest Auto Corral, LLC*, 2025-NMCA-001, cert. denied.

**Judgment as a matter of law was proper where defendant failed to present evidence of damages for breach of contract.** — Where the parties brought claims against each other arising from the sale of a used car, and where, prior to trial, the district court granted partial summary judgment to plaintiff on a claim arising under the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, that defendant willfully misrepresented the age or condition of the used vehicle, and where, after the parties presented evidence at trial, the district court granted plaintiff's motion for judgment as a matter of law on defendant's counterclaim for breach of contract and the jury found for defendant on plaintiff's other UPA claims, but awarded no damages, the district court did not err in granting plaintiff's motion for judgment as a matter of law on defendant's breach of contract claim, because defendant admitted at trial that plaintiff did not owe anything on the vehicle and defendant presented no evidence to the jury to support an award of attorney fees and costs as damages for breach of contract. *Hernandez v. Outwest Auto Corral, LLC*, 2025-NMCA-001, cert. denied.

**Defendant's counterclaim for malicious abuse of process was legally insufficient and properly dismissed.** — Where the parties brought claims against each other arising from the sale of a used car, and where, prior to trial, the district court dismissed defendant's counterclaim for malicious abuse of process and granted partial summary

judgment to plaintiff on a claim arising under the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, that defendant willfully misrepresented the age or condition of the used vehicle, and where, after the parties presented evidence at trial, the district court granted plaintiff's motion for judgment as a matter of law on defendant's counterclaim for breach of contract and the jury found for defendant on plaintiff's other UPA claims, but awarded no damages, the district court did not err in dismissing defendant's malicious abuse of process claim, because the claim did not establish that plaintiff had no factual basis for the 57-12-6 NMSA 1978 claim or that plaintiff had no reasonable belief in the validity of the allegations of fact or law underlying the claim. *Hernandez v. Outwest Auto Corral, LLC*, 2025-NMCA-001, cert. denied.

**"Altered" construed.** — Within the context of Subsection B, goods are "altered" if, as measured against the reasonable expectations of the consumer, the characteristics or value of the motor vehicle are affected in a meaningful way. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**"Due to wreck damage" construed.** — The phrase "due to wreck damage" in Subsection B(2) modifies only "chassis repair" and not "alteration." *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**Alteration found.** — Evidence showing that right front fender was replaced, right door frame was straightened, holes were drilled in the door panel to pull out a dent, sheet metal in the damaged area was ground down and resurfaced with body filler, and the damaged area was repainted was sufficient to support finding that vehicle was altered within the meaning of Subsection B. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**Arbitration agreement that barred punitive damages did not constitute an unconscionable contract term.** — Where plaintiff purchased a 2018 chevrolet vehicle from defendants, and in the process of purchasing the vehicle, plaintiff signed an order agreement and bill of sale, which contained an arbitration provision and a damages limitation provision stating that the dealer was not liable for punitive damages arising out of the sale or use of the vehicle, and where plaintiff filed a complaint in district court, alleging that in the process of purchasing the vehicle, the dealership failed to accurately convey the car's prior damage in order to sell a defective product, and where defendants moved to compel arbitration under the agreement, and where plaintiff opposed the motion, arguing that the arbitration agreement should not be enforced because the contract was unconscionable, primarily because the punitive damages limitation provision restricts access to statutorily mandated treble damages under the Unfair Practice Act provided by the legislature, the district court did not err in its determination that the contract and the arbitration provision must be enforced, because although the damages provision was facially one-sided in that it disclaimed any punitive damages against the car dealer only, the contract was not unconscionable because the only damages the provision at issue excluded were common law punitive damages not granted by the legislature, leaving the statutory treble damages available to plaintiff. *Rojas v. Reliable Chevrolet (NM), LLC*, 2024-NMCA-003.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability on implied warranties in sale of used motor vehicle, 47 A.L.R.5th 677.

## 57-12-7. Exemptions.

Nothing in the Unfair Practices Act shall apply to actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States, but all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to the Unfair Practices Act.

**History:** 1953 Comp., § 49-15-6, enacted by Laws 1967, ch. 268, § 6; 1999, ch. 171, § 2.

**ANNOTATIONS**

**The 1999 amendment,** effective June 18, 1999, added the language beginning "but all" to the end.

**Actions of a regulatory agency.** — The plain language of the statute indicates that the phrase "actions or transactions expressly permitted under laws administered by a regulatory body" is not limited to formal regulations promulgated by an agency. Based on the language of 57-12-7 NMSA 1978 and the New Mexico cases interpreting the statutory exemption, an agency can administer laws expressly permitting an action or transaction through ways other than formal regulation. Plaintiffs' UPA claim asserting that defendant used the term "lights" or "lowered tar and nicotine" on Marlboro Lights or Cambridge Lights cigarette packages without disclosing the tar and nicotine content of the cigarettes according to FTC testing method on the cigarette packages violates the UPA is not barred by implied conflict preemption principles because the evidence before the court was that it would not be "impossible for a private party to comply with both state and federal requirements" and a finding that the use of descriptors on the cigarette packages without supporting numerical tar and nicotine disclosures on the packages is deceptive would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Mulford v. Altria Group, Inc.*, 506 F. Supp. 2d 733 (D.N.M. 2007).

**Regulatory defense.** — Although it is true that the insurance division does administer the regulatory laws governing the issuance of insurance policies in New Mexico, the insurance division has never specifically addressed the subject of modal premiums, and both the Insurance Code and the regulations are silent on the subject. Thus, an insurance company's non-disclosure of certain information regarding its modal premium practices is not "expressly permitted" by the insurance division. Accordingly, the regulatory defense set forth in 57-12-7 NMSA 1978 that would exclude transactions expressly permitted under New Mexico regulatory law does not apply. *Azar v. Prudential Ins.Co. of Am.*, 2003-NMCA-062, 133 N.M. 669, 68 P.3d 909.

**Express permission is required to create an exemption.** — To exempt an activity or a transaction from the coverage of the Unfair Practices Act, an agency must expressly, and not implicitly, permit the specific activity or transaction, including the manner in which the activity or transaction is done. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73, *rev'g* 2008-NMCA-051, 143 N.M. 831, 182 P.3d 814.

**Notice of exemption.** — For an action or a transaction to be deemed expressly permitted and thereby exempted from the coverage of the Unfair Practices Act, the permission must be within the authority of the regulatory body to grant and must be specifically articulated in a public document. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73, *rev'g* 2008-NMCA-051, 143 N.M. 831, 182 P.3d 814.

**An express exemption of certain actions or transactions from the coverage of the Unfair Practices Act does not apply retroactively.** *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73, *rev'g* 2008-NMCA-051, 143 N.M. 831, 182 P.3d 814.

**Question of law.** — Whether a regulatory body has or has not exempted certain actions or transactions from the coverage of the Unfair Practices Act is a question of law, not a question of fact. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73, *rev'g* 2008-NMCA-051, 143 N.M. 831, 182 P.3d 814.

**Use of a computer program to evaluate insurance claims was not expressly permitted.** — Where plaintiffs alleged that the insurer violated the Unfair Practices Act by using claims processing computer programs that were programmed to underestimate and underpay plaintiffs' insurance claims below their true value; the superintendent of insurance adopted an independent market conduct examination that randomly sampled and noted no objections to the insurer's general claims handling practices within the historical period in which plaintiffs' claims had arisen; the market conduct examination did not make any conclusions about the design or manner of use of the insurer's claims processing computer programs; and the market conduct examination and the superintendent's order did not mention the computer programs or any express grant of permission to use the computer programs, the use of the insurer's computer programs was not expressly permitted by the superintendent of insurance and was not exempt from the coverage of the Unfair Practices Act. *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, 147 N.M. 583, 227 P.3d 73, *rev'g* 2008-NMCA-051, 143 N.M. 831, 182 P.3d 814.

**This section requires** that actions be expressly permitted by a regulatory body. *Summit Prop., Inc. v. Public Serv. Co. of N.M.*, 2005-NMCA-090, 138 N.M. 208, 118 P.3d 716, cert. denied, 2005-NMCERT-007, 138 N.M. 145, 117 P.3d 951.

**The language "permitted under laws administered by a regulatory body"** in this section requires more than the mere existence of a regulatory body in order for the

exemption to apply. At a minimum, the regulatory body must actually administer the regulatory laws with respect to the party claiming the exemption, thereby exercising at least the modicum of oversight that the exempting language indicates is required. In effect, this means the regulatory body must render permission to engage in the business of the transaction through licensing, registration or some similar manifestation of "permitting" the business activity. *State ex rel. Stratton v. Gurley Motor Co.*, 1987-NMCA-063, 105 N.M. 803, 737 P.2d 1180, cert. denied, 105 N.M. 781, 737 P.2d 893.

**Bank not exempted.** — A national bank is not exempted from this article by this section. *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

**Because collect call telephone rates are under the primary jurisdiction of the New Mexico public regulation commission,** a regulatory agency, the rates are expressly permitted under the statute and, therefore, are not subject to claims under the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., and New Mexico Antitrust Act, Chapter 57, Article 1 NMSA 1978. *Valdez v. State*, 2002-NMSC-028, 132 N.M. 667, 54 P.3d 71.

**Law reviews.** — For annual survey of New Mexico insurance law, see 19 N.M.L. Rev. 717 (1990).

## 57-12-8. Restraint of prohibited acts; remedies for violations.

A. Whenever the attorney general has reasonable belief that any person is using, has used or is about to use any method, act or practice which is declared by the Unfair Practices Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state alleging violations of the Unfair Practices Act. The action may be brought in the district court of the county in which the person resides or has his principal place of business or in the district court in any county in which the person is using, has used or is about to use the practice which has been alleged to be unlawful under the Unfair Practices Act. The attorney general acting on behalf of the state of New Mexico shall not be required to post bond when seeking a temporary or permanent injunction in such action.

B. In any action filed pursuant to the Unfair Practices Act, including an action with respect to unimproved real property, the attorney general may petition the district court for temporary or permanent injunctive relief and restitution.

**History:** 1953 Comp., § 49-15-7, enacted by Laws 1967, ch. 268, § 7; 1970, ch. 38, § 1; 1977, ch. 181, § 1.

## 57-12-9. Settlements.

A. In lieu of beginning or continuing an action pursuant to the Unfair Practices Act, the attorney general may accept a written assurance of discontinuance of any practice in violation of the Unfair Practices Act from the person who has engaged in the unlawful practice. The attorney general may require an agreement by the person engaged in the unlawful practice that, by a date set by the attorney general and stated in the assurance, he will make restitution to all persons of money, property or other things received from them in any transaction related to the unlawful practice. All settlements are a matter of public record but are not admissible against any defendant in any action brought by any other person or public body against such defendant under the Unfair Practices Act and do not constitute a basis for the introduction of the assurance of discontinuance as prima facie evidence against such defendant in any action or proceeding.

B. A person need not accept restitution pursuant to an assurance. His acceptance of restitution bars recovery of any damages in any action by him or on his behalf against the same defendant on account of the same unlawful practice.

C. A violation of an assurance entered into pursuant to this section is a violation of the Unfair Practices Act.

**History:** 1953 Comp., § 49-15-7.1, enacted by Laws 1971, ch. 240, § 3; 1977, ch. 181, § 2.

**ANNOTATIONS**

**Right to indemnification.** — Although it was unclear whether the terms of a settlement between the state and a homebuilder included assessment of a civil penalty or whether the builder agreed to repair the homes in exchange for the attorney general dropping the charges, to the extent the settlement did not include civil penalties, the builder could seek indemnification against the supplier of inadequate building materials. *Amrep S.W., Inc. v. Shollenbarger Wood Treating, Inc.*, 1995-NMSC-020, 119 N.M. 542, 893 P.2d 438.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

## 57-12-10. Private remedies.

A. A person likely to be damaged by an unfair or deceptive trade practice or by an unconscionable trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required. Relief granted for the copying of an article shall be limited as to the prevention of confusion or misunderstanding as to source.

B. Any person who suffers any loss of money or property, real or personal, as a result of any employment by another person of a method, act or practice declared unlawful by the Unfair Practices Act may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater. Where the trier of fact finds that the party charged with an unfair or deceptive trade practice or an unconscionable trade practice has willfully engaged in the trade practice, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the practice.

C. The court shall award attorney fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if the party prevails. The court shall award attorney fees and costs to the party charged with an unfair or deceptive trade practice or an unconscionable trade practice if it finds that the party complaining of such trade practice brought an action that was groundless.

D. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

E. In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.

F. A party to a court action for a private remedy pursuant to this section may request in writing during the thirty-day period following service of the summons and complaint on all parties named in the action that the parties attempt to settle the claim in early mediation. If a request for mediation is made, the parties shall choose a mutually acceptable mediator and enter into mediation within sixty days of the appointment of an acceptable mediator unless otherwise agreed by the parties. A request for mediation may be rescinded at any time if agreed to by all parties.

G. If the parties do not agree on a mutually acceptable mediator, the court shall appoint the mediator. If the early mediation pursuant to this section is entered into within sixty days following the appointment of the mediator, the parties suing on the basis of unfair, deceptive or unconscionable trade practices or acts under the Unfair Practices Act shall be required to pay no more than fifty dollars ($50.00) toward the cost of the mediation and the other party shall pay the remainder of such cost, unless otherwise agreed by the parties. If a person is seeking injunctive relief in accordance with Subsection A of this section, the person may pursue the claim for injunctive relief without following the mediation requirements of this subsection and Subsection F of this section.

**History:** 1953 Comp., § 49-15-8, enacted by Laws 1967, ch. 268, § 8; 1971, ch. 240, § 4; 1977, ch. 181, § 3; 1987, ch. 187, § 2; 2005, ch. 187, § 1.

## ANNOTATIONS

**Compiler's notes.** — This section is similar to § 3 of the Uniform Deceptive Trade Practices Act.

**The 2005 amendment,** effective June 17, 2005, added Subsection F to provide that a party to a court action for a private remedy may request mediation of the claim and that if a request for mediation is made, the parties shall select an acceptable mediator and that a request for mediation may be rescinded if the parties agree; added Subsection G to provide that if the parties do not agree upon a mediator, the court shall appoint a mediator, that if mediation is entered into within 60 days after appointment of a mediator, the party suing shall be required to pay not more than $50 of the cost of mediation and that a person seeking injunctive relief may pursue the claim for injunctive relief without following the mediation requirements.

**The 1987 amendment,** effective June 19, 1987, added the second sentence of Subsection B and rewrote Subsection C.

**Attorney fees.** — Where plaintiff was successful on certain claims brought against defendant, but was not successful on an Unfair Trade Practices Act claim; the court ruled that defendant was only entitled to attorney fees incurred in defending the Unfair Trade Practices Act claim; and defendant did not identify what portion of defendants' attorney fees were attributable to defending the Unfair Trade Practices Act or demonstrate that it was difficult or impossible to segregate the work in defending the Unfair Trade Practices Act claim from plaintiff's other claims, the court did not abuse its discretion in ruling that defendant was not entitled to any attorney fees. *Dean v. Brizuela*, 2010-NMCA-076, 148 N.M. 548, 238 P.3d 917.

**Award of attorney fees permitted on successful claims only.** — In a class action lawsuit, where individuals who purchased a Black & Decker coffeemaker at a New Mexico Wal-Mart store from 2009 to 2013 claimed that a trademark licensing agreement, whereby Applica Consumer Products, Inc. (Applica) paid royalties to Black & Decker in exchange for Applica's ability to use the Black & Decker name and trademarks in the sale of small kitchen appliances, including the coffeemaker at issue, but where there was no corporate affiliation between Black & Decker and Applica, and where Black & Decker did not design, manufacture, distribute, or warrant the coffeemaker, was an unfair or deceptive trade practice, and where defendants argued that federal permitted such trademark agreements and therefore allowed Applica to market the coffeemaker under the Black & Decker trademark, and where the district court concluded that Applica's use of the Black & Decker trademark on the coffeemaker constituted an unfair or deceptive trade practice and that the named plaintiffs were entitled to statutory damages, but the class was not entitled to damages because it could not establish actual damages, the district court did not abuse its discretion in its award of attorney fees to the named plaintiffs regarding the UPA claim, but the court abused its discretion in its award of attorney fees related to class certification because the class was not a successful party. *Puma v. W-Mart Stores East*, 2023-NMCA-005, cert. granted.

**A viable Unfair Practices Act claim** need not allege actual monetary or property loss. *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, 142 N.M. 437, 166 P.3d 1091, cert. denied, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259.

**The Unfair Practices Act does not provide a cause of action for competitive injury claims.** — Where plaintiff, a company that provides railway construction and repair services to BNSF railway company, sued plaintiff's business competitor in district court raising several claims, including an Unfair Practices Act (UPA) claim, alleging that the competitor operated its business without satisfying the mandatory licensing requirements, and sought damages under the UPA on a theory that had the competitor disclosed its licensure status, BNSF would have awarded to plaintiff contracts that were awarded to its competitor, plaintiff did not have a cause of action under the UPA, because the history of the UPA indicates that the legislature intended to limit the zone of interest protected from unfair trade practices by the UPA to consumers, not competitors. *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, *rev'g* 2018-NMCA-064, 429 P.3d 338.

**Business's standing to bring a private right of action against competitor.** — A business may have a private right of action against a business competitor under the New Mexico Unfair Practices Act provided that the conduct alleged involves trade practices that either implicate consumer protection concerns or are addressed to the market generally. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, cert. granted.

Where plaintiff, a construction company that provides railroad contracting services to BNSF railway company (BNSF), submitted a complaint to the New Mexico construction industries division, alleging defendant, a competing construction company, had performed unlicensed construction work in violation of the Construction Industries Licensing Act, and where plaintiff sued defendant in district court raising several claims, including an Unfair Practices Act (UPA) claim, alleging that defendant operated its business without satisfying the mandatory licensing requirements, induced plaintiff's former employees to divulge confidential trade secrets, and used those trade secrets to convince BNSF to hire defendant instead of plaintiff without disclosing to BNSF that it was unlicensed, the district court did not err in denying defendant's motion to dismiss for lack of standing, because the conduct alleged in plaintiff's complaint involved trade practices addressed to the market generally or otherwise implicated consumer protection concerns. *Gandydancer, LLC v. Rock House CGM, LLC*, 2018-NMCA-064, cert. granted.

**Appellate attorney fees.** — A plaintiff who prevails on appeal of an action brought under the Unfair Practices Act is entitled to an award of appellate attorney fees under 57-12-19C NMSA 1978. An award of fees on appeal furthers the public policies of encouraging individuals to pursue their Unfair Practices Act claims and reimbursing plaintiffs and their counsel for enforcing the Unfair Practices Act. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

**Class actions.** — Because 57-10-12 NMSA 1978 provides that a successful private plaintiff is entitled to attorney fees and costs; may recover the greater of actual damages or statutory damages even if proof of damages or loss or intent to deceive or take unfair advantage of a person cannot established; may recover the greater of treble actual or statutory damages upon a showing that the deceptive or unconscionable trade practice is willful; and are entitled to collect more than their actual damages as opposed to members who sue as a class, a private plaintiff has a individual remedy under 57-10-12 NMSA 1978 that is superior to the remedy the plaintiff would have as a member of a class action and is grounds for the denial of a class certification under Rule 1-023(B)(3) NMRA. *Brooks v. Norwest Corp.*, 2004-NMCA-134, 136 N.M. 599, 103 P.3d 39, cert. denied, 2004-NMCERT-012, 136 N.M. 665, 103 P.3d 1097.

**Reliance on deceptive conduct.** — Consistent with a national trend to interpret consumer protection statutes, like the Unfair Practices Act, such that plaintiffs need not prove reliance, and consistent with the absence of language in the act requiring reliance, a plaintiff need not allege or prove that she relied on defendant's purported deceptive conduct in order to recover under the Act. *Smoot v. Physicians Life Ins. Co.,*, 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Proof of link required.** — While it is true that the Unfair Practices Act requires proof of a casual link between conduct and loss, there is nothing in the language of the act requiring proof of a link between conduct and purchase or sale. *Smoot v. Physicians Life Ins. Co.,* 2004-NMCA-027, 135 N.M. 265, 87 P.3d 545.

**Prevailing party on some, but not all claims.** — Where plaintiff sued defendant for several claims, including tortious interference with prospective contractual relations and violation of the New Mexico Unfair Trade Practices Act; the trial court dismissed most of plaintiff's claims and directed a verdict against plaintiff on the tortious interference claim; and a jury awarded plaintiff damages on the UTPA claim, plaintiff was a prevailing party and was entitled to attorney's fees and costs. *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398 (10th Cir. 1993).

Where plaintiff prevailed on one, but not all of plaintiff's claims under the New Mexico Unfair Trade Practices Act, defendant was not entitled to attorney's fees and costs. *Knight v. Snap-On Tools Corp.*, 3 F.3d 1398 (10th Cir. 1993).

**Failure to file answer bringing partial directed verdict.** — In a civil suit by the state under the Pyramid or Multilevel Sales Act and the Unfair Practices Act, defendant's right to trial by jury was not infringed upon by the trial court's granting of a partial directed verdict against him on the issue of liability and the court's rejection of requested jury instructions, including requested special interrogatories to the jury, where defendant failed to file an answer to the complaint filed by the state, but only filed a document entitled "Declaration of Status", and challenged the jurisdiction of the court and the constitutionality of the Pyramid or Multilevel Sales Act (now Pyramid Promotional Schemes Act, 57-13-1 et seq.). *State ex rel. Stratton v. Sinks*, 1987-NMCA-092, 106 N.M. 213, 741 P.2d 435.

**Actual damages required.** — To obtain financial recovery under the Unfair Practices Act, the deceptive trade practice must have caused plaintiffs to suffer actual damages. *Chavarria v. Fleetwood Retail Corp.*, 2005-NMCA-082, 137 N.M. 783, 115 P.3d 799, *rev'd on other grounds*, *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

**Failure to deliver mobile home with custom features.** — Award of Unfair Practices Act damages for defendant's failure to deliver a mobile home with certain custom features ordered by plaintiffs are damages that appear to relate to promises made by defendant during the sale itself and thus are properly awarded under the UPA. *Chavarria v. Fleetwood Retail Corp.*, 2005-NMCA-082, 137 N.M. 783, 115 P.3d 799, *rev'd on other grounds*, *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, 140 N.M. 478, 143 P.3d 717.

**Failure to prove "loss of money or property".** — Where the aggrieved party did not produce evidence of loss of money or property as a result of a contractor's forgery of a construction contract and overbilling, recovery was limited to $300. *Page & Wirtz Constr. Co. v. Solomon*, 1990-NMSC-063, 110 N.M. 206, 794 P.2d 349.

**Recovery of cost of repair or diminished value.** — Car buyers who claimed recovery for the cost of repairs were limited to only recovering the cost of such repairs ($840) even though the difference between the fair market value of the vehicle before and after the damage took place was $1,000, because a party may recover only the smaller of these items. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

**Measure of damages for erroneous financial advice.** — The proper measure of damages in cases where negligent financial or tax advise has led a plaintiff to incur additional tax liability is the difference between what the plaintiff would have owed absent the negligence and what the plaintiff paid because of the negligence, plus incidental damages. *Maese v. Garrett*, 2014-NMCA-072, cert. denied, 2014-NMCERT-006.

**Recovery of damages due to erroneous financial advice.** — Where defendant provided financial services to plaintiff, which included management of plaintiff’s securities account; at defendant’s recommendation, plaintiff purchased a deferred variable annuity; defendant subsequently erroneously advised plaintiff that plaintiff could withdraw money from the annuity to purchase of an office building without incurring any tax liability; plaintiff withdrew the money from the annuity; the IRS determined that the withdrawal was subject to income tax, increased plaintiff’s tax liability by the amount withdrawn, and assessed $77,623 in additional taxes, interest and penalties; and plaintiff would not have withdrawn money from the annuity but for defendant’s misrepresentation that the withdrawal would be tax free, plaintiff suffered a compensable loss and the district court’s damages award to plaintiff in the amount of $77,623 was correct. *Maese v. Garrett*, 2014-NMCA-072, cert. denied, 2014-NMCERT-006.

**Recovery limited absent actual losses.** — In the absence of actual losses, plaintiff was still entitled to recover the statutory damages of $100; he was only required to put on evidence of his actual damages as it pertained to recovery of actual damages. *Jones v. GMC*, 1998-NMCA-020, 124 N.M. 606, 953 P.2d 1104.

**Federal diversity jurisdiction.** — In unfair trade practices action, federal court did not err in assuming diversity jurisdiction based on amount in controversy of $50,000, where treble damages sought were $41,028.51 and the plaintiff sought reasonable attorney's fees and costs. *Miera v. Dairyland Ins. Co.*, 143 F.3d 1337 (10th Cir. 1998).

In an action involving Unfair Practices Act claims proceeding in a federal court pursuant to its diversity jurisdiction, the potential award under this section of attorney fees and treble damages, in addition to compensatory damages, should be considered in determining whether the plaintiff satisfies the jurisdictional amount-in-controversy requirement. *Woodmen of the World Life Ins. Soc'y v. Manganaro*, 342 F.3d 1213 (10th Cir. 2003).

**Triple damages.** — The permissive language of Subsection B leads to the conclusion that it was within the legislature's contemplation that in some cases, but not all, the false or misleading statement would be made at the outset with the intent to deceive, and in such cases triple damages would not be unwarranted. Conversely, it suggests also that the legislature anticipated other situations wherein the statement would not be intentionally unfair or deceptive, but could become a false or misleading representation at some time during the life of the transaction. *Ashlock v. Sunwest Bank*, 1988-NMSC-026, 107 N.M. 100, 753 P.2d 346, *overruled on other grounds by Gonzales v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 899 P.2d 576.

The district court did not abuse its discretion in denying treble damages based on its findings regarding the record in the case and other remedies awarded. *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985 (10th Cir. 1999).

**Willfully defined.** — The legislature contemplated proof of some culpable mental state to demonstrate "willfully", as set forth in Subsection B of 57-12-8 NMSA 1978; willful conduct is the intentional doing of an act with knowledge that harm may result. *Atherton v. Gopin*, 2015-NMCA-003, cert. granted, 2014-NMCERT-012.

**Meaning of "groundless" claim.** — In enacting Subsection C, the legislature intended the term "groundless" to have the same meaning as "frivolous" as used in Rule 16-301 NMRA. The rule provides in applicable part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." *G.E.W. Mech. Contractors v. Johnston Co.*, 1993-NMCA-081, 115 N.M. 727, 858 P.2d 103.

The simple fact that the defendant prevailed on an unfair practices claim does not establish that the claim is groundless; rather, the defendant must show that there is no

arguable basis in law or fact to support the cause of action and the claim is not supported by a good-faith argument for the extension, modification, or reversal of existing law. *Marchman v. NCNB Tex. Nat'l. Bank*, 1995-NMSC-041, 120 N.M. 74, 898 P.2d 709.

Dismissal of the plaintiffs' claims on the grounds of forum non conveniens did not reflect on the merits of the claims and could not be construed as a ruling that the claims were groundless. *Marchman v. NCNB Tex. Nat'l. Bank*, 1995-NMSC-041, 120 N.M. 74, 898 P.2d 709.

**Defendant not entitled to attorney fees merely for prevailing against plaintiff's claims.** — In an action for breach of contract and unfair trade practices, where plaintiff hired defendant to design and construct a replacement irrigation well on plaintiff's property, and although a written contract was not executed, plaintiff's understanding of the agreement, as told to him by defendant, was that defendant would construct a well that would be fully adequate for plaintiff's irrigation purposes, that it would be capable of producing 2,500 to 3,000 gallons of water per minute, and that it would last at least fifty years, and where, after three-and-a-half years, the well stopped working, the district court did not err in denying defendant's request for attorney fees even though defendant prevailed on plaintiff's unfair practices claim, because plaintiff's claim was not groundless and there was nothing in the record to support defendant's conclusory assertion that plaintiff failed to make a proper argument. *Robey v. Parnell*, 2017-NMCA-038.

**The district court did not err in finding that plaintiff's claim was not groundless, and therefore defendant was not entitled to attorney fees.** — Where the parties brought claims against each other arising from the sale of a used car, and where, prior to trial, the district court granted partial summary judgment to plaintiff on a claim arising under the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, that defendant willfully misrepresented the age or condition of the used vehicle, and where, after the parties presented evidence at trial, the district court granted plaintiff's motion for judgment as a matter of law on defendant's counterclaim for breach of contract and the jury found for defendant on plaintiff's other UPA claims, but awarded no damages, the district court did not err in determining that plaintiff's claims were not groundless or in denying attorney fees for defendant, because under the UPA, a party who successfully defends against a UPA claim is entitled to an award of attorney fees if the district court finds that the party complaining of such trade practice brought an action that was groundless, and in this case, plaintiff's claim as pleaded was grounded in both facts and law, and defendant failed to demonstrate that the claim was brought in bad faith. *Hernandez v. Outwest Auto Corral, LLC*, 2025-NMCA-001, cert. denied.

**The district court did not err in finding that plaintiff was entitled to attorney fees.** — Where the parties brought claims against each other arising from the sale of a used car, and where, prior to trial, the district court granted partial summary judgment to plaintiff on a claim arising under the Unfair Practices Act (UPA), 57-12-1 to 57-12-26 NMSA 1978, that defendant willfully misrepresented the age or condition of the used

vehicle, and where, after the parties presented evidence at trial, the district court granted plaintiff's motion for judgment as a matter of law on defendant's counterclaim for breach of contract and the jury found for defendant on plaintiff's other UPA claims, but awarded no damages, the district court did not err in determining that plaintiff was entitled to attorney fees, because the partial summary judgment ruling established that plaintiff was the prevailing party for the purposes of attorney fees under 57-12-10(C) NMSA 1978, and the district court's findings supported a conclusion that plaintiff offered proof of the reasonableness of the fees requested. *Hernandez v. Outwest Auto Corral, LLC*, 2025-NMCA-001, cert. denied.

**Award of punitive damages not excessive.** — Because the ratio of punitive damages to compensatory damages awarded was smaller than the statutory ratio in Subsection B of this section for similar conduct, the award of punitive damages was not excessive. *Bogle v. Summit Inv. Co.*, 2005-NMCA-024, 137 N.M. 80, 107 P.3d 520.

**Restitution is an appropriate remedy for unconscionable loans.** — Where defendants marketed and originated signature loans that carried the substantively unconscionable and invalid APRs of between 1,147.14 and 1,500 percent, the proper remedy was to strike the unconscionable interest term, enforce the remainder of the loan contracts without the unconscionable term, apply the statutory default interest rate of 15 percent simple interest pursuant to 56-8-3 NMSA 1978, and require defendants to refund all money collected on the loans in excess of 15 percent of the principal as restitution for their unconscionable trade practices. *State ex rel. King v. B&B Inv. Grp. Inc.*, 2014-NMSC-024.

**Award of attorney fees.** — To be entitled to attorneys fees, it is not enough to show that the plaintiff did not prevail on such claims. The defending party must also establish that, at the time such claim was filed, the claim was initiated in bad faith or there was no credible evidence to support it. *Jones v. Beavers*, 1993-NMCA-100, 116 N.M. 634, 866 P.2d 362, cert. denied, 116 N.M. 290, 861 P.2d 971.

Even though plaintiff elected not to recover on his claim under the Unfair Practices Act, but chose to recover damages for fraudulent misrepresentation, he was entitled to an award of attorney's fees under Subsection C. *Garcia v. Coffman*, 1997-NMCA-092, 124 N.M. 12, 946 P.2d 216, cert. denied, 123 N.M. 626, 944 P.2d 274.

An award of attorneys' fees and costs is not limited to a specific percentage of recovery and includes attorneys' fees and costs on appeal. *Jones v. GMC*, 1998-NMCA-020, 124 N.M. 606, 953 P.2d 1104.

Attorney's fees properly awarded to a defendant even though the plaintiff withdrew an unfair practices claim prior to trial, where the plaintiff failed to use the appropriate language in its motion to have the claim dismissed and there was confusion as to whether that was the plaintiff's intent. *Buckingham v. Ryan*, 1998-NMCA-012, 124 N.M. 498, 953 P.2d 33.

Requirement in Subsection C of this section regarding attorneys' fees applies to fees on appeal as well as fees at the district court level. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

Subsection C of this section allows the award of attorney fees in Unfair Practices Act cases, and Rule 12-403 NMRA simply provides a procedure for requesting the appellate portion of those allowable fees. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

**Award of fees and costs.** — Where plaintiff, a construction business that conducts, among other things, roof repair, including "torch-down" roofing, a technique which uses a flaming torch to heat and seal tar paper onto a roof, purchased a general commercial liability insurance policy through an insurance broker, who was authorized to sell insurance products supplied by defendant, an insurance company, and where defendant transmitted to the broker a copy of the insurance policy, which specifically precluded coverage for damages caused by torch-down roofing, and where plaintiff, unaware of the exclusion, submitted a claim for coverage after a fire occurred at a home while plaintiff was performing torch-down roofing, and where defendant denied plaintiff's insurance claim relying on the torch-down roofing exclusion, and where the district court granted defendant's motion for summary judgment on the grounds that plaintiff had reasonable notice of the torch-down roofing exclusion as a matter of law and awarded costs to defendant, the district court did not abuse its discretion in awarding costs and fees where it affirmatively explained, in a detailed twelve-page order, its reasons for awarding fees and costs in a manner that was not contrary to logic or reason. *OR&L Const. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035.

**Prevailing parties are entitled to award of reasonable attorney fees.** — Where tenants brought action against apartment owner and manager for violations of the New Mexico Unfair Practices Act (UPA), §§ 57-12-1 through § 57-12-26 NMSA 1978, and the New Mexico Uniform Owner-Resident Relations Act (UORRA), §§ 47-8-1 through § 47-8-52 NMSA 1978, and where the parties reached a settlement agreement on all issues except attorney fees, plaintiffs were entitled to reasonable attorney fees, notwithstanding the fact that the damage award was small, because plaintiffs successfully prosecuted their UPA and UORRA claims; the amount involved and the results obtained are only one factor among several the court may consider to determine a reasonable attorney fee. *Fallen v. GREP Southwest, LLC*, 247 F.Supp.3d 1165 (2017).

**Multiplier applied to a lodestar attorney fee.** — To the extent a lodestar value does not take into account the factors that justify a multiplier, the district court has discretion to apply a multiplier factor to a lodestar fee awarded in an action under the Unfair Practices Act, 57-12-1 et seq. NMSA 1978. *Atherton v. Gopin*, 2012-NMCA-023, 272 P.3d 700.

Where plaintiff recovered $5,200.00 plus attorney fees in an action under the Unfair Practices Act, 57-12-1 et seq. NMSA 1978; plaintiff calculated attorney fees of $35,759.10; and the court awarded plaintiff attorney fees of $39,608.40 based on the lodestar method, the court had discretion to apply a multiplier factor to the lodestar fee to the extent a lodestar value did not take into account the factors that justify a multiplier. *Atherton v. Gopin*, 2012-NMCA-023, 272 P.3d 700.

**Appellate fees recoverable.** — Subsection C does not by its own terms limit itself to fees and costs incurred at the trial court level. The award of attorney fees and costs on appeal is entirely consistent with the statutory purpose of creating a private remedy to redress wrongs resulting from unfair or deceptive trade practices. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

The district court has the authority to award attorney fees on appeal even if an arbitration panel lacked the authority to do so. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

An award of fees on appeal furthers the public policies of encouraging individuals to pursue their Unfair Practices Act claims and reimbursing plaintiffs and their counsel for enforcing the Unfair Practices Act. *Aguilera v. Palm Harbor Homes, Inc.*, 2004-NMCA-120, 136 N.M. 422, 99 P.3d 672, cert. denied, 2004-NMCERT-010, 136 N.M. 541, 101 P.3d 807.

**Treble damages and punitive damages exclusive.** — Recovery of both statutory treble damages and punitive damages based upon the same conduct would be improper. In Subsection D, the legislature created a new statutory remedy in addition to those otherwise available, but did not suggest that a party would be entitled to multiple awards of damages arising out of the same conduct. *Hale v. Basin Motor Co.*, 1990-NMSC-068, 110 N.M. 314, 795 P.2d 1006.

The Unfair Practices Act does not permit a jury to award punitive damages; it only permits a judge to award up to treble damages for a willful violation of the Act. *McLelland v. United Wis. Life Ins. Co.*, 1999-NMCA-055, 127 N.M. 303, 980 P.2d 86, cert. denied, 127 N.M. 389, 981 P.2d 1207.

**Provision in arbitration agreement that barred punitive damages, but did not bar statutory treble damages, did not constitute an unconscionable contract term.** — Where plaintiff purchased a 2018 chevrolet vehicle from defendants, and in the process of purchasing the vehicle, plaintiff signed an order agreement and bill of sale, which contained an arbitration provision and a damages limitation provision stating that the dealer was not liable for punitive damages arising out of the sale or use of the vehicle, and where plaintiff filed a complaint in district court, alleging that in the process of purchasing the vehicle, the dealership failed to accurately convey the car's prior damage in order to sell a defective product, and where defendants moved to compel arbitration under the agreement, and where plaintiff opposed the motion, arguing that

the arbitration agreement should not be enforced because the contract was unconscionable, primarily because the punitive damages limitation provision restricts access to statutorily mandated treble damages under the Unfair Practice Act provided by the legislature, the district court did not err in its determination that the contract and the arbitration provision must be enforced, because although the damages provision was facially one-sided in that it disclaimed any punitive damages against the car dealer only, the contract was not unconscionable because the only damages the provision at issue excluded were common law punitive damages not granted by the legislature, leaving the statutory treble damages available to plaintiff. *Rojas v. Reliable Chevrolet (NM), LLC*, 2024-NMCA-003.

**Arbitration clause barred.** — Regulation mandating arbitration clause in title insurance contract is in conflict with 59A-16-30 NMSA 1978 and this section; therefore, plaintiff in suit against title company may have statutory claims heard in a court of law. *Lisanti v. Alamo Title Ins. of Tex.*, 2001-NMCA-100, 131 N.M. 334, 35 P.3d 989, *aff'd*, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 962.

Because 59A-16-30 and 57-12-10 NMSA 1978 provide for judicial actions on claims of unfair insurance and trade practices, a regulation, NMAC 13.14.18.14, which requires mandatory arbitration in title insurance policy disputes, is unenforceable because it violates the landowner's right to a trial by jury, as guaranteed by N.M. Const. art. II, § 12, in his action against a title insurance company asserting the above-stated claims and because the rights created by the statutes prevail over the regulation. *Lisanti v. Alamo Title Ins.*, 2002-NMSC-032, 132 N.M. 750, 55 P.3d 962, cert. denied, 537 U.S. 1193, 123 S. Ct. 1288, 154 L. Ed. 2d 1027 (2003).

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

For article, "The Impact of the Revised New Mexico Class Action Rules Upon Consumers," see 9 N.M.L. Rev. 263 (1979).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Liability for interference with at will business relationship, 5 A.L.R.4th 9.

Recovery based on tortfeasor's profits in action for procuring breach of contract, 5 A.L.R.4th 1276.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 A.L.R.4th 1340.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts, 35 A.L.R.4th 12.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract, 54 A.L.R.4th 901.

## 57-12-11. Civil penalty.

In any action brought under Section 57-12-8 NMSA 1978, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Unfair Practices Act, the attorney general, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty of not exceeding five thousand dollars ($5,000) per violation.

**History:** 1953 Comp., § 49-15-9, enacted by Laws 1970, ch. 38, § 2.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1970, ch. 38, § 2, repeals 49-15-9, 1953 Comp., relating to the civil penalty for violation of Sections 3 and 5 of the act, and enacts the above section.

**Willfully defined.** — The legislature contemplated proof of some culpable mental state to demonstrate "willfully", as set forth in 57-12-11 NMSA 1978; willful conduct is the intentional doing of an act with knowledge that harm may result. *Atherton v. Gopin*, 2015-NMCA-003, cert. granted, 2014-NMCERT-012.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

## 57-12-12. Civil investigative demand.

A. Whenever the attorney general has reason to believe that any person may be in possession, custody or control of an original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording which he believes to be relevant to the subject matter of an investigation of a probable violation of the Unfair Practices Act, he may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand requiring such person to produce documentary material and permit the inspection and copying of the material. The demand of the attorney general shall not be a matter of public record and shall not be published by him except by order of the court.

B. Each demand shall:

(1) state the general subject matter of the investigation;

(2) describe the classes of documentary material to be produced with reasonable certainty;

(3) prescribe the return date within which the documentary material is to be produced, which in no case shall be less than ten days after the date of service; and

(4) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

C. No demand shall:

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(2) require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state;

(3) require the removal of any documentary material from the custody of the person upon whom the demand is served except in accordance with the provisions of Subsection E.

D. Service of the demand may be made by:

(1) delivering a duly executed copy thereof to the person to be served, or if the person is not a natural person, to the statutory agent for the person or to any officer of the person to be served; or

(2) delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail a duly executed copy of the demand addressed to the person to be served at his principal place of business in this state, or, if the person has no place of business in this state, to his principal office or place of business.

E. Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served or may be inspected and copied at such other times and places as may be agreed upon by the person served and the attorney general.

F. No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by the district court in the county in which the person resides or has his principal place of business, or is about to [perform] or is performing the practice which is alleged to be unlawful under the Unfair Practices Act, for good cause shown, be produced for inspection or copying by anyone other than an authorized employee of the attorney general, nor shall the contents thereof be disclosed

to anyone other than an authorized employee of the attorney general, or in court in an action relating to a violation of the Unfair Practices Act.

G. At any time before the return date of the demand, a petition to set aside the demand, modify the demand or extend the return date thereon may be filed in the district court in the county in which the person resides or has his principal place of business, or is about to [perform] or is performing the practice which is alleged to be unlawful under the Unfair Practices Act, and the court upon a showing of good cause may set aside the demand, modify it or extend the return date of the demand.

H. After service of the investigative demand upon him, if any person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in the enforcement of the demand. In appropriate cases the court shall issue its order requiring the person to appear and produce the documentary material required in the demand and may upon failure of the person to comply with the order punish the person for contempt.

I. This section shall not be applicable to criminal prosecutions.

**History:** 1953 Comp., § 49-15-10, enacted by Laws 1967, ch. 268, § 10.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — Laws 1967, ch. 268, contained two sections numbered 10. The 1953 compiler has designated the first of these 49-15-10, 1953 Comp., and the other 49-15-11, 1953 Comp (57-12-13 NMSA 1978).

**Cross references.** — For production of documentary evidence, *see* Rule 1-045B NMRA.

**An arbitration agreement contrary to public policy under the UPA will not be enforced.** — Where the state of New Mexico filed suit against ITT Technical Institute (ITT) claiming violations of the New Mexico Unfair Practices Act (UPA) arising out of alleged misrepresentations to students about ITT's nursing program and its financial process, and where ITT filed a motion to compel arbitration in accordance with the arbitration provision, and accompanying confidentiality clause, in the students' enrollment agreements with ITT, which provided that any dispute be resolved by binding arbitration, the district court properly declined to enforce the confidentiality clause and properly denied ITT's motion to compel arbitration, because the state, under the UPA, has been given broad statutory authority to investigate violations and enforce the provisions of the UPA demonstrating New Mexico's fundamental public policy in favor of preventing consumer harm and resolving consumer claims, and it would be contrary to public policy to allow ITT to use the confidentiality clause with its students to shield itself

from the state's investigation and litigation authorized under the UPA. *State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 2018-NMCA-044.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

## 57-12-13. Regulations.

The attorney general is empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of the Unfair Practices Act.

**History:** 1953 Comp., § 49-15-11, enacted by Laws 1967, ch. 268, § 10 [10A].

**ANNOTATIONS**

**Compiler's notes.** — *See* compiler's note to 57-12-12 NMSA 1978.

**Violation of regulations.** — An automobile dealer violated the act when it failed to provide a customer with a written statement explaining the dealer's warranty policy as required by the attorney general's regulations. *Salazar v. DWBH, Inc.*, 2008-NMSC-054, 144 N.M. 828, 192 P.3d 1205.

**Rules governing advertising and fees related to the sale of motor vehicles.** — Under rules promulgated by the office of the attorney general pursuant to this section, the advertised price of a new vehicle must be the full cash price for which the dealer will sell the vehicle. This provision permits a dealer to exclude four specific charges from the advertised price of a vehicle, including "dealer transfer service fees," subject to the specified disclosure requirements. A dealer is prohibited from using the term "documentary fee" for "charges other than those actually required by law for processing of documents." It does not include fees for document preparation, which may be assessed as a component of dealer transfer service fees. A dealer is precluded from negotiating the terms of a sale and then adding the cost of certain items to the contract, including "dealer preparation," without the buyer's knowledge and consent. The rules also prohibit a dealer from adding "any other charges, however denominated, that represent additional dealer profit," which plainly prohibits a dealer from including a profit component within any otherwise permissible fee the dealer charges, including the dealer transfer service fee, documentary fee, and dealer preparation fee. *Fees Covered by Office of Attorney General Rules Governing Advertising and Sale of Motor Vehicles* (5/31/19), Att'y Gen. Adv. Ltr. 2019-02.

## 57-12-14. Construction.

The Unfair Practices Act neither enlarges nor diminishes the rights of parties in private litigation.

**History:** 1953 Comp., § 49-15-12, enacted by Laws 1967, ch. 268, § 11.

**ANNOTATIONS**

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

For note, "State Securities Law: A Valuable Tool for Regulating Investment Land Sales," see 7 N.M.L. Rev. 265 (1977).

## 57-12-15. Enforcement.

In order to promote the uniform administration of the Unfair Practices Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power conferred upon the attorney general by the Unfair Practices Act.

**History:** 1953 Comp., § 49-15-13, enacted by Laws 1967, ch. 268, § 12.

**ANNOTATIONS**

**An arbitration agreement contrary to public policy under the UPA will not be enforced.** — Where the state of New Mexico filed suit against ITT Technical Institute (ITT) claiming violations of the New Mexico Unfair Practices Act (UPA) arising out of alleged misrepresentations to students about ITT's nursing program and its financial process, and where ITT filed a motion to compel arbitration in accordance with the arbitration provision, and accompanying confidentiality clause, in the students' enrollment agreements with ITT, which provided that any dispute be resolved by binding arbitration, the district court properly declined to enforce the confidentiality clause and properly denied ITT’s motion to compel arbitration, because the state, under the UPA, has been given broad statutory authority to investigate violations and enforce the provisions of the UPA demonstrating New Mexico's fundamental public policy in favor of preventing consumer harm and resolving consumer claims, and it would be contrary to public policy to allow ITT to use the confidentiality clause with its students to shield itself from the state's investigation and litigation authorized under the UPA. *State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 2018-NMCA-044.

## 57-12-16. Advertising media excluded.

The Unfair Practices Act does not apply to publishers, broadcasters, printers or other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast or reproduce material without knowledge of its deceptive or unconscionable character.

**History:** 1953 Comp., § 49-15-14, enacted by Laws 1967, ch. 268, § 13; 1971, ch. 240, § 5.

**ANNOTATIONS**

**Compiler's notes.** — This section is similar to § 4 of the Uniform Deceptive Trade Practices Act.

## 57-12-17. Issuance of ne exeat.

Whenever the attorney general has reasonable belief that any person is using or is about to use any method, act or practice which is declared by the Unfair Practices Act to be unlawful, and whenever the attorney general has reasonable belief that any such person is about to remove himself from the state of New Mexico, or is about to remove his property or assets from the state of New Mexico, the attorney general may petition the appropriate district court for a writ of ne exeat and the court may forbid any such person from leaving the state of New Mexico, or removing his property or assets from the state of New Mexico until a determination of the issues has been made.

**History:** 1953 Comp., § 49-15-15, enacted by Laws 1971, ch. 164, § 1.

**ANNOTATIONS**

**Purposes of and requirements for the issuance of the writ of ne exeat.** — The purposes of the writ of ne exeat are to ensure compliance with orders and decrees of court and to enable the court to retain jurisdiction of the party against whom it is issued. The issuance of the writ requires that there be a threatened departure of the defendant or removal of property from the jurisdiction and a resulting defeat of the court's power to give effective in personam relief due to its loss of control over the defendant's person or property. In the absence of a threat to abscond, the writ may not be used as a form of coercing payment of a debt, no matter how just, nor as a form of punishment, no matter how deserved. Once the purposes of the writ and conditions of the bond have been fulfilled, the writ and the bond are discharged. Failure to comply with the conditions of a ne exeat bond results in forfeiture of the bond. *Atherton v. Gopin*, 2015-NMCA-087.

**The writ of ne exeat is collateral to an Unfair Practices Act judgment.** — Issuance of the writ does not depend on an actual violation of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq. (UPA). This section permits the issuance of a writ of ne exeat when the attorney general has a reasonable belief that any person is using or is about to use any method, act or practice which is declared by the UPA to be unlawful and reasonable belief that any such person is about to remove himself from the state, or

is about to remove his property or assets from the state. The writ is a means to effectuate a remedy for UPA violations by keeping a party within the jurisdiction of the court, but it is not itself a remedy, and it is necessarily collateral to any UPA judgment that may be entered. *Atherton v. Gopin*, 2015-NMCA-087.

Following entry of summary judgment for over $2,500,000 against defendant for violations of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant's appearance at future proceedings. Based on the collateral nature of the writ of ne exeat, the modification of the ne exeat bond order was within the district court's jurisdiction to enforce its judgment in the underlying case notwithstanding the appeal of that judgment. *Atherton v. Gopin*, 2015-NMCA-087.

**Ne exeat bond amount.** — A ne exeat bond amount is within the district court's discretion, but the bond amount may not be excessive or oppressive. *Atherton v. Gopin*, 2015-NMCA-087.

Following entry of summary judgment for over $2,500,000 against defendant for violations of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant's appearance at future proceedings. The district court did not abuse its discretion in setting the bond amount where the total bond amount, including the increase, was well under the total amount of the judgment of approximately $2.5 million, and where defendant did not argue on appeal that the bond amount was excessive or oppressive. *Atherton v. Gopin*, 2015-NMCA-087.

**Sufficient evidence to support district court's decision to increase ne exeat bond amount.** — Following entry of summary judgment for over $2,500,000 against

defendant for violations of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant's appearance at future proceedings. Where evidence established that defendant owned certain real property, that he entered into a real estate contract for sale of the property and transferred his interest in the property to his wife just days before judgment was entered in the underlying case, the district court could reasonably find that the sale and transfer of the property constituted dissipation of assets. There was sufficient evidence to support the district court's decision to increase the ne exeat bond. *Atherton v. Gopin*, 2015-NMCA-087.

**Due process required during hearing on motion for writ of ne exeat.** — Due process is required during a hearing on a motion for writ of ne exeat, and is provided when a defendant has timely notice, a reasonable opportunity to be heard, a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence, representation by counsel, and a hearing before an impartial decisionmaker. *Atherton v. Gopin*, 2015-NMCA-087.

Following entry of summary judgment for over $2,500,000 against defendant for violations of the New Mexico Unfair Practices Act, 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant's appearance at future proceedings. Defendant's right to due process of law was not violated where defendant filed a response in opposition to the motion for writ of ne exeat, in which he disputed that he was dissipating assets from the state, where defendant had notice of and was present and represented by counsel at the hearing on the initial motion, where there was no indication in the record that defendant was denied the opportunity to present witnesses at the hearing, and where defendant submitted exhibits for the district court's review. *Atherton v. Gopin*, 2015-NMCA-087.

**Law reviews.** — For article, "Consumer Class Actions Under the New Mexico Unfair Practices Act," see 4 N.M.L. Rev. 49 (1973).

## 57-12-18. Posting of bond.

The court may require any such person to post a ne exeat bond conditioned on such persons [person's] appearance at all hearings on the matter at issue.

**History:** 1953 Comp., § 49-15-16, enacted by Laws 1971, ch. 164, § 2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**The writ of ne exeat may detain property as well as the person.** — At common law, a bond is an inherent part of a writ of ne exeat. Historically, where the removal of property would defeat the purpose of a ne exeat writ, the order in the writ may detain property as well as the person. At common law, a ne exeat writ, including a bond, may be conditioned on preservation of assets. This section does not prohibit bonds related to assets or property. Therefore, since the statute is silent as to these bonds, the statute does not abrogate the common law. *Atherton v. Gopin*, 2015-NMCA-087.

Following entry of summary judgment for over $2,500,000 against defendant for violations of the New Mexico Unfair Practices Act (UPA), 57-12-1 NMSA 1978 et seq., the district court issued a writ of ne exeat and ordered defendant to post a ne exeat bond in the amount of $100,000 based on evidence that defendant was about to remove assets from the jurisdiction of the district court, and following a hearing where the district court found that there was evidence that defendant had engaged in complex financial transactions for the purpose of preventing collection of the judgment, that defendant had dissipated assets during the pendency of the case, including the sale of property, and that defendant, who failed to appear at the hearing, had previously testified under oath that he would attend all future hearings in the case and would not flee the jurisdiction, the district court increased the ne exeat bond to $500,000 to prevent further dissipation of assets within the jurisdiction of the court and to secure defendant’s appearance at future proceedings. Issuance of the bond order conditioned on preservation of assets was not contrary to the UPA, because the UPA does not abrogate the common law, which permitted a ne exeat bond to be conditioned on preservation of assets. *Atherton v. Gopin*, 2015-NMCA-087.

## 57-12-19. [Hearing after incarceration.]

No such person shall be incarcerated for failure to post said ne exeat bond for longer than 72 hours, Sundays excepted, without the benefit of a hearing before the court setting said bond. Such hearing shall be held as soon as possible after incarceration.

**History:** 1953 Comp., § 49-15-17, enacted by Laws 1971, ch. 164, § 3.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-12-20. Sureties on bond.

The sureties upon any bond, shall in all cases justify as to their sufficiency; and the clerk of the district court taking such bond shall certify his approval of the same, as to form and the manner of its execution and to the sufficiency of the sureties thereon.

**History:** 1953 Comp., § 49-15-18, enacted by Laws 1971, ch. 164, § 4.

## 57-12-21. Door-to-door sales; contracts; requirements; prohibitions.

A. In connection with a door-to-door sale, it constitutes an unfair or deceptive trade practice for a seller to:

(1) fail to furnish the buyer with a fully completed receipt or copy of a contract pertaining to the sale at the time of its execution that is in the same language as that principally used in the oral sales presentation and that shows the date of the transaction and contains the name and address of the seller and, in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of ten points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.";

(2) fail to furnish each buyer, at the time the buyer signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION", that shall be attached to the contract or receipt and easily detachable and that shall contain in ten-point bold face type the following information and statements in the same language as that used in the contract:

"NOTICE OF CANCELLATION

_____
date

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale and any negotiable instrument executed by you will be returned within ten business days following receipt by the seller of your cancellation notice and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within twenty days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice or send a telegram to:

_____
(name of seller)

at _____
(address of seller's place of business)

not later than midnight of _____
(date)

I hereby cancel this transaction.

_____
(date)

_____
(buyer's signature)";

(3) fail, before furnishing copies of the notice of cancellation to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation;

(4) include in a door-to-door contract or receipt a confession of judgment or a waiver of any of the rights to which the buyer is entitled under this section, including specifically the buyer's right to cancel the sale in accordance with the provisions of this section;

(5) fail to inform each buyer orally, at the time the buyer signs the contract or purchases the goods or services, of the right to cancel;

(6) misrepresent in any manner the buyer's right to cancel;

(7) fail or refuse to honor a valid notice of cancellation by a buyer and, within ten business days after the receipt of the notice, fail to:

(a) refund all payments made under the contract or sale;

(b) return in substantially as good condition as when received by the seller any goods or property traded in; and

(c) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly a security interest created in the transaction;

(8) negotiate, transfer, sell or assign any notice or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased; and

(9) fail to notify the buyer, within ten business days of receipt of the notice of cancellation, whether the seller intends to repossess or to abandon any shipped or delivered goods.

B. The cancellation period provided for in this section as applied to telephone initiated sales shall not begin until the buyer has been informed of the right to cancel and has been provided with copies of the notice of cancellation.

C. For the purposes of this section:

(1) "business day" means any calendar day except Sunday or the following business holidays: New Year's day; President's day; Memorial day; Independence day; Labor day; Indigenous Peoples' day; Armistice day and Veterans' day; Thanksgiving day; Christmas day; Martin Luther King, Jr.'s birthday; and any other legal public holiday of the state of New Mexico or the United States;

(2) "consumer goods or services" means goods or services other than perishable goods or agricultural products purchased, leased or rented primarily for personal, family or household purposes, including courses of instruction or training, regardless of the purpose for which they are taken;

(3) "door-to-door sale" means a sale, lease or rental of consumer goods or services with a purchase price of twenty-five dollars ($25.00) or more, whether under single or multiple contracts, in which the seller or the seller's representative personally

solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. A door-to-door sale includes seller initiated telephone sales. A door-to-door sale does not include a transaction:

(a) made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis;

(b) in which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act, 15 U.S.C. 1635, or regulations issued pursuant thereto;

(c) in which the buyer has initiated the contract and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days;

(d) in which the buyer has initiated the contract and specifically requested the seller to visit the buyer's home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion;

(e) pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the securities and exchange commission; or

(f) in which a consumer acquires the use of goods under the terms of a rental-purchase agreement made pursuant to the provisions of the Rental-Purchase Agreement Act, with an initial rental period of one week or less, by placing a telephone call to a lessor and by requesting that specific goods be delivered to the consumer's residence or such other place as the consumer directs and consummation of the rental-purchase agreement occurs after the goods are delivered;

(4) "place of business" means the main or permanent branch office or local address of a seller;

(5) "purchase price" means the total price paid or to be paid for the consumer goods or services, including all interest and service charges; and

(6) "seller" means any person, partnership, corporation or association engaged in the door-to-door sale of consumer goods or services.

**History:** 1978 Comp., § 57-12-21, enacted by Laws 1987, ch. 212, § 1; 1995, ch. 38, § 13; 2019, ch. 123, § 2.

**ANNOTATIONS**

**The 2019 amendment,** effective July 1, 2019, replaced Washington's birthday with President's day and Columbus day with Indigenous Peoples' day, and added Armistice day, as exceptions to the definition of "business day" as used in this section; in Subsection C, Paragraph C(1), after "New Year's day", deleted "Washington's birthday" and added "President's day", after "Labor day", deleted "Columbus" and added "Indigenous Peoples'", and after the next occurrence of "day", added "Armistice day and".

**The 1995 amendment,** effective July 1, 1995, inserted Subparagraph C(3)(f) and made stylistic changes.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 67 Am. Jur. 2d Sales § 84.

## 57-12-22. Telephone solicitation sales; automated telephone dialing systems for sales restricted; disclosure and other requirements established for authorized telephone solicitation sales; prohibited telephone solicitation.

A. A person shall not utilize an automated telephone dialing or push-button or tone-activated address signaling system with a prerecorded message to solicit persons to purchase goods or services unless there is an established business relationship between the persons and the person being called consents to hear the prerecorded message.

B. It is unlawful under the Unfair Practices Act for a person to make a telephone solicitation for a purchase of goods or services:

(1) without disclosing within fifteen seconds of the time the person being called answers the name of the sponsor and the primary purpose of the contact;

(2) that misrepresents the primary purpose of a telephone solicitation of a residential subscriber as a "courtesy call", a "public service information call" or some other euphemism;

(3) under the guise of research or a survey when the real intent is to sell goods or services;

(4) without disclosing, prior to commitments by customers, the cost of the goods or services, all terms, conditions, payment plans and the amount or existence of any extra charges such as shipping and handling;

(5) that are received before 9:00 a.m. or after 9:00 p.m.;

(6) using automatic dialing equipment unless the telephone immediately releases the line when the called party disconnects;

(7) using automatic dialing equipment that dials and engages the telephone numbers of more than one person at a time but allows the possibility of a called person not being connected to the calling person for some period not exceeding that established by the federal trade commission at 16 C.F.R. Sections 310(b)(1)(iv) and 310.4(b)(4); and

(8) in which credit card numbers are requested before the prospective purchaser expresses a desire to use a credit card to pay for the purchase.

C. It is unlawful for a person to:

(1) make a telephone solicitation of a residential subscriber whose telephone number has been on the national do-not-call registry, established by the federal trade commission, for at least three months prior to the date the call is made; or

(2) use a method to block or otherwise intentionally circumvent a residential subscriber's use of a caller identification service pursuant to the Consumer No-Call Act [repealed].

D. As used in this section:

(1) "established business relationship" means a relationship that:

(a) was formed, prior to a telephone solicitation, through a voluntary, two-way communication between a seller or telephone solicitor and a residential subscriber, with or without consideration, on the basis of an application, purchase, ongoing contractual agreement or commercial transaction between the parties regarding products or services offered by the seller or telephone solicitor; and

(b) currently exists or has existed within the immediately preceding twelve months;

(2) "local exchange company" means a telecommunications company that provides the transmission of two-way interactive switched voice communications within a local exchange area;

(3) "residential subscriber" means a person who has subscribed to residential telephone service from a local exchange company or the other persons living or residing with such person; and

(4) "telephone solicitation" means a voice or telefacsimile communication over a telephone line for the purpose of encouraging the purchase or rental of or investment in property, goods or services and includes a communication described in this subsection through the use of automatic dialing and recorded message equipment or by other means, but "telephone solicitation" does not include a communication:

(a) to a residential subscriber with that subscriber's prior express invitation or permission;

(b) by or on behalf of a person with whom a residential subscriber has an established business relationship;

(c) made for the sole purpose of urging support for or opposition to a political candidate or ballot issue;

(d) made for the sole purpose of conducting political polls or soliciting the expression of opinions, ideas or votes; or

(e) by a person who is a duly licensed real estate broker pursuant to Section 61-29-11 NMSA 1978, who is a resident of the state and whose telephone call to the consumer is for the sole purpose of selling, exchanging, purchasing, renting, listing for sale or rent or leasing real estate in accordance with the provisions for which he or she is licensed and not in conjunction with any other offer.

**History:** Laws 1989, ch. 309, § 2; 2003, ch. 167, § 10.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. The Consumer No-Call Act, 57-12A-1 to 57-12A-7 NMSA 1978, was repealed on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004).

**The 2003 amendment,** effective July 1, 2003, added "prohibited telephone solicitation" in the section heading; in Subsection A, substituted "established" for "existing" following "there is an"; rewrote Subsection B; and added Subsections C and D.

**Section applies to cellular telephone users as well as landline telephone users.** — Where plaintiff, a consumer who received robo-calls designed to sell a type of discounted medical benefit plan, brought an action against a telemarketer and its purported agent, alleging that defendants violated the New Mexico Unfair Practices Act, §§ 57-12-1 through 57-12-26 NMSA 1978 (NMUPA), by repeatedly calling her cellular telephone and refusing to identify themselves, and where defendants moved to dismiss, arguing that § 57-12-22(C)(1) only prohibits calls to landline telephones and not to cellular telephones, defendant's motion to dismiss was denied because the plain meaning of this section prohibits calls to all telephone numbers on the national do-not-

call registry regardless of whether the telephone number belongs to a wireless telephone or a landline telephone. The purpose of this section of the NMUPA is to reduce unwanted telephone solicitation. *Mohon v. Agentra LLC*, 400 F. Supp. 3d 1189 (D. N.M. 2019).

**Phone owner stated a claim under the Unfair Practices Act.** — Where plaintiff alleged that defendants, or defendants' agents on defendants' behalf, made telephone solicitations to plaintiff at his cellular number more than once within twelve months despite the fact his phone number had been continuously listed on the federal Do Not Call Registry at all relevant times, and that during one call, plaintiff had a conversation with a telemarketer for over fifteen seconds, but at no time during the call did the telemarketer identify the seller or sponsor of the call, but instead used a fake name, and where defendants argued that plaintiff's allegations were insufficient to establish a violation of the Unfair Practices Act (UPA), claiming that the relevant provisions of the UPA apply only to solicitations made to residential land lines and that the UPA intended to exclude cell phone users, the district court denied defendants' motion to dismiss, because plaintiff's allegations were sufficient to state a claim under § 57-12-22(B)(1) NMSA 1978, and there is nothing in the UPA that would indicate the legislature intended to exclude wireless telephone users from provisions related to unwanted telephone solicitations. *Mestas v. CHW Group, Inc.*, 508 F. Supp. 3d 1011 (D. N.M. 2020).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 A.L.R.5th 619.

## 57-12-23. Unsolicited facsimiles or email; prohibition.

A. No person conducting business in this state shall transmit by facsimile or cause to be transmitted by facsimile an unsolicited advertisement unless:

(1) the person establishes a toll-free telephone number that a recipient of the unsolicited advertisement may call to notify the person not to send the recipient any additional unsolicited advertisement; and

(2) the unsolicited advertisement includes a statement, in at least nine-point type, informing the recipient of the toll-free telephone number that the recipient may call to notify the sender not to send the recipient any additional unsolicited information.

B. No person conducting business in this state shall email or cause to be emailed an unsolicited advertisement unless:

(1) the person establishes a toll-free telephone number or a valid sender-operated return email address that a recipient of the unsolicited advertisement may call or email to notify the person not to send the recipient any additional unsolicited advertisement;

(2) the unsolicited advertisement includes a statement, in the first text of the body of the message and in the same size as the majority of the text of the message, informing the recipient of the toll-free telephone number or the email address that the recipient may call or email to notify the sender not to send the recipient any additional unsolicited advertisement;

(3) the subject line of the email includes "ADV:" as the first four characters; and

(4) if the unsolicited advertisement advertises realty, goods, services, intangibles or the extension of credit that may only be viewed, purchased, licensed, rented, leased or held in the possession by an individual eighteen years of age or older, the subject line of the email includes "ADV:ADLT" as the first eight characters.

C. After notification by a recipient of the recipient's request not to receive any further unsolicited advertisement, no person conducting business in this state shall transmit by facsimile, cause to be transmitted by facsimile, email or cause to be emailed any unsolicited advertisement to that recipient.

D. In the case of an employer who is the registered owner of more than one email address, the notification required by Subsection C of this section may be given by the employer on behalf of all of the employees who may use email addresses provided and controlled by the employer.

E. No person shall knowingly or intentionally assist in the transmission of an unsolicited advertisement by facsimile or email if the person knows, or consciously avoids knowing, that the initiator of the advertisement is engaged, or intends to engage, in a violation of this section.

F. A violation of a provision of this section constitutes an unfair or deceptive trade practice.

G. As used in this section and Section 57-12-24 NMSA 1978:

(1) "transmit by facsimile", "cause to be transmitted by facsimile", "email", "cause to be emailed" or "assist in the transmission" does not include the transmission of an unsolicited advertisement by a telecommunications utility or an internet service provider that merely carries the transmission over its network or who acts or fails to act as allowed by contract or other law, including but not limited to 47 USCA 230(c); and

(2) "unsolicited advertisement" means information transmitted by facsimile or email that:

(a) advertises the lease, sale, license, rental, gift offer or other disposition of any realty, goods, services, intangibles or the extension of credit; and

(b) is addressed to a recipient with whom the sender does not have an existing business or personal relationship; or

(c) is not sent at the request of, or with the express consent of, the recipient.

**History:** Laws 2003, ch. 168, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 168 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 57-12-24. Unsolicited facsimiles or email; private remedy.

A. Any person who receives an unsolicited advertisement by facsimile or email may bring an action against the sender of the unsolicited advertisement to recover actual damages, including loss of profits, or statutory damages equal to the greater of twenty-five dollars ($25.00) for each email or facsimile received or five thousand dollars ($5,000) for each day of violation, plus reasonable attorney fees and costs if, prior to receiving the unsolicited advertisement:

(1) the person who received the unsolicited advertisement has notified the sender, pursuant to the provisions of Section 57-12-23 NMSA 1978, of the person's request not to receive unsolicited advertisements; or

(2) the sender of the unsolicited advertisement has entered into a written assurance of discontinuance pursuant to Section 57-12-9 NMSA 1978.

B. A telecommunications utility or internet service provider, injured by a violation of a provision of Section 57-12-23 NMSA 1978 or this section, may recover actual damages, including loss of profits, or statutory damages equal to the greater of ten dollars ($10.00) for each facsimile or email transmitted or five thousand dollars ($5,000) for each day of violation plus reasonable attorney fees and costs.

C. The remedies provided in this section are in addition to any available remedies otherwise provided by law.

**History:** Laws 2003, ch. 168, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 168 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2003, 90 days after adjournment of the legislature.

## 57-12-25. Solicitations using loan information; restriction; cause of action.

A. A person shall not reference the trade name or trademark of a lender or a trade name or trademark confusingly similar to that of a lender in a solicitation offering services or products without the consent of the lender, unless the solicitation clearly and conspicuously states the following in close proximity to and in the same or larger point type as the first and the most prominent use of a lender's trade name or trademark:

(1) the name, address and telephone number of the person making the solicitation;

(2) that the person making the solicitation is not affiliated with the lender;

(3) that the solicitation is not authorized or sponsored by the lender; and

(4) that the loan information referenced was not provided by the lender.

B. A person shall not reference a loan number, loan amount or other specific loan information that is not publicly available in a solicitation offering services or products, unless the information is included in a communication from a lender or an affiliate of a lender to a current customer of the lender or a person who was a customer of the lender during the eighteen months immediately preceding the solicitation.

C. Except as provided in Subsection D of this section, a person shall not reference a loan number, loan amount or other specific loan information that is publicly available in a solicitation offering services or products, unless the solicitation clearly and conspicuously states the following in close proximity to and in the same or larger point type as the first and the most prominent use of the loan number, loan amount or other specific loan information:

(1) the name, address and telephone number of the person making the solicitation;

(2) that the person making the solicitation is not affiliated with the lender;

(3) that the solicitation is not authorized or sponsored by the lender; and

(4) that the loan information referenced was not provided by the lender.

D. Subsection C of this section does not apply to a communication by a lender or an affiliate of a lender with a current customer of the lender or with a person who was a customer of the lender during the eighteen months immediately preceding the communication.

E. A person shall not use the name of a lender or a name similar to that of a lender in a solicitation directed to consumers if that use could cause a reasonable person to be confused, mistaken or deceived as to:

(1) the lender's sponsorship, affiliation, connection or association with the person using the name; or

(2) the lender's approval or endorsement of the person using the name or the person's services or products.

F. Any reference to an outstanding loan, including the name of the lender, the loan number, the loan amount or other specific information about the loan that appears on the outside of an envelope, that is visible through the envelope window or that appears on a postcard in connection with any written communication that includes or contains a solicitation for goods or services, is prohibited without the consent of the lender.

G. The prohibitions of this section do not apply to the use by a person of the trade name of another lender in an advertisement for services or products that compares the services or products offered by the other lender.

H. A lender or owner of a trade name or trademark may seek an injunction in a state district court against a person who violates this section to stop the unlawful use of the trade name, trademark or loan information. In such an action:

(1) the person seeking the injunction shall not have to prove actual damage as a result of the violation; and

(2) irreparable harm and interim harm to the lender or owner shall be presumed.

I. A lender or owner seeking an injunction under Subsection H of this section may, in the same action, seek to recover actual damages and any profits the defendant has accrued as a result of a violation of this section. The prevailing party in an action brought pursuant to this section may recover costs associated with the action and reasonable attorney fees from the other party.

J. As used in this section:

(1) "affiliate" means a business entity that, directly or indirectly through one or more intermediaries controls, is controlled by or is under common control with another business entity; and

(2) "lender" means an insured state or national bank, a state or federal savings and loan association or savings bank, a state or federal credit union, a mortgage loan company, an escrow company or any other person who makes loans in

this state or a holder of a loan and any affiliate, or any third party operating with the consent of the lender.

**History:** Laws 2007, ch. 225, § 1.

**ANNOTATIONS**

**Compiler's notes.** — This section was not enacted as part of the Unfair Practices Act, but has been compiled with that act for the convenience of the user.

**Effective dates.** — Laws 2007, ch. 225 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

## 57-12-26. Gift certificates; expiration; fees; penalties.

A. As used in this section, "gift certificate" means a writing identified as a gift certificate that is not redeemable in cash and is usable in its face amount in lieu of cash in exchange for goods or services supplied by a seller, but does not include a gift certificate useable with multiple unaffiliated sellers or goods or services. "Gift certificate" includes an electronic card with a banked dollar value, a merchandise credit, a certificate where the issuer has received payment for the full face value for the future purchase or delivery of goods or services and any other medium that evidences the giving of consideration in exchange for the right to redeem the certificate, electronic card or other medium for goods or services of at least an equal value. "Gift certificate" does not include:

(1) gift certificates, store gift cards or general use prepaid cards distributed to a consumer for promotional, award, incentive, rebate or other similar purposes without any money or other tangible thing of value being given by the consumer in exchange for the gift certificate, store gift card or general use prepaid card;

(2) gift certificates, store gift cards or general use prepaid cards that are sold below face value or at a volume discount to employers or to nonprofit and charitable organizations for fund-raising purposes;

(3) written promises, plastic cards or other electronic devices that are:

(a) used solely for telephone services; or

(b) are associated with a deposit, checking, savings or similar account at a banking or other similarly regulated financial institution and that provide payments solely by debiting such account; and

(4) gift certificates issued by banks, savings and loan associations and their affiliates and subsidiaries, licensed money transmitters or credit unions operating pursuant to the laws of the United States or New Mexico.

B. A gift certificate shall not have an expiration date less than sixty months after the date upon which the gift certificate was issued. If an expiration date is not conspicuously stated on a gift certificate, that gift certificate shall be presumed to have no expiration date and shall be valid until redeemed or replaced.

C. An issuer of a gift certificate shall not charge a fee of any kind in relation to the sale, redemption or replacement of a gift certificate other than an initial charge not exceeding the face value of the gift certificate, nor may a gift certificate be reduced in value by any fee, including a service or dormancy fee.

D. A violation of this section shall constitute an unfair or deceptive trade practice and shall be subject to the penalties set forth in the Unfair Practices Act.

**History:** Laws 2007, ch. 125, § 1.

**ANNOTATIONS**

**Compiler's notes.** — This section was not enacted as a new section of the Unfair Practices Act, however, it has been compiled with that act because it adopts the penalties of that act.

**Effective dates.** — Laws 2007, ch. 125, § 5 made the section effective July 1, 2007.

**Severability.** — Laws 2007, ch. 125, § 3 provided for the severability of Laws 2007, ch. 125, §§ 1 and 2 if any part or application thereof is held invalid.

**Applicability.** — Laws 2007, ch. 125, §4 provided that Laws 2007, ch. 125, §§ 1 and 2 apply to gift certificates sold or offered for sale on or after July 1, 2007.

## 57-12-27. Prohibited conduct in renting of dwelling units.

A. As used in this section:

(1) "applicant" means a person who submits an application to rent a dwelling unit to the owner or agrees to act as a guarantor or cosigner on a rental agreement;

(2) "dwelling unit" means a structure, mobile home or the part of a structure, including a hotel or motel, that is used as a home, residence or sleeping place by one person who maintains a household or by two or more persons who maintain a common household and includes a parcel of land leased by the owner for use as a site for the parking of a mobile home;

(3) "owner" means one or more persons, jointly or severally, in whom is vested all or part of the:

(a) legal title to a property, but does not include the limited partner in an association regulated under the Uniform Revised Limited Partnership Act [47-8-1 to 47-8-52 NMSA 1978]; or

(b) beneficial ownership and a right to present use and enjoyment of the premises and agents thereof and includes a mortgagee in possession and the lessors, but does not include a person or persons, jointly or severally, who as owner leases the entire premises to a lessee of vacant land for apartment use;

(4) "rent" means payments in currency or in-kind under terms and conditions of the rental agreement for use of a dwelling unit or premises, to be made to the owner by the resident, but does not include deposits; and

(5) "rental agreement" means all agreements between an owner and resident and valid rules and regulations adopted pursuant to Section 47-8-23 NMSA 1978 embodying the terms and conditions concerning the use and occupancy of a dwelling unit or premises.

B. It is an unfair or deceptive trade practice for an owner to charge a fee to an applicant that is not a screening fee or deposit or that was not published in a listing for rental of a dwelling unit in violation of the Uniform Owner-Resident Relations Act.

C. It is an unfair or deceptive trade practice for an owner to charge fees that are not included in the rental agreement in violation of the Uniform Owner-Resident Relations Act.

**History:** Laws 2025, ch. 122, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2025, ch. 122 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 20, 2025, 90 days after adjournment of the legislature.

# ARTICLE 12A
# Consumer No-Call (Repealed.)

## 57-12A-1. Repealed.

**History:** Laws 2003, ch. 167, § 1; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-1 NMSA 1978, as enacted by Laws 2003, ch. 167, § 1, the short title of the Consumer No-Call Act, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-2. Repealed.

**History:** Laws 2003, ch. 167, § 2; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-2 NMSA 1978, as enacted by Laws 2003, ch. 167, § 2, relating to definitions, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-3. Repealed.

**History:** Laws 2003, ch. 167, § 3; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-3 NMSA 1978, as enacted by Laws 2003, ch. 167, § 3, relating to the national "do-not-call" registry, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-4. Repealed.

**History:** Laws 2003, ch. 167, § 4; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-4 NMSA 1978, as enacted by Laws 2003, ch. 167, § 4, relating to civil actions and criminal penalties, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-5. Repealed.

**History:** Laws 2003, ch. 167, § 5; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-5 NMSA 1978, as enacted by Laws 2003, ch. 167, § 5, relating to rules to implement telephone solicitation restrictions, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-6. Repealed.

**History:** Laws 2003, ch. 167, § 6; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-6 NMSA 1978, as enacted by Laws 2003, ch. 167, § 6, relating to restrictions on use of registry, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

## 57-12A-7. Repealed.

**History:** Laws 2003, ch. 167, § 7; repealed by Laws 2003, ch. 167, § 11.

**ANNOTATIONS**

**Repeals.** — Laws 2003, ch. 167, § 11 repealed 57-12A-7 NMSA 1978, as enacted by Laws 2003, ch. 167, § 7, relating to blocking of caller identification service, on July 25, 2003, the date the federal communications commission adopted the delivery restrictions rules, 47 C.F.R. § 64.1200 (2004). For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com.*

# ARTICLE 12B
# Privacy Protection

## 57-12B-1. Short title.

Chapter 57, Article 12B NMSA 1978 may be cited as the "Privacy Protection Act".

**History:** Laws 2003, ch. 169, § 1; 2005, ch. 127, § 1.

**ANNOTATIONS**

**The 2005 amendment,** effective January 1, 2006, changed the reference to the Privacy Protection Act to the NMSA 1978 designation.

## 57-12B-2. Definitions.

As used in the Privacy Protection Act:

A. "business" means a commercial enterprise that:

(1) sells or leases or intends to sell or lease products, goods or services to consumers;

(2) is an agent of a business described in Paragraph (1) of this subsection; or

(3) is an agent of a nonprofit organization selling marketing services to that organization; and

B. "consumer" means a natural person, who is a resident of New Mexico, and who purchases, leases or otherwise contracts for products, goods or services within New Mexico that are primarily used for personal, family or household purposes.

**History:** Laws 2003, ch. 169, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 169, § 5 made Laws 2003, ch. 169, § 2 effective January 1, 2004.

## 57-12B-3. Disclosure of social security number.

A. Except as provided in Subsection B of this section, no business shall require a consumer's social security number as a condition for the consumer to lease or purchase products, goods or services from the business.

B. Nothing in this section prohibits a business from requiring or requesting a consumer's social security number if the number will be used in a manner consistent with state or federal law or as part of an application for credit or in connection with annuity or insurance transactions.

C. Nothing in this section prohibits a business from acquiring or using a consumer's social security number if the consumer consents to the acquisition or use.

D. A company acquiring or using social security numbers of consumers shall adopt internal policies that:

(1) limit access to the social security numbers to those employees authorized to have access to that information to perform their duties; and

(2) hold employees responsible if the social security numbers are released to unauthorized persons.

**History:** Laws 2003, ch. 169, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 169, § 5 made Laws 2003, ch. 169, § 3 effective January 1, 2004.

## 57-12B-4. Use of social security numbers restricted; exceptions.

A. Except as provided in Subsection B of this section, a business shall not:

(1) make the entirety of a social security number available to the general public. This prohibition includes:

(a) intentionally communicating a social security number to the general public; and

(b) printing a social security number on a receipt issued for the purchase of products or services, including a receipt for the purchase of services from the state or its political subdivisions;

(2) require the use of a social security number:

(a) over the internet without a secure connection or encryption security; or

(b) to access an internet account unless a password or unique personal identification number or other personal authentication device is also required to access the account;

(3) print a social security number on materials mailed to a consumer unless authorized or required by federal or state law; provided that nothing in this paragraph prohibits a business from requiring a consumer, as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the social security number, to enter a social security number on material to be mailed by the consumer as long as it is not required to be entered, in whole or in part:

(a) on a postcard or other mailer not requiring an envelope;

(b) on the envelope; or

(c) in any other manner in which the number may be visible without the envelope being opened;

(4) transmit material that associates a social security number with an account number for a bank, savings and loan association or credit union, unless both numbers are required as part of an application or enrollment process or to establish, amend or terminate an account, contract or policy or to confirm the accuracy of the social security, bank, savings and loan association or credit union account number; or

(5) refuse to transact business because of a refusal to provide the social security number for use of that number in a manner prohibited by Paragraphs (1) through (4) of this subsection.

B. The provisions of Subsection A of this section do not apply to:

(1) the use of a social security number by a business if the social security number:

(a) was furnished for a document generated prior to January 1, 2006 and the business is copying or reproducing that document; or

(b) exists on an original document generated prior to January 1, 2006;

(2) the collection, use or release of a social security number by a business if the business complies with Subsection D of Section 57-12B-3 NMSA 1978 and if the collection, use or release:

(a) is part of an application or enrollment process or is used to establish, amend or terminate an account, contract or policy;

(b) is required or authorized by federal or state law or is required for the business to comply with federal or state law; or

(c) is for internal verification or administrative purposes; or

(3) documents that are filed in court or public records or documents recorded in public records or required to be open to the public under federal law, state law, applicable case law, supreme court rule or the constitution of New Mexico.

**History:** Laws 2005, ch. 127, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 127, § 3 made Laws 2005, ch. 127, § 2 effective January 1, 2006.

# ARTICLE 12C
# Data Breach Notification

## 57-12C-1. Short title.

This act [57-12C-1 to 57-12C-12 NMSA 1978] may be cited as the "Data Breach Notification Act".

**History:** Laws 2017, ch. 36, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-2. Definitions.

As used in the Data Breach Notification Act:

A. "biometric data" means a record generated by automatic measurements of an identified individual's fingerprints, voice print, iris or retina patterns, facial characteristics or hand geometry that is used to uniquely and durably authenticate an individual's identity when the individual accesses a physical location, device, system or account;

B. "encrypted" means rendered unusable, unreadable or indecipherable to an unauthorized person through a security technology or methodology generally accepted in the field of information security;

C. "personal identifying information":

(1) means an individual's first name or first initial and last name in combination with one or more of the following data elements that relate to the individual, when the data elements are not protected through encryption or redaction or otherwise rendered unreadable or unusable:

(a) social security number;

(b) driver's license number;

(c) government-issued identification number;

(d) account number, credit card number or debit card number in combination with any required security code, access code or password that would permit access to a person's financial account; or

(e) biometric data; and

(2) does not mean information that is lawfully obtained from publicly available sources or from federal, state or local government records lawfully made available to the general public;

D. "security breach" means the unauthorized acquisition of unencrypted computerized data, or of encrypted computerized data and the confidential process or key used to decrypt the encrypted computerized data, that compromises the security, confidentiality or integrity of personal identifying information maintained by a person. "Security breach" does not include the good-faith acquisition of personal identifying information by an employee or agent of a person for a legitimate business purpose of the person; provided that the personal identifying information is not subject to further unauthorized disclosure; and

E. "service provider" means any person that receives, stores, maintains, licenses, processes or otherwise is permitted access to personal identifying information through its provision of services directly to a person that is subject to regulation.

**History:** Laws 2017, ch. 36, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-3. Disposal of personal identifying information.

A person that owns or licenses records containing personal identifying information of a New Mexico resident shall arrange for proper disposal of the records when they are no longer reasonably needed for business purposes. As used in this section, "proper disposal" means shredding, erasing or otherwise modifying the personal identifying information contained in the records to make the personal identifying information unreadable or undecipherable.

**History:** Laws 2017, ch. 36, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-4. Security measures for storage of personal identifying information.

A person that owns or licenses personal identifying information of a New Mexico resident shall implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal identifying information from unauthorized access, destruction, use, modification or disclosure.

**History:** Laws 2017, ch. 36, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-5. Service provider use of personal identifying information; implementation of security measures.

A person that discloses personal identifying information of a New Mexico resident pursuant to a contract with a service provider shall require by contract that the service provider implement and maintain reasonable security procedures and practices appropriate to the nature of the personal identifying information and to protect it from unauthorized access, destruction, use, modification or disclosure.

**History:** Laws 2017, ch. 36, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-6. Notification of security breach.

A. Except as provided in Subsection C of this section, a person that owns or licenses elements that include personal identifying information of a New Mexico resident shall provide notification to each New Mexico resident whose personal identifying information is reasonably believed to have been subject to a security breach. Notification shall be made in the most expedient time possible, but not later than forty-five calendar days following discovery of the security breach, except as provided in Section 9 [57-12C-9 NMSA 1978] of the Data Breach Notification Act.

B. Notwithstanding Subsection A of this section, notification to affected New Mexico residents is not required if, after an appropriate investigation, the person determines that the security breach does not give rise to a significant risk of identity theft or fraud.

C. Any person that is licensed to maintain or possess computerized data containing personal identifying information of a New Mexico resident that the person does not own

or license shall notify the owner or licensee of the information of any security breach in the most expedient time possible, but not later than forty-five calendar days following discovery of the breach, except as provided in Section 9 of the Data Breach Notification Act; provided that notification to the owner or licensee of the information is not required if, after an appropriate investigation, the person determines that the security breach does not give rise to a significant risk of identity theft or fraud.

D. A person required to provide notification of a security breach pursuant to Subsection A of this section shall provide that notification by:

(1) United States mail;

(2) electronic notification, if the person required to make the notification primarily communicates with the New Mexico resident by electronic means or if the notice provided is consistent with the requirements of 15 U.S.C. Section 7001; or

(3) a substitute notification, if the person demonstrates that:

(a) the cost of providing notification would exceed one hundred thousand dollars ($100,000);

(b) the number of residents to be notified exceeds fifty thousand; or

(c) the person does not have on record a physical address or sufficient contact information for the residents that the person or business is required to notify.

E. Substitute notification pursuant to Paragraph (3) of Subsection D of this section shall consist of:

(1) sending electronic notification to the email address of those residents for whom the person has a valid email address;

(2) posting notification of the security breach in a conspicuous location on the website of the person required to provide notification if the person maintains a website; and

(3) sending written notification to the office of the attorney general and major media outlets in New Mexico.

F. A person that maintains its own notice procedures as part of an information security policy for the treatment of personal identifying information, and whose procedures are otherwise consistent with the timing requirements of this section, is deemed to be in compliance with the notice requirements of this section if the person notifies affected consumers in accordance with its policies in the event of a security breach.

**History:** Laws 2017, ch. 36, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-7. Notification; required content.

Notification required pursuant to Subsection A of Section 6 [57-12C-6 NMSA 1978] of the Data Breach Notification Act shall contain:

A. the name and contact information of the notifying person;

B. a list of the types of personal identifying information that are reasonably believed to have been the subject of a security breach, if known;

C. the date of the security breach, the estimated date of the breach or the range of dates within which the security breach occurred, if known;

D. a general description of the security breach incident;

E. the toll-free telephone numbers and addresses of the major consumer reporting agencies;

F. advice that directs the recipient to review personal account statements and credit reports, as applicable, to detect errors resulting from the security breach; and

G. advice that informs the recipient of the notification of the recipient's rights pursuant to the federal Fair Credit Reporting.

**History:** Laws 2017, ch. 36, § 7.

**ANNOTATIONS**

**Cross references.** — For the federal Fair Credit Reporting Act, *see* 15 U.S.C. § 1681 et seq.

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-8. Exemptions.

The provisions of the Data Breach Notification Act shall not apply to a person subject to the federal Gramm-Leach-Bliley Act or the federal Health Insurance Portability and Accountability Act of 1996.

**History:** Laws 2017, ch. 36, § 8.

**ANNOTATIONS**

**Cross references.** — For the federal Gramm-Leach-Bliley Act, *see* 15 U.S.C. §§ 6801-6810

For the federal Health Insurance Portability and Accountability Act of 1996, *see* 42 U.S.C. 300gg et seq.

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-9. Delayed notification.

The notification required by the Data Breach Notification Act may be delayed:

A. if a law enforcement agency determines that the notification will impede a criminal investigation; or

B. as necessary to determine the scope of the security breach and restore the integrity, security and confidentiality of the data system.

**History:** Laws 2017, ch. 36, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-10. Notification to attorney general and credit reporting agencies.

A person that is required to issue notification of a security breach pursuant to the Data Breach Notification Act to more than one thousand New Mexico residents as a result of a single security breach shall notify the office of the attorney general and major consumer reporting agencies that compile and maintain files on consumers on a nationwide basis, as defined in 15 U.S.C. Section 1681a(p), of the security breach in the most expedient time possible, and no later than forty-five calendar days, except as provided in Section 9 [57-12C-9 NMSA 1978] of the Data Breach Notification Act. A

person required to notify the attorney general and consumer reporting agencies pursuant to this section shall notify the attorney general of the number of New Mexico residents that received notification pursuant to Section 6 of that act [57-12C-6 NMSA 1978] and shall provide a copy of the notification that was sent to affected residents within forty-five calendar days following discovery of the security breach, except as provided in Section 9 of the Data Breach Notification Act.

**History:** Laws 2017, ch. 36, § 10.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-11. Attorney general enforcement; civil penalty.

A. When the attorney general has a reasonable belief that a violation of the Data Breach Notification Act has occurred, the attorney general may bring an action on the behalf of individuals and in the name of the state alleging a violation of that act.

B. In any action filed by the attorney general pursuant to the Data Breach Notification Act, the court may:

(1) issue an injunction; and

(2) award damages for actual costs or losses, including consequential financial losses.

C. If the court determines that a person violated the Data Breach Notification Act knowingly or recklessly, the court may impose a civil penalty of the greater of twenty-five thousand dollars ($25,000) or, in the case of failed notification, ten dollars ($10.00) per instance of failed notification up to a maximum of one hundred fifty thousand dollars ($150,000).

**History:** Laws 2017, ch. 36, § 11.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-12C-12. State of New Mexico and political subdivisions exempted.

Nothing in the Data Breach Notification Act shall be interpreted to apply to the state of New Mexico or any of its political subdivisions.

**History:** Laws 2017, ch. 36, § 12.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 36 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

# ARTICLE 13
# Pyramid or Multilevel Sales

## 57-13-1. Short title.

Chapter 57, Article 13 NMSA 1978 may be cited as the "Pyramid Promotional Schemes Act".

**History:** 1953 Comp., § 50-20-1, enacted by Laws 1973, ch. 377, § 1; 1987, ch. 100, § 1.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Chapter 57, Article 13 NMSA 1978" for "This act" and "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act."

**Applicability.** — Section 15, Laws 1987, ch. 100, effective June 19, 1987, provided that the act applies only to pyramid promotional schemes established, operated, advertised or promoted on or after June 19, 1987.

**Constitutionality.** — The Pyramid or Multilevel Sales Act is not unconstitutionally vague and overbroad. *State ex rel. Stratton v. Sinks*, 1987-NMCA-092, 106 N.M. 213, 741 P.2d 435.

The Pyramid or Multilevel Sales Act does not operate as an unconstitutional restraint of trade. *State ex rel. Stratton v. Sinks*, 1987-NMCA-092, 106 N.M. 213, 741 P.2d 435.

Given the potentially deceptive nature of pyramids, there is a valid state interest in their regulation, and any infringement on first amendment rights to free speech and assembly is both negligible and subordinate. *State ex rel. Stratton v. Sinks*, 1987-NMCA-092, 106 N.M. 213, 741 P.2d 435.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 67 Am. Jur. 2d Sales § 86.

Enforceability of transaction entered into pursuant to referral sales arrangement, 14 A.L.R.3d 1420.

Validity of pyramid distribution plan, 54 A.L.R.3d 217.

77A C.J.S. Sales § 1 et seq.

## 57-13-2. Definitions.

As used in the Pyramid Promotional Schemes Act:

A. "compensation" includes a payment based on a sale or distribution made to a person who either is a participant in a pyramid promotional scheme or has the right to become a participant upon payment;

B. "consideration" means the payment of cash or the purchase of goods, services or intangible property but does not include:

(1) the purchase of goods or services furnished at cost to be used in making sales and not for resale; or

(2) time and effort spent in pursuit of sales or recruiting activities; and

C. "pyramid promotional scheme" means any plan or operation by which a participant gives consideration for the opportunity to receive compensation which is derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services or intangible property by the participant or other persons introduced into the plan or operation.

**History:** 1978 Comp., § 57-13-2, enacted by Laws 1987, ch. 100, § 2.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1987, ch. 100, § 2 repealed former 57-13-2 NMSA 1978, as enacted by Laws 1973, ch. 377, § 2, and enacted a new section, effective June 19, 1987.

## 57-13-3. Prohibition; defenses excluded.

A. A person shall not establish, operate, advertise or promote a pyramid promotional scheme.

B. A limitation as to the number of persons who may participate or the presence of additional conditions affecting eligibility for the opportunity to receive compensation under the plan or operation does not change the identity of the scheme as a pyramid promotional scheme nor is it a defense under this article that a participant, on giving

consideration, obtains any goods, services or intangible property in addition to the right to receive compensation.

**History:** 1978 Comp., § 57-13-3, enacted by Laws 1987, ch. 100, § 3.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1987, ch. 100, § 3 repealed former 57-13-3 NMSA 1978, as enacted by Laws 1973, ch. 377, § 3, and enacted a new section, effective June 19, 1987.

## 57-13-4. Restraint of prohibited acts; restitution; penalties.

A. Whenever the attorney general has reasonable belief that any person is using, has used or is about to use any method, act or practice which is declared by the Pyramid Promotional Schemes Act to be unlawful and that proceedings would be in the public interest, he may bring an action in the name of the state against that person to restrain, by temporary or permanent injunction, the use of such method, act or practice. The action may be brought in the district court of the county in which the person resides or has his principal place of business or in the district court in the county in which the person is using, has used or is about to use the practice which has been alleged to be unlawful under the Pyramid Promotional Schemes Act. The attorney general acting on behalf of the state shall not be required to post bond when seeking a temporary or permanent injunction.

B. In any action brought under Subsection A of this section, the court may, upon petition of the attorney general, require that the person engaged in the unlawful practice make restitution to all persons of money, property or other things received from them in any transaction related to the unlawful practice; and it is further provided that if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Pyramid Promotional Schemes Act, the attorney general, upon petition to the court, may recover on behalf of the state a civil penalty not exceeding ten thousand dollars ($10,000) per violation.

**History:** 1953 Comp., § 50-20-4, enacted by Laws 1973, ch. 377, § 4; 1987, ch. 100, § 4.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" in the three places that it appears in the section and made minor changes in language throughout the section.

## 57-13-5. Settlements.

A. In lieu of beginning or continuing an action pursuant to the Pyramid Promotional Schemes Act, the attorney general may accept a written assurance of discontinuance of any practice in violation of that act from the person who has engaged in the unlawful practice. The attorney general may require an agreement by the person engaged in the unlawful practice that by a date set by the attorney general and stated in the assurance, he will make restitution to all persons of money, property or other things received from them in any transaction related to the unlawful practice. All settlements are a matter of public record.

B. A person need not accept restitution pursuant to an assurance. His acceptance of restitution bars recovery of any damages in any action by him or on his behalf against the same defendant on account of the same unlawful practice.

C. A violation of an assurance entered into pursuant to this section is a violation of the Pyramid Promotional Schemes Act.

**History:** 1953 Comp., § 50-20-5, enacted by Laws 1973, ch. 377, § 5; 1987, ch. 100, § 5.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" in Subsection A and Subsection C and made a minor language change in Subsection A.

## 57-13-6. Private remedies.

A. A person likely to be damaged by any method, act or practice which is declared by the Pyramid Promotional Schemes Act to be unlawful may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required.

B. Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party if:

(1) the party complaining of an unlawful practice has brought an action which he knew to be groundless; or

(2) the party charged with an unlawful practice has willfully engaged in the practice knowing it to be unlawful.

C. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

**History:** 1953 Comp., § 50-20-6, enacted by Laws 1973, ch. 377, § 6; 1987, ch. 100, § 6.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, in Subsection A, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" and deleted the last sentence, which read: "Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source."

**Failure to file answer bringing partial directed verdict.** — In a civil suit by the state under the Pyramid or Multilevel Sales Act and the Unfair Practices Act, defendant's right to trial by jury was not infringed upon by the trial court's granting of a partial directed verdict against him on the issue of liability and the court's rejection of requested jury instructions, including requested special interrogatories to the jury, where defendant failed to file an answer to the complaint filed by the state, but only filed a document entitled "Declaration of Status", and challenged the jurisdiction of the court and the constitutionality of the Pyramid or Multilevel Sales Act. *State ex rel. Stratton v. Sinks*, 1987-NMCA-092, 106 N.M. 213, 741 P.2d 435.

## 57-13-7. Penalties.

Any person violating the Pyramid Promotional Schemes Act shall be deemed guilty of a fourth degree felony and shall be sentenced to a term of imprisonment pursuant to the provisions of Subsections A through C of Section 31-18-15 NMSA 1978 or fined not less than one thousand dollars ($1,000) or more than ten thousand dollars ($10,000), or both.

**History:** 1953 Comp., § 50-20-7, enacted by Laws 1973, ch. 377, § 7; 1987, ch. 100, § 7.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, rewrote the section.

## 57-13-8. Pyramid Promotional Schemes Act restitution fund.

A. All civil penalties collected under Section 57-13-4 NMSA 1978 shall be deposited in the state treasury in a fund to be designated as the "Pyramid Promotional Schemes Act restitution fund", which fund is hereby established and which shall be administered by the attorney general. All expenditures from this fund shall be paid upon petition to the attorney general to those persons adequately establishing injury in money, property or other things in a transaction related to a practice declared unlawful under the Pyramid Promotional Schemes Act and who were unknown to the court at the time judgment was rendered.

B. Excepting any amount then being considered as an expenditure pursuant to a petition under Subsection A of this section, the balance of a civil penalty collected shall be transferred to the state general fund eighteen months after collection.

**History:** 1953 Comp., § 50-20-8, enacted by Laws 1973, ch. 377, § 8; 1987, ch. 100, § 8.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, in Subsection A, substituted "57-13-4 NMSA 1978" for "4 of this act" near the beginning, substituted "Pyramid Promotional Schemes Act" for "Pyramid Sales Act" and made a minor language change.

## 57-13-9. Civil investigative demand.

A. Whenever the attorney general has reason to believe that any person may be in possession, custody or control of an original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording which he believes to be relevant to the subject matter of an investigation of a probable violation of the Pyramid Promotional Schemes Act, he may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand requiring the person to produce documentary material and permit the inspection and copying of the material. The demand of the attorney general shall not be a matter of public record and shall not be published by him except by order of the court.

B. Each demand shall:

(1) state the general subject matter of the investigation;

(2) describe the classes of documentary material to be produced with reasonable certainty;

(3) prescribe the return date within which the documentary material is to be produced, which in no case shall be less than ten days after the date of service; and

(4) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

C. No demand shall:

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state;

(2) require the disclosure of any documentary material which would be privileged or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state; or

(3) require the removal of any documentary material from the custody of the person upon whom the demand is served, except in accordance with the provisions of Subsection E of this section.

D. Service of the demand may be made by:

(1) delivering a duly executed copy thereof to the person to be served or, if the person is not a natural person, to the statutory agent for the person or to any officer of the person to be served; or

(2) delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail a duly executed copy of the demand addressed to the person to be served at his principal place of business in this state or, if the person has no place of business in this state, to his principal office or place of business.

E. Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served or may be inspected and copied at such other times and places as may be agreed upon by the person served and the attorney general.

F. No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by the district court in the county in which the person resides or has his principal place of business or the person is about to perform or is performing the practice which is alleged to be unlawful under the Pyramid Promotional Schemes Act, for good cause shown, be produced for inspection or copying by anyone other than an authorized employee of the attorney general, nor shall the contents be disclosed to anyone other than an authorized employee of the attorney general or in court in an action relating to a violation of that act.

G. At any time before the return date of the demand, a petition to set aside the demand, modify the demand or extend the return date of the demand may be filed in the district court in the county in which the person resides or has his principal place of business or is about to perform or is performing the practice which is alleged to be unlawful under the Pyramid Promotional Schemes Act, and the court upon a showing of good cause may set aside the demand, modify it or extend the return date of the demand.

H. After service of the investigative demand upon him, if any person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in the enforcement of the demand. In appropriate cases, the court shall issue its order requiring the person to appear and produce the documentary material required in the demand and may, upon failure of the person to comply with the order, punish the person for contempt.

I. This section shall not be applicable to criminal prosecutions.

**History:** 1953 Comp., § 50-20-9, enacted by Laws 1973, ch. 377, § 9; 1987, ch. 100, § 9.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" in Subsections A, F, and G and made minor changes in language in the same subsections.

## 57-13-10. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1987, ch. 100, § 16, effective June 19, 1987, repealed 57-13-10 NMSA 1978, as enacted by Laws 1973, ch. 377, § 10, relating to registering of pyramid or multilevel sales companies with the attorney general and the designation of the secretary of state as their agent for service of process.

## 57-13-11. Regulations.

The attorney general is empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of the Pyramid Promotional Schemes Act. A violation of these regulations shall be unlawful.

**History:** 1953 Comp., § 50-20-11, enacted by Laws 1973, ch. 377, § 11; 1987, ch. 100, § 10.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act."

## 57-13-12. Construction.

The Pyramid Promotional Schemes Act neither enlarges nor diminishes the rights of parties in private litigation.

**History:** 1953 Comp., § 50-20-12, enacted by Laws 1973, ch. 377, § 12; 1987, ch. 100, § 11.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act."

## 57-13-13. Enforcement.

In order to promote the uniform administration of the Pyramid Promotional Schemes Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state, and, when this is done, the district attorneys shall have every power conferred upon the attorney general by that act.

**History:** 1953 Comp., § 50-20-13, enacted by Laws 1973, ch. 377, § 13; 1987, ch. 100, § 12.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" near the beginning and made a minor language change near the end of the section.

## 57-13-14. Advertising media excluded.

The Pyramid Promotional Schemes Act does not apply to publishers, broadcasters, printers or other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast or reproduce material without actual knowledge of its being in violation of that act.

**History:** 1953 Comp., § 50-20-14, enacted by Laws 1973, ch. 377, § 14; 1987, ch. 100, § 13.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" and made a minor language change at the end of the section.

## 57-13-15. Issuance of ne exeat.

Whenever the attorney general has reasonable belief that any person is using or is about to use any method, act or practice which is declared by the Pyramid Promotional Schemes Act to be unlawful, and whenever the attorney general has reasonable belief

that any such person is about to remove himself from New Mexico, or is about to remove his property or assets from New Mexico, the attorney general may petition the appropriate district court for a writ of ne exeat, and the court may forbid any such person from leaving New Mexico or removing his property or assets from New Mexico until a determination of the issues has been made.

**History:** 1953 Comp., § 50-20-15, enacted by Laws 1973, ch. 377, § 15; 1987, ch. 100, § 14.

**ANNOTATIONS**

**The 1987 amendment,** effective June 19, 1987, substituted "Pyramid Promotional Schemes Act" for "Pyramid or Multilevel Sales Act" and made minor language changes throughout the section.

**Applicability.** — Section 15, Laws 1987, ch. 100, effective June 19, 1987, provided that the act applies only to pyramid promotional schemes established, operated, advertised or promoted on or after June 19, 1987.

## 57-13-16. Posting of bond.

The court may require any such person to post a ne exeat bond conditioned on such person's appearance at all hearings on the matter at issue.

**History:** 1953 Comp., § 50-20-16, enacted by Laws 1973, ch. 377, § 16.

## 57-13-17. Hearing after incarceration.

No such person shall be incarcerated for failure to post said ne exeat bond for longer than seventy-two hours, Sundays excepted, without the benefit of a hearing before the court setting said bond. Such hearing shall be held as soon as possible after incarceration.

**History:** 1953 Comp., § 50-20-17, enacted by Laws 1973, ch. 377, § 17.

## 57-13-18. Sureties on bond.

The sureties upon any bond, shall in all cases justify as to their sufficiency; and the clerk of the district court taking such bond shall certify his approval of the same, as to form and the manner of its execution and to the sufficiency of the sureties thereon.

**History:** 1953 Comp., § 50-20-18, enacted by Laws 1973, ch. 377, § 18.

# ARTICLE 14
# Price Discrimination

## 57-14-1. Short title.

This act [57-14-1 to 57-14-9 NMSA 1978] may be cited as the "Price Discrimination Act".

**History:** 1953 Comp., § 49-11-1, enacted by Laws 1961, ch. 229, § 1.

**ANNOTATIONS**

**Cross references.** — For restraints of trade generally, *see* 57-1-1 NMSA 1978 et seq.

**Act parallels federal act.** — The Price Discrimination Act (57-14-1 to 57-14-9) adopted by the New Mexico legislature, except for its provision permitting damages, closely parallels the Robinson-Patman Act, adopted by congress as an amendment to the Clayton Anti-Trust Act, 15 U.S.C. § 13 (1976). *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

## 57-14-2. Definitions.

As used in the Price Discrimination Act:

A. "person" means an individual, partnership, association, corporation, joint-stock company or business trust;

B. "price" means the net price to the buyer after deduction of all discounts, rebates or other price concessions paid or allowed by the seller;

C. "commerce" means trade within this state; and

D. "commodity" means any movable article or any commercial service sold in commerce.

**History:** 1953 Comp., § 49-11-2, enacted by Laws 1961, ch. 229, § 2; 1965, ch. 301, § 1.

## 57-14-3. Discrimination unlawful.

A. It is unlawful for any person engaged in commerce, either directly or indirectly, intentionally, for the purpose of destroying competition or eliminating a competitor, to:

(1) discriminate in price between different purchasers of commodities of like grade and quality; or

(2) discriminate in price between different sections, communities or cities in this state where the effect is to lessen competition substantially, to create a monopoly in

any line of commerce or to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of the discrimination, or with customers of either.

B. This section does not prevent:

(1) allowance for differences in cost of manufacture, sale or delivery resulting from differing methods or quantities in which commodities are sold or delivered;

(2) persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions not in restraint of trade; or

(3) price changes in response to changing conditions affecting the market or marketability of goods.

**History:** 1953 Comp., § 49-11-3, enacted by Laws 1961, ch. 229, § 3.

## ANNOTATIONS

**Allowance of rebates.** — Because of the similarities between the Price Discrimination Act (57-14-1 to 57-14-9) and the Robinson-Patman Act, the courts look to the federal law for assistance in interpretation and application of the state act, and rebates allowed upon the purchase of goods are permissible under the Robinson-Patman Act when there is no discrimination between buyers of the same classification and the rebates do not stifle competition or create a monopoly. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**Price differentials proper if based on valid criteria.** — It is not a violation of the Price Discrimination Act (57-14-1 to 57-14-9 NMSA 1978) for a distributor to establish price differentials for the produce sold based on factors which are not designed or intended to eliminate competition or to create a monopoly, but which instead are based upon other valid criteria, such as cost differentials due to geographic proximity. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**No violation where price variations for purpose of equal profit.** — Since the issue of competition involves questions of geographic proximity and marketing practices, where defendant company had distributed entirely through jobbers and with the company itself absorbing any loss as a result of price reductions in the area during the period in question so that all jobbers retained the same profit margin before and after the alleged price discrimination, and furthermore, where the nearest jobber to plaintiff was too distant geographically (54 miles) to be considered in competition with him, it was held that plaintiff itself negated any possibility of establishing a competitive relationship with defendant under either the United States or New Mexico antitrust laws, and that defendant's pricing policies, different from the policies of the other defendants,

were inconsistent with plaintiffs' conspiracy count which basically alleged selective price reductions to monopolize the gasoline distributors market; thus, in the absence of any basis for allegations of competition or conspiracy on the part of defendant, the claims against it were dismissed and its motion for summary judgment was granted. *Ingram v. Phillips Petroleum Co.*, 252 F. Supp. 674 (D.N.M. 1966).

**Offsetting depressed prices in one locality by raising them in another.** — Price discrimination statutes are designed to prevent a business from destroying competition through unfair pricing practices, such as, for example, depressing prices in one locality where there is competition and offsetting the loss by raising prices in another area where there is little or no competition. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**Functional availability of rebate plan.** — The notion that a rebate plan must be "functionally available", is not expressly recognized in either this section or in the federal counterpart, § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) and, although circumstances may exist in which a rebate plan or discount allowance may not be functionally available, the facts did not give rise to a basis for such finding. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**"Good faith" as a defense.** — It is a defense to an action alleging price discrimination under the New Mexico Price Discrimination Act (57-14-1 to 57-14-9 NMSA 1978) to show that defendants acted in "good faith" and did not intend their actions to create a monopoly or to unlawfully discriminate against a competitor. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**Anti-competitive intent is question of fact for fact finder.** — Whether a rebate plan was fashioned with an intention of injuring or destroying competition and whether defendants' actions tended to curtail or destroy competition are questions of fact for the fact finder. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**Averments of intrastate and interstate price discrimination avoid dismissal.** — Assuming, arguendo, that the New Mexico antitrust and price discrimination statutes involved apply only to intrastate commerce, plaintiffs' affidavit accompanying their opposition to the defendant's motions to dismiss averred that plaintiffs complained of unfair competition within New Mexico as well as between New Mexico and Texas distributors, and since the mere fact that plaintiffs' volume had increased would not negate the possibility of actual harm, the motions to dismiss were denied. *Ingram v. Phillips Petroleum Co.*, 252 F. Supp. 674 (D.N.M. 1966).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade and Unfair Trade Practices §§ 1069, 1071.

Giving of trading stamps, premiums, or the like, as violation of statute prohibiting sales below cost, 70 A.L.R.2d 1080.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

87 C.J.S. Trademarks, Tradenames and Unfair Competition § 244.

## 57-14-4. Meeting competitive price a defense.

It is a defense to any action under this act [57-14-1 to 57-14-9 NMSA 1978] to show that the seller's lower price, payment or furnishing of services or facilities to any purchaser, was made in good faith to meet equally low prices of a competitor or the services or facilities furnished by a competitor.

**History:** 1953 Comp., § 49-11-4, enacted by Laws 1961, ch. 229, § 4.

**ANNOTATIONS**

**"Good faith" as a defense.** — It is a defense to an action alleging price discrimination under the New Mexico Price Discrimination Act (57-14-1 to 57-14-9 NMSA 1978) to show that defendants acted in "good faith" and did not intend their actions to create a monopoly or to unlawfully discriminate against a competitor. *Jay Walton Enters., Inc. v. Rio Grande Oil Co.*, 1987-NMCA-070, 106 N.M. 55, 738 P.2d 927, cert. denied, 106 N.M. 7, 738 P.2d 125.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Meeting competition defense under § 2(b) of Clayton Act, as amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)), 164 A.L.R. Fed. 633.

## 57-14-5. Commissions and brokerages unlawful.

It is unlawful for any person engaged in commerce to pay, grant, receive or accept anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise. It is unlawful for either party to the transaction to pay or grant anything of value as a commission, brokerage or other compensation, or any allowance or discount to the other party to the transaction or to any agent, representative or other intermediary acting for, on behalf of or subject to direct or indirect control of the other party to the transaction.

**History:** 1953 Comp., § 49-11-5, enacted by Laws 1961, ch. 229, § 5.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 54A Am. Jur. 2d Monopolies, Restraints of Trade and Unfair Trade Practices § 1070.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

## 57-14-6. Customer discrimination.

It is unlawful for any person engaged in commerce:

A. to pay or contract for payment of anything of value to or for the benefit of a customer as compensation for any services or facilities furnished by or through the customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold or offered for sale unless the payment or compensation is available on proportionally equal terms to all other customers competing in the distribution of the products or commodities;

B. to discriminate in favor of one purchaser against another purchaser of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of any services or facilities connected with the processing, handling, sale or offering for sale of the commodity purchased on terms not accorded to all purchasers on proportionally equal terms; or

C. knowingly to induce or receive a discrimination in price which is prohibited by the Price Discrimination Act.

**History:** 1953 Comp., § 49-11-6, enacted by Laws 1961, ch. 229, § 6.

## 57-14-7. Cooperatives exempt.

Nothing in the Price Discrimination Act prevents a cooperative association from returning to its members, producers or consumers the whole or any part of the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the cooperative.

**History:** 1953 Comp., § 49-11-7, enacted by Laws 1961, ch. 229, § 7.

## 57-14-8. Injunctive relief; damages.

A. Any person injured by any violation, or who will be injured from any threatened violation of the Price Discrimination Act may maintain an action in the district court to enjoin the violation or threatened violation. If a violation or threatened violation is established, the court shall enjoin it and the plaintiff may recover threefold, the amount of damages sustained, costs of suit and a reasonable attorney fee.

B. Any person injured by any violation of the Price Discrimination Act may maintain an action in the district court for damages alone and the measure of damages is the same as that prescribed in Subsection A of this section.

C. In any action under this section, upon proof that he has been unlawfully discriminated against by the defendant, the plaintiff shall be presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination and in addition, he may establish further damages sustained as a result of the discrimination.

D. Where a defendant's trade or industry has an established cost survey for the localities in which the offense was committed, it is competent evidence to prove the costs of the defendant in an action under the Price Discrimination Act.

**History:** 1953 Comp., § 49-11-8, enacted by Laws 1961, ch. 229, § 8; 1965, ch. 301, § 2.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 87 C.J.S. Trademarks, Tradenames and Unfair Competition § 245.

## 57-14-9. Illegal contracts.

Any express or implied contract made by any person in violation of the Price Discrimination Act is an illegal contract and no action for enforcement shall be maintained in any court in this state.

**History:** 1953 Comp., § 49-11-9, enacted by Laws 1961, ch. 229, § 9.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico Restraint of Trade Statutes - A Legislative Proposal," see 9 N.M.L. Rev. 1 (1978-79).

# ARTICLE 15
# False Advertising

## 57-15-1. False advertising unlawful.

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

**History:** 1953 Comp., § 49-12-1, enacted by Laws 1965, ch. 79, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 3 Am. Jur. 2d Advertising §§ 3, 7 et seq.

Validity, construction, and application of statutes or ordinances directed against false or fraudulent statements in advertisements, 89 A.L.R. 1004.

## 57-15-2. False advertising defined.

The term false advertising means advertising, including labeling, which is misleading in any material respect; and in determining whether any advertising is misleading, there shall be taken into account (among other things) not only representations made by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertising fails to reveal facts material in the light of such representations with respect to the commodity to which the advertising relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

**History:** 1953 Comp., § 49-12-2, enacted by Laws 1965, ch. 79, § 2; 1967, ch. 270, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792.

Actionable nature of advertising impugning quality or worth of merchandise or products, 42 A.L.R.4th 318.

What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 A.L.R.4th 1192.

## 57-15-3. Notice of proposed action.

Before the attorney general commences an action pursuant to Section 4 [57-15-4 NMSA 1978] of this article he shall be required to give the person against whom such action is contemplated appropriate notice by certified mail and an opportunity to show either orally or in writing why such action should not be commenced. In such showing, said person may present, among other things, that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the federal trade commission or any official department, division, commission or agency of this state.

**History:** 1953 Comp., § 49-12-3, enacted by Laws 1965, ch. 79, § 3.

## 57-15-4. Civil penalty.

Any person, firm, corporation or association or agent or employee thereof who engages in any of the acts or practices made unlawful by this act [57-15-1 to 57-15-5, 57-15-9, 57-15-10 NMSA 1978] shall be liable to a civil penalty of not more than five hundred dollars ($500) for each violation, which shall inure to this state and may be recovered in a civil action brought by the attorney general or, with his consent, the district attorney of the district where the act is committed. In any such action it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the federal trade commission.

**History:** 1953 Comp., § 49-12-4, enacted by Laws 1965, ch. 79, § 4.

## 57-15-5. Injunctions to prevent violation.

A. The attorney general of the state of New Mexico or the district attorney of the district in which the violation occurs or a private citizen may bring an action in the name of the state against any person to restrain and prevent any violation of this act [57-15-1 to 57-15-5, 57-15-9, 57-15-10 NMSA 1978]. Any proceeding initiated under this section by a private citizen shall be initiated on his behalf and all others similarly situated.

B. The court in exceptional cases brought by private citizens may award reasonable attorneys' fees to the prevailing party. Costs or attorneys' fees may be assessed against a defendant only if the court finds that he has willfully engaged in false advertising.

**History:** 1953 Comp., § 49-12-5, enacted by Laws 1965, ch. 79, § 5.

**ANNOTATIONS**

**Cross references.** — For class action suits generally, *see* Rule 1-023 NMRA.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Availability of permanent injunction under § 13(b) of Federal Trade Commission Act (15 USC § 53(b)), 70 A.L.R. Fed. 716.

## 57-15-6. Civil investigative demand.

A. Whenever the attorney general has reason to believe that any person may be in possession, custody or control of an original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording which he believes to be relevant to the subject matter of an investigation of a probable violation of Section 57-15-1 NMSA 1978, he may prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person, a civil investigative demand requiring such person to produce documentary material and permit the inspection and copying of the material. The demand of the attorney general shall not be a matter of public record and shall not be published by him except by order of the court.

B. Each demand shall:

(1) state the general subject matter of the investigation;

(2) describe the classes of documentary material to be produced with reasonable specificity;

(3) prescribe the return date within which the documentary material is to be produced, which in no case shall be less than ten days after the date of service; and

(4) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

C. No demand shall:

(1) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(2) require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state;

(3) require the removal of documentary material from the custody of the person upon whom the demand is served except in accordance with the provisions of Subsection E.

D. Service of the demand may be made by:

(1) delivering a duly executed copy thereof to the person to be served, or if the person is not a natural person, to the statutory agent for the person or to any officer of the person to be served; or

(2) delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(3) mailing by registered or certified mail a duly executed copy of the demand addressed to the person to be served at his principal place of business in this state, or, if the person has no place of business in this state, to his principal office or place of business.

E. Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general.

F. No documentary material produced pursuant to a demand, or copies thereof, shall unless otherwise ordered by the district court in the county in which the person resides or has his principal place of business or in the district court of the county in

which the person is [performing] or is about to perform the practice which is alleged to be unlawful under Section 57-15-1 NMSA 1978, for good cause shown, be produced for inspection or copying by anyone other than an authorized employee of the attorney general, nor shall the contents thereof be disclosed to anyone other than an authorized employee of the attorney general, or in a court in an action relating to the violation of Section 57-15-1 NMSA 1978.

G. At any time before the return date of the demand a petition to set aside the demand, modify the demand or extend the return date thereof may be filed in the district court in the county in which the person resides or has his principal place of business or in the district court of the county in which the person is [performing] or is about to perform the practice which is alleged to be unlawful under Section 57-15-1 NMSA 1978, and the court upon a showing of good cause may set aside the demand, modify it or extend the return date of the demand.

H. After service of the investigative demand upon him, if any person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in the enforcement of the demand. In appropriate cases the court shall issue its order requiring the person to appear and produce the documentary material required in the demand and may upon failure of the person to comply with the order punish the person for contempt.

I. This section shall not be applicable to criminal prosecution.

**History:** 1953 Comp., § 49-12-5.1, enacted by Laws 1967, ch. 270, § 2.

**ANNOTATIONS**

**Cross references.** — For subpoenas for the production of documentary evidence, *see* Rule 1-045B NMRA.

## 57-15-7. Regulations.

The attorney general is empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of this act [57-15-2, 57-15-6 to 57-15-8 NMSA 1978].

**History:** 1953 Comp., § 49-12-5.2, enacted by Laws 1967, ch. 270, § 3.

**ANNOTATIONS**

**Rules governing advertising and fees related to the sale of motor vehicles.** — Under rules promulgated by the office of the attorney general pursuant to this section, the advertised price of a new vehicle must be the full cash price for which the dealer will sell the vehicle. This provision permits a dealer to exclude four specific charges from the advertised price of a vehicle, including "dealer transfer service fees," subject to the

specified disclosure requirements. A dealer is prohibited from using the term "documentary fee" for "charges other than those actually required by law for processing of documents." It does not include fees for document preparation, which may be assessed as a component of dealer transfer service fees. A dealer is precluded from negotiating the terms of a sale and then adding the cost of certain items to the contract, including "dealer preparation," without the buyer's knowledge and consent. The rules also prohibit a dealer from adding "any other charges, however denominated, that represent additional dealer profit," which plainly prohibits a dealer from including a profit component within any otherwise permissible fee the dealer charges, including the dealer transfer service fee, documentary fee, and dealer preparation fee. *Fees Covered by Office of Attorney General Rules Governing Advertising and Sale of Motor Vehicles* (5/31/19), Att'y Gen. Adv. Ltr. 2019-02.

## 57-15-8. Enforcement.

In order to promote the uniform administration of this act [57-15-2, 57-15-6 through 57-15-8 NMSA 1978] in New Mexico, the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power conferred upon the attorney general by this act.

**History:** 1953 Comp., § 49-12-5.3, enacted by Laws 1967, ch. 270, § 4.

## 57-15-9. Construction.

This act [57-15-1 through 57-15-5, 57-15-9, 57-15-10 NMSA 1978] neither enlarges nor diminishes the rights of parties in private litigation.

**History:** 1953 Comp., § 49-12-6, enacted by Laws 1965, ch. 79, § 6.

## 57-15-10. Exceptions.

Nothing in this article [57-15-1 to 57-15-5, 57-15-9, 57-15-10 NMSA 1978] shall apply to any television or sound radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising who broadcasts, publishes or prints such advertisement.

**History:** 1953 Comp., § 49-12-7, enacted by Laws 1965, ch. 79, § 7.

# ARTICLE 16
# Motor Vehicle Dealers Franchising

## 57-16-1. Declaration of policy.

The distribution and sale of motor vehicles in this state vitally affects the general economy of the state and the public interest and welfare of its citizens. It is the policy of this state and the purpose of this act to exercise the state's police power to ensure a sound system of distributing and selling motor vehicles and regulating the manufacturers, distributors, representatives and dealers of those vehicles to provide for compliance with manufacturer's warranties, and to prevent frauds, unfair practices, discriminations, impositions and other abuses of our citizens.

**History:** 1953 Comp., § 64-37-1, enacted by Laws 1973, ch. 6, § 1.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

**Law reviews.** — For comment, "State v. Galio: An Administrative Search?," see 9 N.M.L. Rev. 419 (1979).

Annual Survey of New Mexico Commercial Law, see 17 N.M.L. Rev. 219 (1987).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 7A Am. Jur. 2d Automobiles and Highway Traffic §§ 394, 396.

Regulation or licensing of business of selling motor vehicles, 57 A.L.R.2d 1265, 7 A.L.R.3d 1173.

Validity and construction of statute regulating dealings between automobile manufacturers, distributors and dealers, 7 A.L.R.3d 1173, 82 A.L.R.4th 624, 51 A.L.R. Fed. 812.

Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchisees, 82 A.L.R.4th 624.

## 57-16-2. Application of act.

The provisions of this act shall apply to all persons, manufacturers, representatives, distributors and dealers and to all written or oral agreements between a manufacturer, distributor or representative with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interest, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts and all other such agreements in which the manufacturer, distributor or representative has any direct or indirect interest.

**History:** 1953 Comp., § 64-37-2, enacted by Laws 1973, ch. 6, § 2.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

**Inapplicable to prospective franchisees.** — This article does not govern manufacturers' dealings with prospective franchisees, nor does it provide in explicit terms protection for that class. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

Taken as a whole, this article does not afford protection to every prospective purchaser of an automobile franchise; the Act provides for standing in broad terms, but it links standing to forbidden conduct in specific terms. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

**Reducing award of costs based on financial disparity between parties.** — The district court abused its discretion when, without evidence, it reduced a cost award to defendant because of the financial disparity between the parties, plaintiff's perceived inability to pay all of defendant's costs, and the chilling effect that a large cost award might have on future litigation under this article. *Key v. Chrysler Motors Corp.*, 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

**This article (57-16-1 to 57-16-16 NMSA 1978) applies to manufacturers, representatives, distributors and dealers** of self-propelled agricultural machines and equipment which may travel upon the public highways of New Mexico. 1974 Op. Att'y Gen. No. 74-25.

## 57-16-3. Definitions.

As used in Chapter 57, Article 16 NMSA 1978:

A. "current price" means an amount equal to the price listed in the manufacturer's or distributor's printed price list in effect when the franchise is terminated, less applicable trade and cash discounts;

B. "dealer cost" means an amount equal to the sum of the original invoice price that the dealer paid for inventory and the cost of the delivery of the inventory from the manufacturer or distributor to the dealer, less applicable discounts;

C. "designated family member" means a spouse, child, grandchild, parent, brother or sister of a deceased or incapacitated dealer who is entitled to inherit the dealer's ownership interest in the dealership under the terms of a will or the laws of intestate

succession in this state. In the case of an incapacitated dealer, the term means the person appointed by a court as the legal representative of the dealer's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased dealer. However, the term shall be limited to mean only that individual designated by a dealer in a written document filed with the manufacturer, distributor or representative in the event that such a document has been filed;

D. "distributor" means any person who distributes or sells new or used motor vehicles to dealers and who is not a manufacturer;

E. "do not drive order" means a notice advising a motor vehicle dealer or an owner of a motor vehicle not to drive the vehicle until the vehicle has been repaired because the vehicle has a safety defect, fails to comply with a federal motor vehicle safety standard or fails to comply with a federal requirement;

F. "former franchisee":

(1) means a dealer that has entered into a franchise agreement with a manufacturer and that has:

(a) entered into a termination agreement or deferred termination agreement with the manufacturer related to the franchise; or

(b) has had the franchise canceled, terminated or otherwise ended; and

(2) includes the designated successor of the former franchisee in the event the former franchisee is deceased or disabled;

G. "franchise" means an oral or written arrangement for a definite or indefinite period in which a manufacturer, distributor or representative grants to a motor vehicle dealer a license to use a trade name, service mark or related characteristic and in which there is a community of interest in the marketing of motor vehicles or services related to marketing, service or repair of motor vehicles at wholesale, retail, leasing or otherwise;

H. "fraud" includes, in addition to its normal legal connotation, the following:

(1) a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact;

(2) a promise or representation not made honestly and in good faith; and

(3) an intentional failure to disclose a material fact;

I. "inventory" means new or unused motorcycles, motor vehicles, motorcycle attachments and motorcycle and motor vehicle repair parts that are provided by a

manufacturer or distributor to a dealer under a franchise agreement and that are purchased within thirty-six months of the termination of the franchise or are listed in the manufacturer's or distributor's current sales manual or price list at the time that the franchise is terminated;

J. "manufacturer" means any person who manufactures or assembles new motor vehicles either within or outside of this state and may include a predecessor manufacturer or a successor manufacturer;

K. "motorcycle" means any motor vehicle used on or off a public highway that has an unladen weight of less than one thousand five hundred pounds;

L. "motor vehicle" means every self-propelled vehicle, having two or more wheels, by which a person or property may be transported on a public highway and includes recreational vehicles;

M. "motor vehicle dealer" or "dealer" means a person who sells or solicits or advertises the sale of new or used motor vehicles and is licensed as a dealer pursuant to the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978]. "Motor vehicle dealer" or "dealer" shall not include:

(1) receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under judgment, decree or order of any court;

(2) public officers while performing their duties as such officers;

(3) persons making casual sales of their own vehicles duly registered and licensed to them by the state; or

(4) finance companies, banks and other lending institutions covering sales of repossessed vehicles;

N. "person" means every natural person, partnership, corporation, association, trust, estate or any other legal entity;

O. "predecessor manufacturer" means a manufacturer that is acquired, succeeded by or assumed by a successor manufacturer;

P. "prospective purchaser" means a person who has a bona fide written agreement to purchase a franchise;

Q. "recall claim" includes a claim for reimbursement for the parts and labor required for a dealer to repair a motor vehicle subject to a do not drive order or stop sale order;

R. "recreational vehicle" means any motor vehicle with a camping body that either has its own motive power or is drawn by another vehicle;

S. "relevant market area" means an area of a size specified in this subsection around an existing motor vehicle dealer's place of business. The size of the area shall be the greater of the area of responsibility specified in the dealer's franchise or a circle with a center at the dealer's place of business and a radius of:

(1) seven miles, if the population of the county in which the dealership is located is two hundred fifty thousand or more;

(2) fifteen miles, if the population of the county in which the dealership is located is less than two hundred fifty thousand but is thirty-five thousand or more; or

(3) twenty miles in all other cases.

If the existing and proposed dealerships are in different counties, the lesser of the applicable mileage limitations shall be used. For purposes of this subsection, the population of any area shall be determined in accordance with the most recent decennial census or the most recent population update from the national planning data corporation or other similar recognized source, whichever is later;

T. "representative" means any person who is or acts as an agent, employee or representative of a manufacturer or distributor and who performs any duties in this state relating to promoting the distribution or sale of new or used motor vehicles or contacts dealers in this state on behalf of a manufacturer or distributor;

U. "sale" includes:

(1) the issuance, transfer, agreement for transfer, exchange, pledge, hypothecation or mortgage in any form, whether by transfer in trust or otherwise, of any motor vehicle or interest therein or of any franchise related thereto; and

(2) any option, subscription or other contract or solicitation looking to a sale or offer or attempt to sell in any form, whether spoken or written. A gift or delivery of any motor vehicle or franchise with respect thereto with, or as, a bonus on account of the sale of anything shall be deemed a sale of such motor vehicle or franchise;

V. "stop sale order" means a notice prohibiting a motor vehicle dealer from leasing or selling and delivering at wholesale or retail a used motor vehicle in the inventory of the dealer until the vehicle has been repaired because the vehicle has a safety defect, fails to comply with a federal motor vehicle safety standard or fails to comply with a federal requirement;

W. "successor manufacturer" means a motor vehicle manufacturer that, on or after January 1, 2010, acquires, succeeds to or assumes any part of the business of a predecessor manufacturer as the result of:

(1) a change in ownership, operation or control of the predecessor manufacturer;

(2) the termination, suspension or cessation of all or a part of the business operation of the predecessor manufacturer;

(3) the discontinuance of the sale of a product line; or

(4) a change in the distribution system by the predecessor manufacturer, whether through a change in distributor or the predecessor manufacturer's decision to cease conducting business through a distributor; and

X. "value of the used motor vehicle" means the average trade-in value indicated in an independent third party guide for a used motor vehicle of the same year, make and model.

**History:** 1953 Comp., § 64-37-3, enacted by Laws 1973, ch. 6, § 3; 1977, ch. 100, § 1; 1985, ch. 213, § 1; 1991, ch. 49, § 1; 1995, ch. 19, § 1; 1997, ch. 31, § 1; 2010, ch. 38, § 1; 2010, ch. 40, § 1; 2018, ch. 28, § 1.

## ANNOTATIONS

**The 2018 amendment,** effective March 1, 2018, reorganized the section, placing the definitions in alphabetical order, added definitions for "do not drive order", "recall claim", "stop sale order", and "value of the used motor vehicle"; and deleted former Subsections A through T and added new Subsections A through X.

**The 2010 amendment,** effective March 8, 2010, in Subsection E, after "within or outside of this state", added the remainder of the sentence; in Subsection M, in the fourth sentence, after "individual designated by", deleted "the motorcycle" and added "a"; in Subsection P, after "new or unused motorcycles", added "motor vehicles" and after "motorcycle attachments and", added "motorcycle and motor vehicle"; and added Subsections R, S and T.

Laws 2010, ch. 38, § 1 and Laws 2010, ch. 40, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2010, ch. 40, § 1. *See* 12-1-8 NMSA 1978.

**The 1997 amendment,** effective June 20, 1997, added Subsection D and redesignated the remaining subsections accordingly, inserted "service or repair" in Subsection H, made stylistic changes in Subsection O and in Subsection P, and added Subsection Q.

**The 1995 amendment,** effective July 1, 1996, added "and includes recreational vehicles" at the end of Subsection A; substituted "or" for "and" at the end of Paragraph B(3); inserted Subsection K; redesignated former Subsections K through N as Subsections L through O; and made stylistic changes.

**The 1991 amendment,** effective June 14, 1991 added Subsections L to N and made minor stylistic changes to subsection J.

**Ad hoc approach to determine coverage of article approved.** — There may be certain pieces of agricultural machinery which may be excepted from definition of motor vehicle and which must be evaluated on a case-by-case basis. *Smith Mach. Corp. v. Hesston, Inc.*, 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

**Windrower is not "vehicle" or "motor vehicle".** — A windrower, a piece of farm machinery used to mow, crimp and cut hay or other crops into rows to be picked up and compacted into bales, is not a "vehicle" or "motor vehicle" under Motor Vehicle Code, 66-1-1 NMSA 1978 et seq., and is similarly excluded from coverage under this article. *Smith Mach. Corp. v. Hesston, Inc.*, 1985-NMSC-004, 102 N.M. 245, 694 P.2d 501.

## 57-16-4. Unlawful acts; dealers.

It is unlawful for any dealer to:

A. require a retail purchaser of a new motor vehicle, as a condition of sale and delivery thereof, to purchase special features, equipment, parts or accessories not ordered or desired by the purchaser, provided such features, equipment, parts or accessories are not already installed on the new motor vehicle when received by the dealer;

B. use false, deceptive or misleading advertising in connection with his business;

C. willfully defraud any retail buyer to the buyer's damage;

D. fail to perform the obligations placed on the dealer in connection with the delivery and preparation of a new motor vehicle for retail sale as provided in the manufacturer's preparation and delivery agreements;

E. fail to perform the obligations placed on the dealer in connection with the manufacturer's warranty agreements;

F. represent or sell as a new motor vehicle any motor vehicle which has been used and operated for demonstration purposes or which is otherwise a used motor vehicle; or

G. intentionally fail to perform any written agreement with any retail buyer.

**History:** 1953 Comp., § 64-37-4, enacted by Laws 1973, ch. 6, § 4; 1985, ch. 236, § 1.

**ANNOTATIONS**

**Cross references.** — For misrepresentation of age or condition of vehicle as an unlawful practice, *see* 57-12-6 NMSA 1978.

**Adequate statement of claim.** — Allegations sufficient to state a claim under the New Mexico Motor Vehicle Dealers Franchising Act where car dealer affirmatively misrepresented to her that the car was a demonstrator, failed to disclose to that the car had been used as a rental car and had been involved in an accident. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314 (D.N.M. 2003).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Regulation or licensing of business of selling motor vehicles, 57 A.L.R.2d 1265, 7 A.L.R.3d 1173.

## 57-16-5. Unlawful acts; manufacturers; distributors; representatives.

It is unlawful for a manufacturer, distributor or representative to:

A. coerce or attempt to coerce a dealer to order or accept delivery of a motor vehicle, appliances, equipment, parts or accessories therefor or any other commodity that the motor vehicle dealer has not voluntarily ordered;

B. coerce or attempt to coerce a dealer to order or accept delivery of a motor vehicle with special features, appliances, accessories or equipment not included in the list price of the motor vehicles as publicly advertised by the manufacturer;

C. coerce or attempt to coerce a dealer to order for any person any parts, accessories, equipment, machinery, tools, appliances or any commodity whatsoever;

D. refuse to deliver, in reasonable quantities and within a reasonable time after receipt of dealer's order, to a motor vehicle dealer having a franchise or contractual arrangement for the retail sale of motor vehicles sold or distributed by the manufacturer, distributor or representative, those motor vehicles, parts or accessories covered by the franchise or contract specifically publicly advertised by the manufacturer, distributor or representative to be available for immediate delivery; provided, however, the failure to deliver a motor vehicle, parts or accessories shall not be considered a violation of Chapter 57, Article 16 NMSA 1978 if the failure is due to an act of God, work stoppage or delay due to a strike or labor difficulty, shortage of materials, freight embargo or other cause over which the manufacturer, distributor or representative or an agent thereof has no control;

E. coerce or attempt to coerce a motor vehicle dealer to enter into an agreement with the manufacturer, distributor or representative or to do any other act prejudicial to the dealer by threatening to cancel a franchise or a contractual agreement existing between the manufacturer, distributor or representative and the dealer; provided, however, that notice in good faith to a motor vehicle dealer of the dealer's violation of the terms or provisions of the franchise or contractual agreement does not constitute a violation of Chapter 57, Article 16 NMSA 1978;

F. terminate or cancel the franchise or selling agreement of a dealer without due cause. "Due cause" means a material breach by a dealer, due to matters within the dealer's control, of a lawful provision of a franchise or selling agreement. As used in this subsection, "material breach" means a contract violation that is substantial and significant. In determining whether due cause exists under this subsection, the court shall take into consideration only the dealer's sales in relation to the business available to the dealer; the dealer's investment and obligations; injury to the public welfare; the adequacy of the dealer's sales and service facilities, equipment and parts; the qualifications of the management, sales and service personnel to provide the consumer with reasonably good service and care of new motor vehicles; the dealer's failure to comply with the requirements of the franchise; and the harm to the manufacturer or distributor. The nonrenewal of a franchise or selling agreement, without due cause, shall constitute an unfair termination or cancellation regardless of the terms or provisions of the franchise or selling agreement. The manufacturer, distributor or representative shall notify a motor vehicle dealer in writing by registered mail of the termination or cancellation of the franchise or selling agreement of the dealer at least sixty days before the effective date thereof, stating the specific grounds for termination or cancellation; and the manufacturer, distributor or representative shall notify a motor vehicle dealer in writing by registered mail at least sixty days before the contractual term of the dealer's franchise or selling agreement expires that it will not be renewed, stating the specific grounds for nonrenewal in those cases where there is no intention to renew, and in no event shall the contractual term of a franchise or selling agreement expire without the written consent of the motor vehicle dealer involved prior to the expiration of at least sixty days following the written notice. During the sixty-day period, either party may in appropriate circumstances petition a district court to modify the sixty-day stay or to extend it pending a final determination of proceedings on the merits. The court may grant preliminary and final injunctive relief;

G. use false, deceptive or misleading advertising in connection with the manufacturer's, distributor's or representative's business;

H. offer to sell or to sell a motor vehicle to a motor vehicle dealer in this or any other state of the United States at a lower actual price than the actual price offered to any other motor vehicle dealer in this state for the same model vehicle similarly equipped or to utilize devices, including sales promotion plans or programs that result in a lesser actual price; provided, however, the provisions of this subsection do not apply to sales to a motor vehicle dealer for resale to a unit of the United States government, the state or its political subdivisions; and provided, further, the provisions of this subsection do not apply to sales to a motor vehicle dealer of a motor vehicle ultimately sold, donated or used by the dealer in a driver education program; and provided, further, that the provisions of this subsection do not apply if a manufacturer, distributor or representative offers to sell or sells new motor vehicles to all motor vehicle dealers at an equal price. As used in this section, "actual price" means the price to be paid by the dealer less any incentive paid by the manufacturer, distributor or representative, whether paid to the dealer or the ultimate purchaser of the vehicle. This provision does not apply to sales by the manufacturer, distributor or representatives to the United States government or its

agencies. The provisions of this subsection dealing with vehicle prices in another state and defining actual price do not apply to a manufacturer or distributor if all of the manufacturer's or distributor's dealers within fifty miles of a neighboring state are given all cash or credit incentives available in the neighboring state, whether the incentives are offered by the manufacturer or distributor or a finance subsidiary of either, affecting the price or financing terms of a vehicle;

I. willfully discriminate, either directly or indirectly, in price between different purchasers of a commodity of like grade or quality where the effect of the discrimination may be to lessen substantially competition or tend to create a monopoly or to injure or destroy the business of a competitor;

J. offer to sell or to sell parts or accessories to a motor vehicle dealer for use in the dealer's own business for the purpose of repairing or replacing the same or a comparable part or accessory at a lower actual price than the actual price charged to any other motor vehicle dealer for similar parts or accessories for use in the dealer's own business; provided, however, in those cases where motor vehicle dealers have a franchise to operate and serve as wholesalers of parts and accessories to retail outlets or other dealers, whether or not the dealer is regularly designated as a wholesaler, nothing in this section prevents a manufacturer, distributor or representative from selling to the motor vehicle dealer who operates and serves as a wholesaler of parts and accessories such parts and accessories as may be ordered by the motor vehicle dealer for resale to retail outlets at a lower actual price than the actual price charged a motor vehicle dealer who does not operate or serve as a wholesaler of parts and accessories;

K. prevent or attempt to prevent by contract or otherwise a motor vehicle dealer from changing the capital structure of the dealer's dealership or the means by or through which the dealer finances the operation of the dealership, if the dealer at all times meets any reasonable capital standards agreed to between the dealer and the manufacturer, distributor or representative, and if the change by the dealer does not result in a change in the executive management control of the dealership;

L. prevent or attempt to prevent by contract or otherwise a motor vehicle dealer or an officer, partner or stockholder of a motor vehicle dealer from selling or transferring a part of the interest of any of them to any other person or party; provided, however, that no dealer, officer, partner or stockholder shall have the right to sell, transfer or assign the franchise or power of management or control thereunder without the consent of the manufacturer, distributor or representative except that the manufacturer, distributor or representative shall not withhold consent to the sale, transfer or assignment of the franchise to a qualified buyer capable of being licensed in New Mexico and who meets the manufacturer's or distributor's uniformly applied requirement for appointment as a dealer. Uniform application shall not prevent the application of a separate standard of consent for sale, transfer or assignment to minority or women dealer candidates, and shall not require the application of an identical standard to all persons in all situations. The requirement of uniform application shall be met if the manufacturer applies the same set of standards, which takes into account business performance and experience,

financial qualifications, facility requirements and other relevant characteristics; provided that, if two dealers, persons or situations are identical, given the characteristics considered in the standards, the two dealers, persons or situations shall be treated identically, except as provided in this subsection. Upon request, a manufacturer or distributor shall provide its dealer with a copy of the standards that are normally relied upon by the manufacturer or distributor to evaluate a proposed sale, transfer or assignment. A manufacturer, distributor or representative shall send a letter by certified mail approving or withholding consent within sixty calendar days of receiving the completed application forms and related information requested by a manufacturer or distributor as provided below. A manufacturer, distributor or representative shall send its existing motor vehicle dealer the necessary application forms and identify the related information required within twenty calendar days of receiving written notice from the existing motor vehicle dealer of the proposed sale or transfer. No manufacturer, distributor or representative shall require any information not requested in the twenty-day period, and submission of the information requested within that period together with a completed form of the application provided shall constitute a completed application form. A request for consent shall be deemed granted, and the manufacturer, distributor or representative shall be estopped from denying the consent, if the consent has not been expressly withheld during the applicable sixty-day period;

M. obtain money, goods, services, anything of value or any other benefit from any other person with whom the motor vehicle dealer does business on account of or in relation to the transactions between the dealer and the other person, unless the benefit is promptly accounted for and transmitted to the motor vehicle dealer;

N. require a motor vehicle dealer to assent to a release, assignment, novation, waiver or estoppel that would relieve a person from liability imposed by Chapter 57, Article 16 NMSA 1978;

O. require a motor vehicle dealer to provide installment financing with a specified financial institution;

P. establish an additional franchise, including any franchise for a warranty or service facility outside of the relevant market area of the dealer establishing the facility, but excluding the relocation of existing franchises, for the same line-make in a relevant market area where the same linemake [line-make] is presently being served by an existing motor vehicle dealer if such addition would be inequitable to the existing dealer; provided, however, that the sales and service needs of the public shall be given due consideration in determining the equities of the existing dealer. The sole fact that the manufacturer, distributor or representative desires further penetration of the market is not grounds for establishing an additional franchise; provided, further, that the manufacturer, distributor or representative shall give a ninety-day written notice by registered mail to all same line-make dealers in a relevant market area of its intention to establish an additional franchise;

Q. offer to sell or lease or to sell or lease a new motor vehicle to a person, except a distributor, at a lower actual price therefor than the actual price offered and charged to a motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device that results in a lower actual price;

R. sell, lease or provide motorcycles, parts or accessories to a person not a dealer or distributor for the line-make sold, leased or provided. The provisions of this subsection do not apply to sales, leases or provisions of motor vehicles, parts or accessories by a manufacturer, distributor or representative to the United States government or its agencies or the state or its political subdivisions;

S. offer a finance program, either directly or through an affiliate, based on the physical location of the selling dealer or the residence of the buyer. The provisions of this subsection do not apply to a manufacturer or distributor that has no dealer within fifty miles of a state line or if all of the manufacturer's or distributor's dealers within that fifty miles are given all cash or credit incentives available in the neighboring state, whether the incentives are offered by the manufacturer or the distributor or a finance subsidiary of either, affecting the price or financing terms of a vehicle;

T. force a dealer to sell or relocate a franchise with another manufacturer located at the same physical location or consider the existence of another line-make at a dealership for product allocation, successorship, location approval and capitalization; provided that a manufacturer or distributor may require that the dealer:

(1) meet the manufacturer's capitalization requirements;

(2) meet the manufacturer's facilities requirements; and

(3) not have committed fraudulent acts;

U. enforce a right of first refusal or option to purchase the dealership by a manufacturer or distributor or to require a dealer to grant a right or option to a manufacturer or distributor;

V. be licensed as a dealer or perform warranty or other service or own an interest, directly or indirectly, in a person licensed as a dealer or performing warranty or other service; provided that a manufacturer or distributor may own a person licensed as a dealer for a reasonable time in order to dispose of an interest acquired as a secured party or as part of a dealer development program;

W. fail to recognize and approve the transfer of a dealership to a person named as a successor, donee, beneficiary or devisee in a valid testamentary or trust instrument; provided that a manufacturer or distributor may impose standards or criteria used in a transfer;

X. impose capitalization requirements not necessary to assure that the dealer can meet its financial obligations;

Y. compel a dealer through a finance subsidiary of the manufacturer or distributor to agree to unreasonable operating requirements or directly or indirectly to terminate a dealer, except as allowed by Subsection F of this section, through the actions of a finance subsidiary of the manufacturer or distributor. This subsection shall not limit the right of a financing entity to engage in business practices in accordance with the usage of the trade in which it is engaged;

Z. require a dealer or the dealer's successor to:

(1) construct a new dealership, require the relocation of an existing dealership or substantially change, alter or remodel a dealer's facility except as necessary to comply with health or safety laws or to comply with technology requirements necessary to sell or service vehicles; or

(2) construct a new dealership, require relocation of an existing dealership or substantially change, alter or remodel an existing dealership before the tenth anniversary of the date that the construction or change, alteration or remodel of the dealership at that location was completed if the construction was in substantial compliance with standards or plans provided by a manufacturer, distributor or representative;

AA. unreasonably withhold approval for a dealer to purchase substantially similar goods or services related to the construction, alteration, remodel or renovation of a dealership facility from vendors of the dealer's choice. This subsection shall not be construed to allow a dealer or vendor to infringe upon or impair a manufacturer's trademark rights or to erect or maintain a sign that does not conform to the manufacturer's reasonable fabrication specifications and trademark usage guidelines;

BB. use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchise motor vehicle dealer's compliance with a franchise agreement. The manufacturer has the burden of proving the reasonableness of its performance standards;

CC. fail to compensate a motor vehicle dealer for labor and parts required for a dealer to perform necessary repairs on an affected new or used motor vehicle pursuant to a recall, do not drive order or stop sale order, if the dealer holds a franchise of the same line-make as the subject vehicle;

DD. fail to compensate a motor vehicle dealer as prescribed by Chapter 57, Article 16 NMSA 1978 for a delay in delivering parts or equipment needed to perform recall-related repairs on an affected used motor vehicle in the dealer's inventory that is subject to a do not drive order or stop sale order, if the dealer holds a franchise of the same line-make as the vehicle;

EE. subject to the manufacturer's audit rights provided in Section 57-16-7 NMSA 1978, reduce compensation to a motor vehicle dealer, process a charge back to a dealer, reduce the amount of compensation that the manufacturer otherwise owes to an individual dealer under an incentive program or remove an individual dealer from an incentive program solely because the motor vehicle dealer submitted a claim or received compensation for a claim. This subsection does not prohibit a manufacturer from modifying or discontinuing an incentive program prospectively or from making ordinary business decisions; or

FF.use data, calculations or statistical determinations of the sales performance of a motor vehicle dealer to take adverse action against the motor vehicle dealer for any period of time during which the dealer has at least five percent of its total new and used motor vehicle inventory subject to a stop sale order or do not drive order; provided that the motor vehicle dealer's performance, as reflected in the data, calculations or statistical determinations, is adversely affected by the stop sale order or do not drive order.

**History:** 1953 Comp., § 64-37-5, enacted by Laws 1973, ch. 6, § 5; 1985, ch. 213, § 2; 1993, ch. 167, § 1; 1997, ch. 31, § 2; 2001, ch. 222, § 1; 2013, ch. 13, § 1; 2018, ch. 28, § 2.

## ANNOTATIONS

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Cross references.** — For the financing of automobile sales, *see* 57-11-1 to 57-11-13, 58-19-1 to 58-19-13 NMSA 1978.

**The 2018 amendment,** effective March 1, 2018, made it unlawful for manufacturers and distributors to use arbitrary or unfair performance standards in determining a franchise dealer’s compliance with a franchise agreement, to fail to compensate a motor vehicle dealer for reconditioning expenses and for performing necessary repairs or for labor or parts required for a manufacturer recall, do not drive order, or stop sale order, to fail to compensate a dealer for delay in delivery of parts or equipment needed to repair vehicles subject to a do not drive order or a stop sale order, to reduce compensation, process a charge back, reduce the incentive amount, or remove a dealer from an incentive program, and to use data, calculations or statistical determinations of sales performance of a dealer while at least three percent of a dealer’s total new and used inventory is subject to a stop sale order or do not drive order; and added Subsections BB through FF.

**The 2013 amendment,** effective March 14, 2013, made it unlawful to require a dealer to construct a new dealership, relocate a dealership, or alter a facility except as necessary to comply with health and safety laws, to require a dealer to construct a new dealership, relocate a dealership, or alter a facility before the tenth anniversary of the construction

or alteration of a dealership that was constructed in compliance with the manufacturer's, distributor's, or representative's standards or plans, and to withhold approval for a dealer to purchase goods and services related to the construction or alteration of a dealership from vendors of the dealer's choice; and added Subsections Z and AA.

**The 2001 amendment,** effective July 1, 2001, added the last three sentences in Subsection L.

**The 1997 amendment,** effective June 20, 1997, added the second through fourth sentences of Subsection F; substituted the language beginning "if all of the" for "which has no dealer within fifty miles of a state line, which dealer is in a different region from that other state" in the last sentence of Subsection H; in Subsection L, substituted the language beginning "the manufacturer, distributor or representative shall not withhold" for "consent shall not be unreasonably withheld" at the end of the first clause in the subsection and added the second through fourth sentences; in Subsection P, in the first clause, inserted the language beginning "including any franchise for a warranty" and ending "existing franchises" and substituted "relevant market area" for "community", and substituted "relevant market area" for "community" in the second sentence; made a stylistic change in Subsection R; in Subsection S, made a stylistic change and substituted the language beginning "or if all of the manufacturer's" for "which dealer is in a different region from that other state"; and added Subsections T through Y.

**The 1993 amendment,** effective June 18, 1993, in Subsection H, inserted "in this or any other state of the United States" and "in this state" near the beginning of the first sentence and added the second and last sentences; added Subsection S, making a related grammatical change; and made stylistic changes in Subsection A and the first sentence of Subsection H.

**Inapplicable to prospective franchisees.** — This article does not govern manufacturers' dealings with prospective franchisees, nor does it provide in explicit terms protection for that class. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 62B Am. Jur. 2d Private Franchise Contracts §§ 564 to 658.

Validity and construction of statute regulating dealings between automobile manufacturers, distributors and dealers, 7 A.L.R.3d 1173, 82 A.L.R.4th 624, 51 A.L.R. Fed. 812.

## 57-16-5.1. Prohibition on denial of claims based on technical errors.

A manufacturer, distributor or representative shall not charge back an element of a paid claim, customer or dealer incentive, recall claim or warranty claim based on a dealer's incidental failure to comply with a claim requirement or a clerical error or other technicality, as long as the dealer corrects the clerical error or other technicality

according to licensee guidelines within ninety days of learning of the clerical error or other technicality and provides appropriate documentation to demonstrate the need for the repair. This section applies to a successor manufacturer or distributor.

**History:** Laws 2018, ch. 28, § 4.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2018, ch. 28, § 6 contained an emergency clause and was approved March 1, 2018.

## 57-16-5.2. Used vehicles; do not drive or stop sale orders; duty to provide parts or equipment; compensation for delay.

A. If a manufacturer, a distributor or the federal government issues a stop sale order or do not drive order on a used motor vehicle that is part of a franchise motor vehicle dealer's inventory, the manufacturer or distributor upon availability shall immediately provide to the dealer the part or equipment needed to make the vehicle comply with the motor vehicle standards or to correct the defect.

B. If a remedy or part necessary to repair a used motor vehicle subject to a stop sale order or do not drive order is not available within thirty days of the issuance of the order, upon request of a franchise motor vehicle dealer, the manufacturer shall compensate its franchise motor vehicle dealer for each affected used motor vehicle of the same line-make as new vehicles that the dealer is authorized to sell or service in the dealer's inventory at a prorated rate of at least one percent of the value of the used motor vehicle per month, commencing on the thirtieth day after the order was issued and ending on the earlier of the date that a remedy or all parts necessary to repair or service the affected used motor vehicle are made available to the dealer or the dealer sells, trades or otherwise disposes of the affected used motor vehicle. Alternatively, a manufacturer may compensate a motor vehicle dealer under a recall compensation program if the motor vehicle dealer agrees to be compensated under the program. A manufacturer is not required to compensate a motor vehicle dealer for more than the total value of the used motor vehicle.

C. Compensation provided to a franchise motor vehicle dealer under Subsection B of this section is exclusive and shall not be combined with any other recall compensation remedy under state or federal law.

D. For the purposes of this section, a used motor vehicle is part of the franchise motor vehicle dealer's inventory if the used motor vehicle is held for sale and in the possession of the dealer on the date the do not drive order or stop sale order is issued or if the dealer obtains the used motor vehicle as a result of trade-in pursuant to the purchase of a new or used motor vehicle or a lease return contract after the date that the order is issued but before the remedy and all parts necessary to repair the used motor vehicle are made available to the dealer. The manufacturer may establish the

method by which a dealer demonstrates that an affected motor vehicle is part of the dealer's inventory. The method may not be unreasonable, be unduly burdensome or require the dealer to provide information to the manufacturer that is not necessary to validate payment.

**History:** Laws 2018, ch. 28, § 5.

**ANNOTATIONS**

**Emergency clauses.** — Laws 2018, ch. 28, § 6 contained an emergency clause and was approved March 1, 2018.

## 57-16-6. Obligations; statement of compensation.

Every manufacturer shall specify to the dealer the delivery and preparation obligations of its motor vehicle dealers prior to delivery of new motor vehicles to retail buyers. A copy of the delivery and preparation obligations of its motor vehicle dealers and a schedule or statement of the compensation to be paid or credited to its motor vehicle dealers for the work and services they shall be required to perform in connection with such delivery and preparation obligations shall be furnished to the dealer. The compensation as set forth on such schedule or statement shall be reasonable and paid or credited as set out in Section 7 [57-16-7 NMSA 1978] of this act.

**History:** 1953 Comp., § 64-37-6, enacted by Laws 1973, ch. 6, § 6.

## 57-16-6.1. Motorcycle dealers; new product; franchise or sales agreement.

A. Before a manufacturer, distributor or representative offers a new or additional motorcycle product for resale to any person to act as dealer whose market area, as defined in Subsection P of Section 57-16-5 NMSA 1978, includes the place of business of an existing dealer of a manufacturer, distributor or representative, the manufacturer, distributor or representative shall first offer the new or additional motorcycle product to the existing dealer in writing by registered mail with all of the conditions for marketing the new or additional motorcycle product in the market area which the manufacturer, distributor or representative will impose on any person marketing the new or additional motorcycle product in the market area. The manufacturer, distributor or representative shall not offer the new or additional motorcycle product to any other person, to act as a dealer of the new or additional motorcycle product, whose market area, as defined in Subsection P of Section 57-16-5 NMSA 1978, includes the place of business of the existing dealer, until either sixty days has elapsed after the offer of the new or additional motorcycle product to the existing dealer or the existing dealer has rejected, in writing, that offer, whichever is sooner.

B. Any renewal of an existing franchise or sales agreement by a manufacturer, distributor or representative which occurs on or after July 1, 1985, or any new franchise

or sales agreement which is executed by a manufacturer, distributor or representative on or after July 1, 1985, shall contain provisions for the addition of those motorcycle models, types or products which are under separate franchises or sales agreements to the dealer and for the addition of franchise agreements for new or additional motorcycle products introduced by the manufacturer, distributor or representative on or after July 1, 1985, so that, upon the date of renewal of the last separate franchise or sales agreement which was entered into by the dealer with the manufacturer, distributor or representative before July 1, 1985, all of those models and types of motorcycles, and any new or additional motorcycle products, which are offered by the manufacturer, distributor or representative on or after July 1, 1985 and accepted by the dealer, are under one franchise.

**History:** 1978 Comp., § 57-16-6.1, enacted by Laws 1985, ch. 213, § 3.

## 57-16-6.2. Recreational vehicles; franchise agreements.

A. Every recreational vehicle manufacturer, distributor or representative shall execute a written franchise or sales agreement with each of its recreational vehicle dealers. Each agreement shall include the following provisions:

(1) warranty service obligations, including rates charged by a dealer for performing warranty service;

(2) specific territory or market area designation;

(3) grounds for termination;

(4) repurchase obligations;

(5) sales volume and performance; and

(6) dispute resolution procedures.

B. Notwithstanding the provisions of Subsection A of this section, a dealer and manufacturer, distributor or representative may mutually agree not to include the provisions listed in Paragraphs (2) through (6) of Subsection A of this section; provided, however, a written declaration stating which of the provisions were intentionally omitted and not applicable shall be incorporated into the written agreement.

**History:** Laws 1995, ch. 19, § 2; 2003, ch. 199, § 1.

**ANNOTATIONS**

**The 2003 amendment,** effective July 1, 2003, inserted "including rates charged by a dealer for performing warranty service" at the end of Paragraph A(1).

## 57-16-7. Warranty and recall claims; payment.

A. Each manufacturer shall specify in its franchise agreement, or in a separate written agreement, with each of its dealers licensed in this state, the dealer's obligation to perform warranty work or service on the manufacturer's products.

B. Each manufacturer shall provide each of its dealers with a schedule of compensation to be paid to the dealer for recall or warranty repairs, work or service, including parts, labor and diagnostic work, required of the dealer by the manufacturer in connection with the manufacturer's products. The schedule of compensation for a recall or warranty repair shall not be less than the rates charged by the dealer for similar service to retail customers for nonwarranty service and repairs.

C. The rates charged by the dealer for nonwarranty service or work for parts means the price paid by the dealer for those parts, including all shipping and other charges, increased by the franchisee's average percentage markup. A dealer shall establish and declare the dealer's average percentage markup by submitting to the manufacturer one hundred sequential customer-paid service repair orders or ninety days of customer-paid service repair orders, whichever is less, covering repairs made no more than one hundred eighty days before the submission. A change in a dealer's established average percentage markup takes effect thirty days following the submission. A manufacturer shall not require a dealer to establish average percentage markup by another methodology. A manufacturer shall not require information that is unduly burdensome or time-consuming to provide, including part-by-part or transaction-by-transaction calculations.

D. A manufacturer shall compensate a dealer for labor and diagnostic work for recall or warranty repairs at the rates charged by the dealer to its retail customers for such work. A dealer shall establish and declare the dealer's average customer pay labor rate by submitting to the manufacturer the lesser of one hundred sequential customer-paid service repair orders or ninety days of customer-paid service repair orders covering repairs made no more than one hundred eighty days before the submission.

E. If a manufacturer can demonstrate that the rates under Subsection C or D of this section were incorrectly calculated by a dealer or unreasonably exceed those of all other franchised motor vehicle dealers in the same relevant market area offering the same or a competitive motor vehicle line, the manufacturer is not required to honor the rate increase proposed by the dealer. If the manufacturer is not required to honor the rate increase proposed by the dealer, the dealer is entitled to resubmit a new proposed rate for labor and diagnostic work.

F. A dealer shall not be granted an increase in the average percentage markup or labor and diagnostic work rate more than twice in one calendar year.

G. All recall or warranty claims for parts and labor made by dealers under this section shall be submitted to the manufacturer within one year of the date the work was

performed. All claims submitted must be paid by the manufacturer within thirty days following receipt, provided that the claim has been approved by the manufacturer. The manufacturer has the right to audit claims and to charge the dealer for any unsubstantiated, incorrect or false claims for a period of six months following payment. However, the manufacturer may audit and charge the dealer for any fraudulent claims during any period for which an action for fraud may be commenced under applicable state law.

H. All claims submitted by dealers on the forms and in the manner specified by the manufacturer shall be either approved or disapproved within thirty days following their receipt. The manufacturer shall notify the dealer in writing of any disapproved claim and shall set forth the reasons why the claim was not approved. Any claim not specifically disapproved in writing within thirty days following receipt is approved, and the manufacturer is required to pay that claim within thirty days of receipt of the claim.

I. A manufacturer may not recover its costs for compensating its dealers licensed in this state for a recall or warranty claim either by reduction in the amount due to the dealer or by separate charge, surcharge or other imposition.

J. A manufacturer, distributor or representative shall not deny a claim by a dealer for performing a covered warranty repair or required recall, do not drive order or stop sale order repair on a motor vehicle if the dealer discovered the need for the repair during the course of a separate repair request by the customer; provided that the dealer provides the required documentation, which shall not be unreasonably burdensome, demonstrating the need for the repair.

K. The provisions of this section shall not apply to recreational travel trailers or to parts of systems, fixtures, appliances, furnishings, accessories and features of motor homes.

**History:** 1953 Comp., § 64-37-7, enacted by Laws 1973, ch. 6, § 7; 1979, ch. 310, § 1; 1993, ch. 167, § 2; 1997, ch. 14, § 1; 2011, ch. 111, § 1; 2011, ch. 118, § 1; 2018, ch. 28, § 3.

## ANNOTATIONS

**The 2018 amendment,** effective March 1, 2018, required a manufacturer, a distributor or representative to compensate a dealer for labor and diagnostic work for repairs to a vehicle subject to a warranty, a recall, a do not drive order or stop sale order; in the catchline, added "and recall"; added new subsection designation "B" and redesignated former Subsections B and C as Subsections C and D, respectively; in Subsection B, after "paid to the dealer for", deleted "any" and added "recall or", after the first occurrence of "warranty", added "repairs", after "compensation for a", added "recall or", after the second occurrence of "warranty", deleted "claim" and added "repair", and after "nonwarranty service and repairs", deleted "and shall not be less than the schedule of compensation for an existing dealer as of July 1, 2011"; in Subsection C, after "shall not

require information that", deleted "the dealer believes"; in Subsection D, after "labor and diagnostic work", added "for recall or warranty repairs", and added the second sentence of the subsection; added new subsection designation "E", after "that the rates" added "under Subsection C or D of this section were incorrectly calculated by a dealer or" and redesignated former Subsections D through G as Subsections F through I, respectively; in Subsection G, after "All", added "recall or warranty", after the first occurrence of "claims", deleted "for warranty work", and after "right to audit claims", deleted "for warranty work"; in Subsection I, after "A manufacturer may not", deleted "otherwise", after "recover", deleted "all or any portion of", after "this state for", added "a recall", and after "warranty", deleted "parts and service" and added "claim"; and added a new Subsection J and redesignated former Subsection H as Subsection K.

**The 2011 amendment,** effective July 1, 2011, rewrote former Subsection A to require manufacturers to specify the dealer's obligation to perform warranty work and to provide dealers with a schedule of compensation for warranty work at rates not less than the dealers' charges for non-warranty work; and to provide the method for determining dealers' average percentage markups for non-warranty work, require notice of the average percentage markup to manufacturers, limit the frequency of increases of average percentage markups, impose a one-year limitation on the submission of claims to manufacturers, decrease the audit period from one year to six months and prohibit manufacturers from recovering costs for compensating dealers.

Laws 2011, ch. 111, § 1 and Laws 2011, ch. 118, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2011, ch. 118, § 1. *See* 12-1-8 NMSA 1978.

**The 1997 amendment,** effective June 20, 1997, in the third sentence of Subsection A, substituted "pursuant to provisions of this section and" for "under this section and under", and added the last sentence.

**The 1993 amendment,** effective June 18, 1993, designated the provisions of this section as subsection A; added the third sentence and made stylistic changes throughout in Subsection A; and added Subsection B.

## 57-16-7.1. Sales and service incentives; audit.

A manufacturer or distributor may audit a claim for sales and service incentives only during the six-month period immediately following payment or credit issued for the claim; however, this limitation shall not apply if there is a reasonable suspicion of fraud.

**History:** Laws 1997, ch. 14, § 2; 2011, ch. 111, § 2; 2011, ch. 118, § 2.

### ANNOTATIONS

**The 2011 amendment,** effective July 1, 2011, changed the period for auditing claims for sales and service incentives from twenty-four months to six months.

Laws 2011, ch. 111, § 2 and Laws 2011, ch. 118, § 2 enacted identical amendments to this section. The section was set out as amended by Laws 2011, ch. 118, § 2. *See* 12-1-8 NMSA 1978.

## 57-16-8. Unreasonable restrictions; site control agreements; exclusive use agreements.

A. It is unlawful to, directly or indirectly, impose unreasonable restrictions on the motor vehicle dealer or franchise relative to transfer, sale, right to renew, termination discipline, noncompetitive covenants, site-control whether by sublease, collateral pledge of lease or otherwise, right of first refusal to purchase, option to purchase, compliance with subjective standards and assertion of legal or equitable rights.

B. Unless a separate agreement lasting no more than fifteen years has been voluntarily entered into for separate consideration, it is unlawful to, directly or indirectly, require a site control agreement or exclusive use agreement as a condition of:

(1) awarding a franchise to a prospective motor vehicle dealer;

(2) adding a line make or franchise to an existing dealer;

(3) renewing the franchise of an existing dealer;

(4) approving the relocation of an existing dealer's facility; or

(5) approving the sale or transfer of ownership of a franchise.

C. As used in this section, "site control agreement" or "exclusive use agreement" means any agreement that has the effect of:

(1) requiring a dealer to establish or maintain exclusive dealership facilities;

(2) restricting the ability of a dealer or a dealer's lessor to transfer, sell, lease or change the use of the dealership premises; or

(3) preventing or attempting to prevent a dealer from acquiring, adding or maintaining a sales or service operation for another line make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership, provided that the dealer complies with any reasonable facilities requirements of the manufacturer, successor manufacturer or distributor.

**History:** 1953 Comp., § 64-37-8, enacted by Laws 1973, ch. 6, § 8; 2010, ch. 38, § 2; 2010, ch. 40, § 2.

**ANNOTATIONS**

**The 2010 amendment,** effective March 8, 2010, in the catchline, after "unreasonable restrictions;", added "site control agreements; exclusive use agreements"; in Subsection A, at the beginning of the sentence, changed "It shall be unlawful to impose unreasonable restrictions" to "It is unlawful to, directly or indirectly, impose unreasonable restrictions"; and added Subsections B and C.

Laws 2010, ch. 38, § 2 and Laws 2010, ch. 40, § 2 enacted identical amendments to this section. The section was set out as amended by Laws 2010, ch. 40, § 2. *See* 12-1-8 NMSA 1978.

**Inapplicable to prospective franchisees.** — This article does not govern manufacturers' dealings with prospective franchisees, nor does it provide in explicit terms protection for that class. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

## 57-16-9. Franchise renewal; termination; anticipatory termination.

A. Anything to the contrary notwithstanding, it is unlawful for the manufacturer, distributor or representative without due cause to fail to renew a franchise on terms then equally available to all its motor vehicle dealers or their prospective purchasers, to terminate a franchise or to restrict the transfer of a franchise unless the dealer receives fair and reasonable compensation for the value of the business. A prospective purchaser may enforce the provisions of this section whether or not the person is a dealer.

B. A public announcement by a manufacturer or distributor of an intention to cease manufacturing or distribution of a motor vehicle brand within three years of the announcement or upon expiration of a dealers' current franchise or selling agreement may at the option of an affected dealer be deemed an anticipatory involuntary termination of the dealer's franchise.

**History:** 1953 Comp., § 64-37-9, enacted by Laws 1973, ch. 6, § 9; 1997, ch. 31, § 3; 2010, ch. 38, § 3; 2010, ch. 40, § 3.

**ANNOTATIONS**

**Cross references.** — For termination or cancellation of a franchise, *see* 57-16-5 NMSA 1978.

**The 2010 amendment,** effective March 8, 2010, in the catchline, after "termination", added "anticipatory termination"; in Subsection A, in the first sentence, after "fail to renew", added "a franchise"; and added Subsection B.

Laws 2010, ch. 38, § 3 and Laws 2010, ch. 40, § 3 enacted identical amendments to this section. The section was set out as amended by Laws 2010, ch. 40, § 3. *See* 12-1-8 NMSA 1978.

**The 1997 amendment,** effective June 20, 1997, inserted "or their prospective purchasers" in the first sentence, added the second sentence, and made stylistic changes throughout the section.

**Purpose of section.** — This section was intended to forbid conduct that is otherwise lawful under the act. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

**Inapplicable to prospective franchisees.** — This article does not govern manufacturers' dealings with prospective franchisees, nor does it provide in explicit terms protection for that class. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

**Standing.** — This article requires only that the manufacturer act with due cause; when an existing dealer was denied the acquisition of an additional franchise based on his past performance, the dealer did not show the requisite injury to recover under this Act. *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, 121 N.M. 764, 918 P.2d 350.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 62B Am. Jur. 2d Private Franchise Contracts §§ 564 to 658.

Validity and construction of statute regulating dealings between automobile manufacturers, distributors and dealers, 7 A.L.R.3d 1173, 82 A.L.R.4th 624, 51 A.L.R. Fed. 812.

## 57-16-9.1. Succession to motorcycle dealership.

A. A manufacturer, distributor or representative shall not prevent or refuse to give effect to the succession to ownership or management control of a motorcycle dealership upon the death or incapacity of the dealer by the surviving spouse, heir, legatee or devisee nor shall the manufacturer, distributor or representative interfere, prevent or hinder, either directly or indirectly, the continuance of the business by reason of such succession, except as otherwise provided in this act.

B. Any designated family member of a deceased or incapacitated dealer may succeed the motorcycle dealer in ownership or management control under the existing agreement; provided that the designated family member provides notice to the manufacturer, distributor or representative, in writing by registered mail, of the intention to succeed to the dealership within one hundred and twenty days after the dealer's death or incapacity and the successor agrees to be bound by all the terms of the original agreement. The successor must meet the reasonable criteria applied by the manufacturer, distributor or representative to new dealers.

C. The rejection of succession, without good cause, shall constitute an unfair termination or cancellation, regardless of the terms or provisions of the franchise or selling agreement. If the manufacturer, distributor or representative believes that good

cause exists for rejection, such manufacturer, distributor or representative shall provide notice to the successor, in writing by registered mail within sixty days of the receipt of the notice of intention to succeed. In no event shall the contractual term of any franchise or selling agreement expire, without the written consent of the successor, prior to the expiration of at least ninety days following such written notice. During the ninety-day period the designated family member or successor may petition a court to modify such ninety-day stay or to extend it pending a final determination of such proceedings on the merits. The court shall have authority to grant preliminary and final injunctive relief.

D. A motorcycle dealer may designate any person as the successor by written instrument filed with the manufacturer, distributor or representative and such written instrument shall be controlling.

**History:** 1978 Comp., § 57-16-19.1, enacted by Laws 1985, ch. 213, § 4.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to at the end of Subsection A, means Laws 1985, Chapter 213, which appears at 57-16-3, 57-16-5, 57-16-6.1 and 57-16-9.1 NMSA 1978.

## 57-16-9.2. Motor vehicle dealers; termination of franchise; return of inventory.

A. If on termination of a franchise the dealer delivers to the manufacturer or distributor the inventory, vehicle brand-specific tools, signage and other specialized systems, equipment and real estate required by the manufacturer that was purchased from the manufacturer or distributor and that is held by the dealer on the date of termination, the manufacturer or distributor shall pay to the dealer:

(1) the dealer cost of the new, unsold and undamaged motorcycles and motor vehicles from the current and immediately preceding two model years and purchased from the manufacturer or distributor within fourteen months prior to receipt of a notice of termination;

(2) an amount equal to ninety-five percent of the current price of new, unused and undamaged motorcycle attachments and motor vehicle repair parts;

(3) an amount equal to an additional five percent of the current price of new, unused and undamaged motorcycle attachments and motor vehicle repair parts, unless the manufacturer or distributor performs the handling, packing and loading of the parts, in which case no additional amount is required under this paragraph;

(4) the fair market value, determined by appraisal as if installed for continuous use in an operating dealership, of all vehicle brand-specific special tools, signage and other specialized systems and equipment required by the manufacturer or distributor for

dealership operations. The fair market value will be determined by a qualified independent appraiser agreed upon by the manufacturer or distributor and the dealer unless the fair market value is mutually agreed upon by the parties; and

(5) the economic loss to the dealer resulting from idled or underused dealer facility real estate due to a manufacturer's involuntary termination, determined by any reasonable means, including appraisal, unless the dealer is in violation of the franchise agreement. Economic loss is presumed to be at least equal to the value of two years of dealer facility fair market rental value, as if the facility were an operating dealership; real estate property tax; and property insurance.

B. The manufacturer or distributor may subtract from the sum due under Subsection A of this section the amount of debts owed by the dealer to the manufacturer or distributor. The manufacturer or distributor and the dealer are each responsible for one-half of the cost of delivering the inventory to the manufacturer or distributor.

C. The manufacturer or distributor shall pay the amount due under this section before the sixty-first day after the day that the manufacturer or distributor receives inventory from the dealer.

D. On payment of the amount due under this section, title to the inventory is transferred to the manufacturer or distributor.

E. The provisions of this section shall not apply to recreational travel trailer or motor home manufacturers or dealers.

**History:** 1978 Comp., § 57-16-9.2, enacted by Laws 1991, ch. 49, § 2; 1993, ch. 167, § 3; 2010, ch. 38, § 4; 2010, ch. 40, § 4.

## ANNOTATIONS

**The 2010 amendment,** effective March 8, 2010, in Subsection A, after "distributor the inventory", added "vehicle brand-specific tools, signage and other specialized systems, equipment and real estate required by the manufacturer"; in Subsection A(1), after "undamaged motorcycles", deleted "current year model" and added "and"; after "motor vehicles", deleted "and motor vehicles" and added "from the current and immediately preceding two model years and"; and after "manufacturer or distributor", deleted "six" and added "within fourteen"; and added Paragraphs (4) and (5) of Subsection A.

Laws 2010, ch. 38, § 4 and Laws 2010, ch. 40, § 4 enacted identical amendments to this section. The section was set out as amended by Laws 2010, ch. 40, § 4. *See* 12-1-8 NMSA 1978.

**The 1993 amendment,** effective June 18, 1993, substituted "Motor vehicle" for "Motorcycle" in the section heading; in Subsection A, deleted "motorcycle" preceding "franchise" in the introductory language, added the language beginning "current model

year" to the end of Paragraph (1), inserted "motor vehicle" and added "and" to the end, in Paragraph (2), and inserted "motor vehicle" in Paragraph (3); and added Subsection E.

## 57-16-9.3. Motor vehicle dealers; termination of franchise; return of inventory; exceptions.

A manufacturer or distributor is not required to repurchase:

A. inventory that the dealer orders either after the dealer receives notice of the termination of the franchise from the manufacturer or distributor or after any relief, granted by a court to the dealer in the form of temporary restraining orders, temporary injunctions or permanent injunctions, has expired;

B. inventory for which the dealer is unable to furnish evidence of clear title; or

C. motorcycle attachments or motor vehicle repair parts that have a limited storage life, are in a broken or damaged package, are usually sold as part of a set, if the parts are separated from the set, or cannot be sold without reconditioning.

**History:** 1978 Comp., § 57-16-9.3, enacted by Laws 1991, ch. 49, § 3; 1993, ch. 167, § 4.

**ANNOTATIONS**

**The 1993 amendment,** effective June 18, 1993, substituted "Motor vehicle" for "Motorcycle" in the section heading and inserted "motor vehicle" near the beginning of Subsection C.

## 57-16-10. Refunds; discounts.

In connection with a sale of a motor vehicle or vehicles to the state or to any political subdivision thereof, no manufacturer, distributor or representative shall offer any discounts, refunds or any other similar type of inducement to any dealer without making the same offer or offers to all other of its dealers within the relevant market area, and if such inducements are made, the manufacturer, distributor or representative shall give simultaneous notice thereof to all of its dealers within the relevant market area who have requested such notice.

**History:** 1953 Comp., § 64-37-10, enacted by Laws 1973, ch. 6, § 10.

## 57-16-11. Injunction.

Whenever it appears that a person has violated, or is violating, or is threatening to violate, any provision of this act, the aggrieved person may cause a civil suit to be

instituted in district court for injunctive relief to restrain the person from continuing the violation or threat of violation.

**History:** 1953 Comp., § 64-37-11, enacted by Laws 1973, ch. 6, § 11.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

## 57-16-12. Venue of suits; relief.

A suit for injunctive relief may be brought either in the county where the defendant resides or in the county where the violation or threat of violation occurs. In any suit to enjoin a violation or threat of violation of this act, the court may grant temporary restraining orders, temporary injunctions and permanent injunctions.

**History:** 1953 Comp., § 64-37-12, enacted by Laws 1973, ch. 6, § 12.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

## 57-16-13. Right of action; damages.

In addition to any other judicial relief, any person who shall be injured in his business or property by reason of anything forbidden in this act may sue therefor in the district court and shall recover actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee. In an action for money damages, the court or jury may award punitive damages not to exceed three times the actual damages, if the defendant acted maliciously.

**History:** 1953 Comp., § 64-37-13, enacted by Laws 1973, ch. 6, § 13.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

**Retail buyer’s cause of action.** — The statutory language of this article, the explicit legislative object of ensuring "a sound system" of motor vehicle sale and distribution within the state, and the intent to provide a remedy for warranty abuse, implies a retail buyer's cause of action against a manufacturer for such abuse. *GMAC v. Anaya*, 1985-NMSC-066, 103 N.M. 72, 703 P.2d 169.

**Defendant’s breach of contract was not malicious.** — Where plaintiff sued defendant for breach of automobile dealership contract; and the trial court found that defendant acted willfully and improperly denied warranty claims and willfully breached the contract, but did not find that defendant’s actions were maliciously intentional, fraudulent, oppressive, reckless or undertaken with wanton disregard of plaintiff’s rights, plaintiff was not entitled to punitive damages. *Art Janpol Volkswagen, Inc. v. Fiat Motors of N. Am., Inc.*, 767 F.2d 690 (10th Cir. 1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

## 57-16-14. Limitations on suits.

Actions rising out of any provision of this act shall be commenced within four years next after the cause of action accrues; provided, however, that if a person liable hereunder conceals the cause of action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action. If a cause of action accrues during the pendency of any civil, criminal or administrative proceeding against a person brought by the United States, or any of its agencies, under the antitrust laws, the Federal Trade Commission Act or any other federal act, or the laws of the state related to antitrust laws or to franchising, such actions may be commenced within one year after the final disposition of such civil, criminal or administrative proceeding.

**History:** 1953 Comp., § 64-37-14, enacted by Laws 1973, ch. 6, § 14.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act", referred to in the second sentence, means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

**Cross references.** — For the Federal Trade Commission Act, *see* 15 U.S.C. §§ 41 to 58.

## 57-16-15. Price schedule change.

A manufacturer or distributor motor vehicle price increase shall not apply to vehicles which the dealer had ordered for private retail consumers prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a private retail consumer shall constitute evidence of each such order. In the event of price reductions, the amount of any such reduction received by a dealer shall be passed on to the private retail consumer by the dealer if the retail price was negotiated on the basis of the previous higher price to the dealer. Price reduction shall apply to all motor vehicles in the dealer's inventory that are subject to the reduction. Price differences applicable to new model motor vehicles at the time of the introduction of new models shall not be considered a price increase or price decrease.

**History:** 1953 Comp., § 64-37-15, enacted by Laws 1973, ch. 6, § 15.

## 57-16-16. Penalty.

Any dealer who shall willfully violate any of the provisions of Section 4 [57-16-4 NMSA 1978] of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars ($100) or more than five hundred dollars ($500), or by imprisonment in the county jail for a period not to exceed six months, or by both such fine and imprisonment.

**History:** 1953 Comp., § 64-37-16, enacted by Laws 1973, ch. 6, § 16.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act" means Laws 1973, Chapter 6, which appears as 57-16-1 to 57-16-6, 57-16-7 to 57-16-9, and 57-16-10 to 57-16-16 NMSA 1978. The reference probably should be to all of Chapter 57, Article 16 NMSA 1978.

# ARTICLE 16A
# Motor Vehicle Quality Assurance

## 57-16A-1. Short title.

This act [57-16A-1 to 57-16A-9 NMSA 1978] may be cited as the "Motor Vehicle Quality Assurance Act".

**History:** Laws 1985, ch. 220, § 1.

**ANNOTATIONS**

**Law reviews.** — For article, "New Mexico's 'Lemon Law': Consumer Protection or Consumer Frustration?", see 16 N.M.L. Rev. 251 (1986).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 17 Am. Jur. 2d, Consumer Product Warranty Acts §§ 66, 67.

Liability on implied warranties in sale of used motor vehicle, 47 A.L.R.5th 677.

Validity, construction and effect of state motor vehicle warranty legislation, 88 A.L.R.5th 301.

## 57-16A-2. Definitions.

As used in the Motor Vehicle Quality Assurance Act:

A. "collateral charges" means additional charges to a consumer not directly attributed to a manufacturer's suggested retail price label for a new motor vehicle and includes all taxes, license, title and registration fees and other governmental charges related to the purchase of the vehicle;

B. "comparable motor vehicle" means an identical or reasonably equivalent motor vehicle;

C. "consumer" means the purchaser, other than for purposes of resale, of a new or used motor vehicle normally used for personal, family or household purposes, a person to whom such a motor vehicle has been transferred during the duration of an express warranty applicable to the motor vehicle and any other person entitled by the terms of the warranty to enforce the obligations of the warranty;

D. "express warranty" means a written affirmation of the fact of promise made by a manufacturer to a consumer in connection with the sale of a new or used motor vehicle that relates to the nature of the material or workmanship or to a specified level of performance over a specified period of time, including any terms or conditions precedent to the enforcement of obligations pursuant to the warranty;

E. "manufacturer" means a person engaged in the manufacturing, assembling, importing or distributing of a motor vehicle as a regular business;

F. "motor vehicle" means a passenger motor vehicle, including an automobile, pickup truck, motorcycle or van normally used for personal, family or household purposes, that is sold and registered in this state and whose gross vehicle weight is less than ten thousand pounds;

G. "used motor vehicle" means a motor vehicle that has been sold, bargained or exchanged or a motor vehicle that is the subject of a title that has been transferred from the person who first acquired the motor vehicle from the manufacturer, importer or dealer or agent of the manufacturer or importer and that has been placed in bona fide consumer use; and

H. "used motor vehicle dealer" means a person or business that sells or offers for sale a used motor vehicle after selling or offering for sale four or more used motor vehicles in the previous twelve months but does not include:

(1) a bank or financial institution;

(2) an insurance company;

(3) a business selling a used motor vehicle to an employee of the business; or

(4) a lessor selling a leased vehicle to the lessee of the vehicle or to an employee of the lessee of the vehicle.

**History:** Laws 1985, ch. 220, § 2; 2003, ch. 216, § 1.

**ANNOTATIONS**

**The 2003 amendment,** effective January 1, 2004, inserted "or used" following "new" near the beginning of Subsection C; inserted "or used" following "new" near the middle of Subsection D; and added Subsections G and H.

**"Consumer" construed.** — A person is not a "consumer" entitled to recovery under the Motor Vehicle Quality Assurance Act unless he or she uses the vehicle for personal, family, or household purposes. *Jones v. GMC*, 1998-NMCA-020, 124 N.M. 606, 953 P.2d 1104.

## 57-16A-3. Conformation to express warranties.

A. If a new motor vehicle does not conform to all applicable express warranties and the consumer reports the nonconformity to the manufacturer, its agent or its authorized dealer during the term of such express warranties or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, the manufacturer, its agent or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties.

B. If the manufacturer or its agent or authorized dealer, after a reasonable number of attempts, is unable to conform the new motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and market value of the motor vehicle to the consumer, the manufacturer shall replace the motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all collateral charges, less a reasonable allowance for the consumer's use of the vehicle. The subtraction of a reasonable allowance for use shall apply when either a replacement or refund of the new motor vehicle occurs. As used in this subsection, a reasonable allowance for use shall be that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, agent or

dealer and during any subsequent period when the vehicle is not out of service by reason of repair. Refunds shall be made to consumers or lienholders as their interests may appear.

C. It shall be presumed that a reasonable number of attempts as mentioned in Subsection B of this section have been undertaken to conform a new motor vehicle to the applicable express warranties if:

(1) the same uncorrected nonconformity has been subject to repair four or more times by the manufacturer or its agents or authorized dealers within the express warranty term or during the period of one year following the date of original delivery of the motor vehicle to a consumer, whichever is the earlier date, but the nonconformity continues to exist; or

(2) the vehicle is in the possession of the manufacturer, its agent or authorized dealer for repair a cumulative total of thirty or more business days during such term or during such period whichever is the earlier date, exclusive of down time for routine maintenance as prescribed by the manufacturer. The term of an express warranty, such one-year period and such thirty-day period shall be extended by any period of time during which repair services are not available to the consumer because of war, invasion, strike, fire, flood or other natural disaster. In no event shall the presumption herein provided apply against a manufacturer unless the manufacturer has received prior direct written notification from or on behalf of the consumer and an opportunity to cure the defect alleged. The manufacturer shall provide written notice and instruction to the consumer, either in the warranty or a separate notice, of the obligation to file this written notification before invoking the remedies available pursuant to the Motor Vehicle Quality Assurance Act.

**History:** Laws 1985, ch. 220, § 3.

## 57-16A-3.1. Used motor vehicles.

A. Unless a seller is a used motor vehicle dealer, before the seller attempts to sell a used motor vehicle, the seller shall possess the title to the used motor vehicle and the title shall be in the seller's name.

B. Except as otherwise provided in the Motor Vehicle Quality Assurance Act, a used motor vehicle dealer shall not exclude, modify or disclaim the implied warranty of merchantability prescribed in Section 55-2-314 NMSA 1978 or limit the remedies for a breach of the warranty before midnight of the fifteenth calendar day after delivery of a used motor vehicle or until a used motor vehicle is driven five hundred miles after delivery, whichever is earlier. In calculating time under this subsection, a day on which the warranty is breached and all subsequent days in which the used motor vehicle fails to conform with the implied warranty of merchantability are excluded. In calculating distance under this subsection, the miles driven to obtain or in connection with the repair, servicing or testing of the used motor vehicle that fails to conform with the

implied warranty of merchantability are excluded. An attempt to exclude, modify or disclaim the implied warranty of merchantability or to limit the remedies for a breach of the warranty in violation of this subsection renders a purchase agreement voidable at the option of the purchaser.

C. An implied warranty of merchantability is met if a used motor vehicle functions substantially free of a defect that significantly limits the use of the used motor vehicle for the ordinary purpose of transportation on any public highway. The implied warranty of merchantability expires at midnight of the fifteenth calendar day after delivery of a used motor vehicle or until a used motor vehicle is driven five hundred miles after delivery, whichever is earlier. In calculating time, a day on which the implied warranty of merchantability is breached is excluded and all subsequent days in which the used motor vehicle fails to conform with the warranty are also excluded. In calculating distance, the miles driven to obtain or in connection with the repair, servicing or testing of the used motor vehicle that fails to conform with the implied warranty of merchantability are excluded.

D. An implied warranty of merchantability does not extend to damage that occurs after the sale of the used motor vehicle that results from:

(1) off-road use;

(2) racing;

(3) towing;

(4) abuse;

(5) misuse;

(6) neglect;

(7) failure to perform regular maintenance; and

(8) failure to maintain adequate oil, coolant and other required fluids or lubricants.

E. If the implied warranty of merchantability described in this section is breached, the consumer shall give reasonable notice to the seller within thirty days of the date of the breach. Before the consumer exercises another remedy pursuant to Chapter 55, Article 2 NMSA 1978, the seller shall have a reasonable opportunity to repair the used motor vehicle. The consumer shall pay one-half of the cost of the first two repairs necessary to bring the used motor vehicle into compliance with the warranty. The payments by the consumer are limited to a maximum payment of twenty-five dollars ($25.00) for each repair.

F. The maximum liability of a seller pursuant to this section is limited to the purchase price paid for the used motor vehicle, to be refunded to the consumer or lender, as applicable, in exchange for return of the vehicle, unless the seller knew or should have known of the defect given the circumstances in which the vehicle was acquired or sold and the seller did not disclose that defect.

G. An agreement for the sale of a used motor vehicle by a used motor vehicle dealer is voidable at the option of the consumer unless it contains on its face the following conspicuous statement printed in boldface, ten-point or larger type set off from the body of the agreement:

"New Mexico law requires that this vehicle will be fit for the ordinary purposes for which the vehicle is used for fifteen days or five hundred miles after delivery, whichever is earlier, except with regard to particular defects disclosed on the first page of this agreement. You (the consumer) will have to pay up to twenty-five dollars ($25.00) for each of the first two repairs if the warranty is violated.".

H. The inclusion in the agreement of the statement prescribed in Subsection G of this section does not create an express warranty.

I. A consumer of a used motor vehicle may waive the implied warranty of merchantability only for a particular defect in the vehicle and only if all of the following conditions are satisfied:

(1) the used motor vehicle dealer fully and accurately discloses to the consumer that because of circumstances unusual to the business of the used motor vehicle dealer, the used motor vehicle has a particular defect;

(2) the consumer agrees to buy the used motor vehicle after disclosure of the defect; and

(3) before the sale, the consumer indicates agreement to the waiver by signing and dating the following conspicuous statement that is printed on the first page of the sales agreement in boldface ten-point or larger type and that is written in the language in which the presentation was made:

"Attention consumer: sign here only if the dealer has told you that this vehicle has the following problem(s) and you agree to buy the vehicle on those terms:

1. _____

2. _____

3. _____.".

J. A used motor vehicle dealer has the burden to prove by a preponderance of the evidence that the dealer complied with Subsection I of this section.

K. A consumer or seller that is aggrieved by a transaction pursuant to this section and that seeks a legal remedy shall pursue an appropriate remedy prescribed in Chapter 55, Article 2 NMSA 1978 and shall comply with the requirements prescribed in that article.

**History:** Laws 2003, ch. 216, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 216, § 4 made Laws 2003, ch. 216, § 3 effective January 1, 2004.

## 57-16A-4. Affirmative defenses.

It shall be an affirmative defense to any claim under the Motor Vehicle Quality Assurance Act that:

A. an alleged nonconformity does not substantially impair the use and market value of the motor vehicle;

B. a nonconformity is the result of abuse, neglect or unauthorized modifications or alterations of the motor vehicle;

C. a claim by a consumer was not filed in good faith; or

D. any other affirmative defense allowed by law.

**History:** Laws 1985, ch. 220, § 4.

## 57-16A-5. Limitation of remedy.

Any consumer who seeks enforcement of the provisions of the Motor Vehicle Quality Assurance Act shall be foreclosed from pursuing any Uniform Commercial Code remedy set forth in Sections 55-2-602 through 55-2-608 NMSA 1978.

**History:** Laws 1985, ch. 220, § 5.

## 57-16A-6. Informal dispute resolution.

If a manufacturer has established or participates in a fair and impartial informal dispute settlement procedure which substantially complies with the substantive requirements of Title 16, Part 703 of the Code of Federal Regulations, the provisions of Subsection B of Section 3 [57-16A-3B NMSA 1978] of the Motor Vehicle Quality

Assurance Act concerning refunds or replacement shall not apply to any consumer who has not first resorted to that procedure. The state attorney general may investigate and determine that the informal dispute settlement procedure is fair and impartial and conforms with the requirements of Title 16, Part 703 of the Code of Federal Regulations.

**History:** Laws 1985, ch. 220, § 6.

## 57-16A-7. Resale of returned motor vehicle.

No motor vehicle which has not been properly repaired pursuant to the provisions of Subsection B of Section 3 [57-16A-3 NMSA 1978] of the Motor Vehicle Quality Assurance Act, or pursuant to a similar law of another state, may be resold in New Mexico unless the manufacturer provides full written disclosure of the reason for the return to any prospective buyer.

**History:** Laws 1985, ch. 220, § 7.

## 57-16A-7.1. Notice of replacement or repurchase to used motor vehicle dealers and consumers.

A manufacturer, its agent, its authorized dealer or a used motor vehicle dealer that has been ordered by judgment or decree to replace or repurchase or that has replaced or repurchased a motor vehicle pursuant to the Motor Vehicle Quality Assurance Act shall, before offering the motor vehicle for resale, attach to the motor vehicle written notification indicating that the motor vehicle has been replaced or repurchased. A consumer or a used motor vehicle dealer may bring a cause of action against a person who removes the notification from the motor vehicle, unless the manufacturer, its agent or its authorized dealer or a used motor vehicle dealer, before completion of the sale, has provided the purchaser with written notification by the manufacturer, dealer or agent of the dealer, that the motor vehicle has been replaced or repurchased.

**History:** Laws 2003, ch. 216, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2003, ch. 216, § 4 made Laws 2003, ch. 216, § 2 effective January 1, 2004.

## 57-16A-8. Limitation of action.

Any action brought to enforce the provisions of the Motor Vehicle Quality Assurance Act shall be commenced within eighteen months following the date of original delivery of the motor vehicle to a consumer, or, in the event that a consumer resorts to an informal dispute settlement procedure pursuant to Section 6 [57-16A-6 NMSA 1978] of the Motor

Vehicle Quality Assurance Act, within ninety days following the final action of the panel, whichever is later.

**History:** Laws 1985, ch. 220, § 8.

## 57-16A-9. Reasonable attorney fees.

A consumer who prevails in an action brought to enforce the provisions of the Motor Vehicle Quality Assurance Act shall be entitled to receive reasonable attorneys' fees and court costs from the manufacturer. If a consumer does not prevail in such an action and brings that action for frivolous reasons or in bad faith, the manufacturer shall be entitled to receive reasonable attorneys' fees and court costs from the consumer.

**History:** Laws 1985, ch. 220, § 9.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Award of attorney's fees under state motor vehicle warranty legislation (lemon laws), 82 A.L.R.5th 501.

# ARTICLE 17
# Standards of Weights and Measures

## 57-17-1. Definitions.

As used in this act:

A. "person" includes individuals, partnerships, corporations, companies, societies and associations;

B. "weight(s)" and "measure(s)" include all instruments and devices used for weighing and measuring and their necessary and associated accessories and appliances;

C. "sell" and "sale" include barter and exchange;

D. "apparatus" includes any manual or mechanical unit, method or device used to determine weight, measure or quantity;

E. "correct" means the condition of apparatus, which by reason of its construction and adjustment, will give accurate readings or indications of weight and quantity;

F. "incorrect" means the condition of apparatus, or its construction, which precludes it from being reasonably permanent in its adjustment or which will not allow it to repeat its indications of weight or quantity with accuracy;

G. "in package form" means a good or commodity packaged or contained in advance of sale so as to constitute a unity [unit] quantity of the good or commodity; a good or commodity not contained, but upon which is marked a selling price based upon weight or measure, shall be construed to be in packaged form; a shipping container containing goods or commodities in packaged form is excluded from this definition;

H. "weight" means net weight;

I. "sale from bulk" means the sale of commodities when the quantity is determined at the time of sale;

J. "board" means the board of regents of New Mexico state university; and

K. "director" means the director of the New Mexico department of agriculture.

**History:** 1953 Comp., § 76-1-28, enacted by Laws 1959, ch. 202, § 1; 1973, ch. 386, § 1.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act" refers to Laws 1959, Chapter 202, which is compiled as 57-17-1, 57-17-5 to 57-17-13, 57-17-15 to 57-17-18 NMSA 1978.

## 57-17-2. Systems of weights and measures.

The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized, and either one or both of these systems shall be used for all commercial purposes in the state. The definitions of basic units of weights and measure, the tables of weight and measure and weights and measures equivalents as published by the national bureau of standards shall be used by the board in arriving at standards which shall govern weighing and measuring equipment and transactions in the state.

**History:** 1953 Comp., § 76-1-29, enacted by Laws 1973, ch. 386, § 2.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1973, ch. 386, §§ 2, 20, repealed 76-1-29, 1953 Comp., relating to the equivalents of units of weight and measure, and enacted a new section.

**Cross references.** — For inspection of measuring devices for sale of petroleum products, *see* 57-19-30 NMSA 1978.

For standards for measuring flow and volume of water, *see* 72-5-19 NMSA 1978.

**In absence of any agreement as to method of measuring hay** in the stack, the statutory rule is applicable. *King v. Tabor*, 1910-NMSC-037, 15 N.M. 488, 110 P. 601 (decided under former law).

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures §§ 1 to 40.

Parol or extrinsic evidence of custom or usage to show that terms of measurement in contract have a special trade significance, 89 A.L.R. 1240.

94 C.J.S. Weights and Measures §§ 1 to 4.

## 57-17-3. Physical standards.

Weights and measures that are traceable to the United States prototype standards supplied by the federal government, or approved as being satisfactory by the national bureau of standards shall be the state primary standards of weights and measures. The state primary standards shall be maintained in such calibration as prescribed by the national bureau of standards. Secondary standards may be prescribed by the director. Secondary standards shall be verified upon their initial receipt and as often thereafter as deemed necessary by the director.

**History:** 1953 Comp., § 76-1-30, enacted by Laws 1973, ch. 386, § 3.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1973, ch. 386, §§ 3, 20, repealed 76-1-30, 1953 Comp., relating to standards of weights and measures as received from the federal government, and enacted a new section.

## 57-17-4. Enforcement and administration.

A. Sections 57-17-1 through 57-17-19 NMSA 1978 shall be administered and enforced by the director under the direction of the board. Such sums as may be appropriated by the legislature and fees which are collected shall be allowed to the department for salaries for inspectors and for necessary clerical employees, necessary equipment and supplies, travel and contingent expenses.

B. The board shall after due notice and hearing issue reasonable regulations to carry out the provisions of Articles 17 and 18 of this Chapter 57 NMSA 1978. The regulations shall have the force of law and may include but not be limited to:

(1) standards of weight, measure or count, reasonable standards of fill and labeling requirements for a commodity in package form; and

(2) specifications and tolerances for apparatus, weights and measures designed to eliminate from use apparatus the inaccuracy of which would facilitate the perpetration of fraud.

**History:** 1953 Comp., § 76-1-31, enacted by Laws 1973, ch. 386, § 4.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1973, ch. 386, §§ 4, 20, repealed 76-1-31, 1953 Comp., relating to the office of the state superintendent of weights and measures, and enacted a new section.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures § 12.

## 57-17-5. Bonds.

A bond with sureties, to be approved by the secretary of state and conditioned upon faithful performance of duties, shall be given by the director in the penal sum of five thousand dollars ($5,000) and, upon appointment, by each inspector in the penal sum of one thousand dollars ($1,000). The premium on a bond required by this section shall be paid by the state.

**History:** 1953 Comp., § 76-1-32, enacted by Laws 1959, ch. 202, § 5; 1973, ch. 386, § 5.

## 57-17-6. Custody of state standards.

The New Mexico standards of weight and measure shall be kept in a safe and suitable place in the office of the director and shall not be removed except for repairs or certification.

**History:** 1953 Comp., § 76-1-33, enacted by Laws 1959, ch. 202, § 6; 1973, ch. 386, § 6.

## 57-17-7. Duties of director.

It shall be the duty of the director to:

A. enforce the provisions of this act;

B. maintain custody of the New Mexico standards of weight and measure and of the other standards and equipment entrusted to his care;

C. keep accurate records of all standards of weight and measure;

D. keep and have general supervision over apparatus used to determine weight and measure offered for sale, sold or in use in the state;

E. report annually to the governor of the state, the report to cover all activities carried out under the provisions of Articles 17 and 18 of this Chapter 57 NMSA 1978;

F. test at least once annually all apparatus, weights and measures used in checking the receipt or disbursement of supplies in institutions supported in whole or in part by moneys appropriated by the legislature;

G. inspect and test for accuracy, at least once annually, commercial apparatus, weights and measures used in:

(1) determining the weight, measurement or count of goods and commodities sold or offered for sale on the basis of weight or measure;

(2) computing the basic charge or payment for services rendered on the basis of weight or measure; and

(3) determining weight or measure when a charge is made for such determination; and

H. weigh, measure and inspect, from time to time, packages and amounts of goods and commodities offered for sale, sold or in the process of delivery to determine whether the weight or quantity of the good or commodity is the same as that represented by the terms of the offer or sale.

**History:** 1953 Comp., § 76-1-34, enacted by Laws 1959, ch. 202, § 7; 1973, ch. 386, § 7.

## ANNOTATIONS

**Compiler's notes.** — The term "this act" refers to Laws 1959, Chapter 202, which is compiled as 57-17-1, 57-17-5 to 57-17-13, 57-17-15 to 57-17-18 NMSA 1978.

**Cross references.** — For inspection of gasoline pumps by director, *see* 57-19-30 NMSA 1978.

For checking and calibration stations for measuring capacity of vehicle tank used in transporting petroleum products, *see* 57-19-31 NMSA 1978.

For testing and accuracy of meters of public utilities, *see* 62-6-20 through 62-6-22 NMSA 1978.

For inspection and certification of scales at livestock sales rings, *see* 77-10-7 NMSA 1978.

## 57-17-8. Powers of the director; police powers; right of entry and stoppage.

To facilitate the performance of his duties and the enforcement of the provisions of this act and the regulations promulgated hereunder, the director, in the performance of his duties, is empowered to:

A. approve for use, and seal or mark with appropriate devices, the weights and measures he finds upon inspection and test to be correct;

B. reject and mark or tag as "recommended for repair" apparatus, weights and measures he finds upon inspection and test to be incorrect, but which in his best judgment are susceptible of satisfactory repair;

C. condemn or seize weights and measures he finds upon inspection to be incorrect, but which in his best judgment are not susceptible of satisfactory repair;

D. arrest by formal warrant a willful violator of the provisions of this act or the regulations promulgated hereunder; and to seize, without formal warrant, for use as evidence, incorrect or unsealed apparatus, weights and measures and packages or goods and commodities, found by him to be sold or offered for sale in violation of law;

E. to enter, without formal warrant, a structure or premises for the purposes of inspection during business hours;

F. conduct investigations to ensure compliance with this act; and

G. issue stop-use, hold and removal orders with respect to any weights and measures commercially used, and stop-sale, hold and removal orders with respect to any packaged commodities or bulk commodities kept, offered or exposed for sale.

**History:** 1953 Comp., § 76-1-35, enacted by Laws 1959, ch. 202, § 8; 1973, ch. 386, § 8.

**ANNOTATIONS**

**Compiler's notes.** — The term "this act" refers to Laws 1959, Chapter 202, which is compiled as 57-17-1, 57-17-5 to 57-17-13, 57-17-15 to 57-17-18 NMSA 1978.

## 57-17-9. Duties and powers of inspectors.

When acting under instructions and under the direction of the director, the powers and duties of the inspectors of weights and measures shall be the same as the powers and duties given to and imposed upon the director.

**History:** 1953 Comp., § 76-1-36, enacted by Laws 1959, ch. 202, § 9; 1973, ch. 386, § 9.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 94 C.J.S. Weights and Measures § 5.

## 57-17-10. Duty of owner of incorrect apparatus.

An owner or user of apparatus of weight or measure, recommended for repair, shall cause the apparatus to be made correct within a reasonable period specified by the director or an inspector. Except, at the election of the owner or user, the apparatus may be disposed of in a manner specifically authorized by the director. An apparatus of weight or measure which has been recommended for repair shall not be used again for a commercial purpose until it has been made correct, and found to be correct, by the director or an inspector unless otherwise provided for by regulation.

**History:** 1953 Comp., § 76-1-37, enacted by Laws 1959, ch. 202, § 10; 1973, ch. 386, § 10.

## 57-17-11. Methods of sale of commodities; general.

A commodity in liquid form shall be sold only by liquid measure or by weight, and a commodity not in liquid form shall be sold only by weight, by measure of length or area or by count; provided, that the provisions of this section shall not apply to a commodity sold for immediate consumption on the premises of sale, to vegetables sold by the head or bunch, to cotton seed sold to cotton gins or to a commodity when in package or container form standardized by law. The board shall issue such regulations as are required to carry out the provisions of this section.

**History:** 1953 Comp., § 76-1-38, enacted by Laws 1959, ch. 202, § 11; 1965, ch. 279, § 1; 1973, ch. 386, § 11.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight, 6 A.L.R. 429, 90 A.L.R. 1290.

## 57-17-12. Declarations on packages; declarations of unit price on random packages.

A. Except as otherwise provided by law or regulation of the board, a commodity in package form shall bear on the outside of the package a definite, plain and conspicuous declaration of net quantity of the contents in terms of weight, measure or count, and in the case of any package not sold on the premises where packed, the name and place of

business of the manufacturer, packer or distributor; and the identity of the commodity in the package, unless the same can easily be identified through the wrapper or container.

B. In addition to the declarations required by this section, any package being one of a lot containing random weights of the same commodity and bearing the total selling price of the package shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight.

**History:** 1953 Comp., § 76-1-39, enacted by Laws 1959, ch. 202, § 12; 1973, ch. 386, § 12.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity of statute or ordinance as to "containers," 5 A.L.R. 1068, 101 A.L.R. 862.

Construction of statute or ordinance in relation to containers, 35 A.L.R. 782.

## 57-17-13. Misleading packages.

No commodity in package form shall be so wrapped, nor be in a container so made, formed or filled as to mislead the purchaser as to the quantity of its contents, and the contents of a container shall not fall below the reasonable standard of fill as may have been prescribed for the commodity by the director.

**History:** 1953 Comp., § 76-1-40, enacted by Laws 1959, ch. 202, § 13; 1973, ch. 386, § 13.

## 57-17-14. Retail sales; regulation of.

The board may by regulation, when it is necessary or desirable for the protection of the public, establish standard quantities, weights and sizes by which specific commodities may be sold at retail. If any specific commodity is regulated in this regard, by another state agency or law, the regulation of that other state agency or law shall control.

**History:** 1953 Comp., § 76-1-40.1, enacted by Laws 1973, ch. 386, § 14.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight, 6 A.L.R. 429, 90 A.L.R. 1290.

Constitutionality of regulations as to capacity of milk receptacles, 18 A.L.R. 251, 42 A.L.R. 556, 58 A.L.R. 672, 80 A.L.R. 1225, 101 A.L.R. 64, 110 A.L.R. 644, 119 A.L.R. 243, 155 A.L.R. 1383.

## 57-17-15. Misrepresentation of price.

Whenever a commodity or service is sold, offered or advertised for sale by weight, measure or count, the price shall not be misrepresented, nor shall the price be represented in any manner calculated or tending to mislead or deceive a purchaser.

**History:** 1953 Comp., § 76-1-41, enacted by Laws 1959, ch. 202, § 14.

## 57-17-16. Hindering or obstructing officers; penalties.

A person who shall hinder or obstruct in any way the director or an inspector, in the performance of his official duties, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty dollars ($20.00) or more than one hundred dollars ($100), or by imprisonment for not more than three months, or by both fine and imprisonment.

**History:** 1953 Comp., § 76-1-50, enacted by Laws 1959, ch. 202, § 23; 1973, ch. 386, § 15.

## 57-17-17. Impersonation of officer; penalties.

A person who shall impersonate, in any manner, the director or an inspector, by the use of his seal or a counterfeit of his seal, or in any other manner, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), or by imprisonment for not more than one year, or by both fine and imprisonment.

**History:** 1953 Comp., § 76-1-52, enacted by Laws 1959, ch. 202, § 25; 1973, ch. 386, § 16.

## 57-17-18. Offenses and penalties.

A person who, by himself or by his servant or agent, or as the servant or agent of another person, performs any one of the acts specified in this section shall be guilty of a misdemeanor and, upon a first conviction thereof, shall be punished by a fine of not less than twenty dollars ($20.00) or more than one hundred dollars ($100), or by imprisonment for not more than three months, or by both fine and imprisonment; and upon a second or subsequent conviction thereof, he shall be punished by a fine of not less than fifty dollars ($50.00) or more than five hundred dollars ($500), or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment in the discretion of the court:

A. use or have in his possession, for the purpose of using for any commercial purpose, sell, offer for sale or hire, or have in his possession for the purpose of selling

or hiring, an incorrect weight or measure, or any device or instrument calculated to falsify any weight or measure;

B. use, or have in his possession for current use, in the buying or selling of any commodity or good, or for hire or award, or in the computation of any basic charge or payment for services rendered on the basis of weight or measurement, or in the determination of weight or measurement when a charge is made for such determination, a weight or measure which has not been sealed within the next preceding year, by the director or an inspector, unless written notice has been given to the director to the effect that the weight or measure is available for examination, or is due for re-examination, as the case may be, and unless specific written permission to use such weight or measure has been received from the office of the director;

C. dispose of any rejected or condemned weight or measure in a manner contrary to law;

D. remove from any weight or measure, contrary to law, any tag, seal or mark placed thereon by the director or an inspector;

E. sell or offer for sale, less than the quantity he represents of any commodity, good or service;

F. take more than the quantity he represents of any commodity, good or service when, as buyer, he furnishes the weight or measure by means of which the amount of the commodity, good or service is determined;

G. keep for the purpose of sale, advertise or offer for sale, or sell any commodity, good or service in a condition or manner contrary to law;

H. use in retail trade, except in the preparation of packages put up in advance of sale and of medical prescriptions, a weight or measure which is not so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonably be assumed by a customer; and

I. violate any provision of this act or of the regulations promulgated under the provisions of this act, for which a specific penalty has not been prescribed.

**History:** 1953 Comp., § 76-1-53, enacted by Laws 1959, ch. 202, § 26; 1973, ch. 386, § 17.

## ANNOTATIONS

**Compiler's notes.** — The term "this act" refers to Laws 1959, Chapter 202, which is compiled as 57-17-1, 57-17-5 to 57-17-13, 57-17-15 to 57-17-18 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures §§ 41, 42.

94 C.J.S. Weights and Measures §§ 8 to 12.

## 57-17-19. Inspection fees.

The board may establish fees to recover the cost of performing services of inspection, testing or calibrating weights, measures and weighing and measuring devices when such services are requested by the person owning or using the weight, measure or device. All fees shall be placed in an account with the business office of New Mexico state university to be used for the enforcement of Articles 17 and 18 of this Chapter 57 NMSA 1978.

**History:** 1953 Comp., § 76-1-54, enacted by Laws 1973, ch. 386, § 18.

**ANNOTATIONS**

**Repeals and reenactments.** — Laws 1973, ch. 386, §§ 18, 20 repealed 76-1-54, 1953 Comp. relating to fees for inspecting, testing and sealing weights or measures, and enacted a new section.

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures § 19.

## 57-17-20. Homemade food items; exemption.

The provisions of Chapter 57, Article 17 NMSA 1978 shall not apply to homemade food items produced or sold pursuant to the Homemade Food Act [25-12-1 to 25-12-5 NMSA 1978].

**History:** Laws 2021, ch. 98, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 98, § 9 made Laws 2021, ch. 98, § 8 effective July 1, 2021.

# ARTICLE 18
# Weighmasters

## 57-18-1. Short title.

This act [57-18-1 to 57-18-26 NMSA 1978] may be cited as the "Weighmaster Act".

**History:** 1953 Comp., § 76-4-1, enacted by Laws 1973, ch. 236, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures § 20 et seq.

94 C.J.S. Weights and Measures §§ 6, 7.

## 57-18-2. Definitions.

As used in the Weighmaster Act:

A. "weighmaster" means a natural person licensed under the provisions of the Weighmaster Act;

B. "vehicle" means any device by which any property, produce, commodity or article is transported;

C. "director" means the director of the state department of agriculture;

D. "board" means the board of regents of New Mexico state university;

E. "public weighing" means the determination of any weight upon which a sale is based, or upon which a basic charge or payment for services rendered is based, when the person making the weight determination is not a party to, or an agent of the party to, the transaction upon which the weight is based;

F. "third-party weighing" means public weighing; and

G. "weight certificate" means a document in the form of a certificate consecutively numbered and indicating the weight in accordance with the standards of weights and measures set forth in Sections 57-17-1 through 57-17-19 NMSA 1978.

**History:** 1953 Comp., § 76-4-2, enacted by Laws 1973, ch. 236, § 2; 1977, ch. 89, § 1.

## 57-18-3. Enforcement; rules and regulations.

The director is authorized to enforce the provisions of the Weighmaster Act. The board shall issue regulations for the enforcement of the Weighmaster Act.

**History:** 1953 Comp., § 76-4-3, enacted by Laws 1973, ch. 236, § 3.

## 57-18-4. Qualifications for weighmaster.

A citizen of the United States, who is mature, of good moral character, who has the ability to weigh accurately and to make correct weight certificates, and who has received from the director a weighmaster license, shall be authorized to act as a weighmaster.

**History:** 1953 Comp., § 76-4-4, enacted by Laws 1973, ch. 236, § 4; 1979, ch. 80, § 1.

## 57-18-5. License application.

An application for a weighmaster license shall be made upon a form provided by the director. The application shall furnish evidence that the applicant has the qualifications required by Section 4 [57-18-4 NMSA 1978] of the Weighmaster Act.

**History:** 1953 Comp., § 76-4-5, enacted by Laws 1973, ch. 236, § 5.

## 57-18-6. Evaluation of qualifications of applicants; records.

The director may promulgate rules for determining the qualifications of the applicant for a weighmaster license. He may pass upon the qualifications of the applicant on the basis of the information supplied in the application, or he may examine the applicant orally or in writing, or both, for the purpose of determining his qualifications. He shall grant the weighmaster license to those applicants who possess the qualifications required by Sections 4 [57-18-4 NMSA 1978] and 6 [this section] of the Weighmaster Act. The director shall keep a record of all applications and of all licenses issued.

**History:** 1953 Comp., § 76-4-6, enacted by Laws 1973, ch. 236, § 6.

## 57-18-7. License fees.

The board may establish reasonable fees for weighmaster licenses and deputy weighmaster licenses to assist in carrying out the provisions of the Weighmaster Act. The fees shall not exceed the amount necessary to cover the cost of examination of applicants, issuance of the licenses and making the necessary inspections required under the Weighmaster Act.

**History:** 1953 Comp., § 76-4-7, enacted by Laws 1973, ch. 236, § 7.

## 57-18-8. Bond required.

Before any license is issued, except a deputy weighmaster license, the applicant shall execute and deliver to the director a surety bond in the sum of one thousand dollars ($1,000) or other proof of financial responsibility that the board may set by regulation. The bond shall be executed by the applicant as principal and by a corporate surety company qualified and authorized to do business in this state as a surety. The bond shall be conditioned upon the faithful and honest compliance with the provisions of

the Weighmaster Act. The bond shall run to the state in favor of every person availing himself of the services and certifications issued by the weighmaster or any of his deputies.

**History:** 1953 Comp., § 76-4-8, enacted by Laws 1973, ch. 236, § 8; 1977, ch. 89, § 2.

## 57-18-9. Licenses; period; renewal.

Each weighmaster license shall be issued for a period of one year. Effective date of license shall be determined by the director. The license holder shall file a renewal application with the director prior to the expiration date. Renewal applications shall be in the form prescribed by the director.

**History:** 1953 Comp., § 76-4-9, enacted by Laws 1973, ch. 236, § 9.

## 57-18-10. Licensed weighmaster.

A. A weighmaster license is required of any person who does public weighing or third-party weighing, except as provided in Section 57-18-18 NMSA 1978, or charges a fee for any weight determination.

B. The issuance of a weighmaster license shall not obligate the state to pay to the licensee any compensation for his services as a licensed weighmaster. Each weighmaster shall sign each certificate in indelible markings at the time of issuance as provided for in Section 57-18-12 NMSA 1978.

C. Weighmasters may designate any person under their employ who otherwise complies with the provisions of the Weighmaster Act to act for them as a deputy weighmaster. Licensed weighmasters shall forward to the director the names of persons designated as deputy weighmasters, together with fees as established under the provisions of the Weighmaster Act.

**History:** 1953 Comp., § 76-4-10, enacted by Laws 1973, ch. 236, § 10; 1977, ch. 89, § 3.

## 57-18-11. Deputy weighmaster.

Except for the surety bond requirement provided in Section 8 [57-18-8 NMSA 1978] of the Weighmaster Act, the duties, qualifications and responsibilities of the deputy weighmaster shall be the same as those of the weighmaster provided in the Weighmaster Act. The deputy weighmaster shall perform his duties in accordance with the same provisions of the Weighmaster Act applicable to the weighmaster.

**History:** 1953 Comp., § 76-4-11, enacted by Laws 1973, ch. 236, § 11.

## 57-18-12. Weight certificate; required entries; official weights.

The director shall prescribe the form of weight certificates to be used by each weighmaster. The weight certificates shall be consecutively numbered and shall bear, but not be limited to, the following information: the date of issuance, the kind of property, produce, commodity or article weighed, the name of the declared owner or agent of the owner or of the consignee of the material weighed, the accurate weight of the material weighed, the means by which the material was being transported at the time it was weighed and other available information as may be necessary to distinguish or identify the property, produce, commodity or article. The weight certificate, when properly made and signed, is prima facie evidence of the accuracy of the weights shown, which for all purposes shall be considered as official weights if issued under the direct supervision of the director or his agent.

**History:** 1953 Comp., § 76-4-12, enacted by Laws 1973, ch. 236, § 12; 1977, ch. 89, § 4.

## 57-18-13. Weight certificate; execution; requirements.

Each weighmaster shall personally determine each weight entered on a weight certificate issued by him. He shall make no entries on a weight certificate issued by some other person except as allowed by regulation. Each weight certificate shall show clearly that weight or weights were actually determined. In any case in which only the gross, the tare or the net weight is determined by the weighmaster, he shall cancel the printed entries for the weights not determined or computed. If gross and tare weights are shown on a weight certificate and both of these were not determined on the same scale and on the day for which the certificate is dated, the weighmaster shall identify on the certificate the scale used for determining each weight and the date of each determination.

**History:** 1953 Comp., § 76-4-13, enacted by Laws 1973, ch. 236, § 13.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures §§ 25, 27.

## 57-18-14. Scale used.

When making a weight determination as provided for by the Weighmaster Act, a weighmaster shall use a proper weighing device. A proper weighing device is one suitable for weighing the amount and kind of material to be weighed. A proper weighing device is one that has been inspected and approved for use by a weights and measures officer of this state within a period of twelve months immediately preceding the date of the weighing.

**History:** 1953 Comp., § 76-4-14, enacted by Laws 1973, ch. 236, § 14.

**ANNOTATIONS**

**Cross references.** — For duty of director to inspect and test accuracy of scales annually, *see* 57-17-7 NMSA 1978.

## 57-18-15. Scale used; capacity; platform size; one-draft weighing.

A weighmaster shall not use any scale to weigh a load which exceeds the nominal or rated capacity of the scale. All persons shall be off the vehicle and clear of the scale platform when a weighmaster is weighing the vehicle, except that the driver may remain on the vehicle if so noted on the weight certificate.

**History:** 1953 Comp., § 76-4-15, enacted by Laws 1973, ch. 236, § 15.

## 57-18-16. Copies of weight certificate.

A weighmaster shall keep and preserve for at least one year a legible copy of each weight certificate issued by him. Copies of weight certificates shall be kept open to the inspection by any weights and measures officer of this state.

**History:** 1953 Comp., § 76-4-16, enacted by Laws 1973, ch. 236, § 16.

**ANNOTATIONS**

**Cross references.** — For director's and his inspector's right of entry and stoppage with respect to scales, *see* 57-17-8, 57-17-9 NMSA 1978.

## 57-18-17. Reciprocal acceptance of weight certificates.

Whenever there is statutory authority in any other state which licenses weighmasters, for the recognition and acceptance of the weight certificates issued by licensed weighmasters of this state, the director of this state is authorized to recognize and accept the weight certificates of the other state.

**History:** 1953 Comp., § 76-4-17, enacted by Laws 1973, ch. 236, § 17.

## 57-18-18. Optional licensing.

The following may, but are not required to, obtain licenses as weighmasters:

A. a weights and measures officer when acting within the scope of his official duties;

B. a person weighing property, produce, commodities or articles that he or his employer is buying or selling;

C. a person weighing property, produce, commodities or articles in conformity with the requirements of federal statutes;

D. retailers weighing or measuring commodities for sale by them in retail stores directly to consumers except weighing bulk lot commodities on vehicle or hopper scales;

E. persons who measure the amount of oil, gas or other fuels for purposes of royalty computation and payment or for other operations of fuel and oil companies and their retail outlets; or

F. producers of agricultural commodities or livestock, weighing commodities produced or purchased by them or by their producer neighbors, when no charge is made for such weighing, or no signed or initialed statement or memorandum is issued of the weight upon which a purchase or sale of the commodity is based.

**History:** 1953 Comp., § 76-4-18, enacted by Laws 1973, ch. 236, § 18.

**ANNOTATIONS**

**Cross references.** — For duties and powers of the inspectors of weights and measures, *see* 57-17-9 NMSA 1978.

## 57-18-19. Reweighing.

Duly authorized representatives of the director may at any time require a loaded or unloaded vehicle to proceed to the nearest vehicle scale for the purpose of verifying the gross or tare weight of the vehicle.

**History:** 1953 Comp., § 76-4-19, enacted by Laws 1973, ch. 236, § 19.

## 57-18-20. Livestock sales.

Notwithstanding any other provisions of the Weighmaster Act, livestock shall be weighed by a weighmaster where livestock is sold on the basis of weight at a public salesyard, or by or at any livestock market, market agency or dealer subject to the federal Packers and Stockyards Act.

**History:** 1953 Comp., § 76-4-20, enacted by Laws 1973, ch. 236, § 20.

**ANNOTATIONS**

**Cross references.** — For the Packers and Stockyards Act, *see* 7 U.S.C. § 181 et seq.

## 57-18-21. Salvage materials.

Scrap metal and salvage material shall be weighed by a weighmaster where scrap metal and salvage materials are purchased or sold by dealers, brokers or commission merchants on the basis of weight obtained from a vehicle scale.

**History:** 1953 Comp., § 76-4-21, enacted by Laws 1973, ch. 236, § 21.

## 57-18-22. Prohibited acts.

No person shall perform the duties or acts to be performed by a weighmaster under the Weighmaster Act or shall hold himself out as a weighmaster, issue any weight certificate, ticket, memorandum or statement for which a fee is charged, unless he holds a valid license as a weighmaster or a deputy weighmaster.

**History:** 1953 Comp., § 76-4-22, enacted by Laws 1973, ch. 236, § 22.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures § 25.

## 57-18-23. Suspension and revocation of license.

The director is authorized to suspend or revoke the license of any weighmaster or a deputy weighmaster when:

A. he is satisfied, after a hearing upon ten days' notice to the licensee, that the licensee has violated any provision of the Weighmaster Act or any valid regulations of the board affecting licensed weighmasters; or

B. the licensee has been convicted in any court of competent jurisdiction of violating any provision or regulation issued under the Weighmaster Act.

**History:** 1953 Comp., § 76-4-23, enacted by Laws 1973, ch. 236, § 23.

## 57-18-24. Offenses and penalties.

Any person who requests a weighmaster to weigh any property, produce, commodity or article falsely or incorrectly, or who requests a false or incorrect weight certificate, or who issues a weight certificate simulating the weight certificate prescribed in the Weighmaster Act, and who is not a weighmaster, shall be guilty of a misdemeanor. Upon conviction for the first offense, he shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100). Upon a second or subsequent conviction, he shall be punished by a fine of not less than one hundred

dollars ($100) nor more than five hundred dollars ($500), or by imprisonment for not less than thirty days nor more than ninety days, or by both the fine and imprisonment.

**History:** 1953 Comp., § 76-4-24, enacted by Laws 1973, ch. 236, § 24.

## 57-18-25. Offenses and penalties; malfeasance.

Any licensed weighmaster or deputy weighmaster who falsifies a weight certificate, or who delegates his authority to any person not licensed as a weighmaster or deputy weighmaster, or who signs a weight certificate with his official signature before performing the act of weighing, shall be guilty of a misdemeanor. Upon conviction he shall be punished by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500), or by imprisonment for not less than thirty days nor more than ninety days, or by both the fine and imprisonment.

**History:** 1953 Comp., § 76-4-25, enacted by Laws 1973, ch. 236, § 25.

## 57-18-26. Offenses and penalties; general.

Any person who violates any provision of the Weighmaster Act or any rule or regulation promulgated pursuant thereto for which no specific penalty has been provided shall be guilty of a misdemeanor. Upon conviction he shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred dollars ($100).

**History:** 1953 Comp., § 76-4-26, enacted by Laws 1973, ch. 236, § 26.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 79 Am. Jur. 2d Weights and Measures § 41.

94 C.J.S. Weights and Measures § 7.

# ARTICLE 19
# Petroleum Products

## 57-19-1. Repealed.

**History:** Laws 1937, ch. 102, § 1; 1941 Comp., § 69-501; 1953 Comp., § 65-6-1; Laws 1973, ch. 117, § 1; 1977, ch. 71, § 1; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-1 NMSA 1978, as enacted by Laws 1937, ch. 102, § 1, relating to definitions of "person", "director" and "board", and persons punishable for violations of act, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-2. Repealed.

**History:** Laws 1937, ch. 102, § 2; 1941 Comp., § 69-502; 1953 Comp., § 65-6-2; Laws 1959, ch. 302, § 1; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-2 NMSA 1978, as enacted by Laws 1937, ch. 102, § 2, relating to deceiving purchasers in regard to product, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-3. Repealed.

**History:** Laws 1937, ch. 102, § 3; 1941 Comp., § 69-503; 1953 Comp., § 65-6-3; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-3 NMSA 1978, as enacted by Laws 1937, ch. 102, § 3, relating to use of pumps or containers for storage or sale of products other than those indicated thereon, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-4. Repealed.

**History:** Laws 1937, ch. 102, § 4; 1941 Comp., § 69-504; 1953 Comp., § 65-6-4; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-4 NMSA 1978, as enacted by Laws 1937, ch. 102, § 4, relating to imitation of design, symbol or trade name, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-5. Repealed.

**History:** Laws 1937, ch. 102, § 5; 1941 Comp., § 69-505; 1953 Comp., § 65-6-5; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-5 NMSA 1978, as enacted by Laws 1937, ch. 102, § 5, relating to adulteration and blending of products sold under different trademarks or trade names, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-6. Repealed.

**History:** Laws 1937, ch. 102, § 6; 1941 Comp., § 69-506; 1953 Comp., § 65-6-6; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-6 NMSA 1978, as enacted by Laws 1937, ch. 102, § 6, relating to adulteration or blending of products sold under same trademark or trade name, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-7. Repealed.

**History:** Laws 1937, ch. 102, § 7; 1941 Comp., § 69-507; 1953 Comp., § 65-6-7; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-7 NMSA 1978, as enacted by Laws 1937, ch. 102, § 7, relating to delivery into any pump or container of products other than those indicated on the container, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-8. Repealed.

**History:** Laws 1937, ch. 102, § 8; 1941 Comp., § 69-508; Laws 1949, ch. 119, § 1; 1953 Comp., § 65-6-8; Laws 1959, ch. 302, § 2; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-8 NMSA 1978, as enacted by Laws 1937, ch. 102, § 8, relating to kerosene specifications, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-9. Repealed.

**History:** Laws 1937, ch. 102, § 9; 1941 Comp., § 69-509; Laws 1949, ch. 119, § 2; 1953 Comp., § 65-6-9; Laws 1959, ch. 302, § 3; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-9 NMSA 1978, as enacted by Laws 1937, ch. 102, § 9, relating to sale of kerosene for domestic use; flash point, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-10. Repealed.

**History:** Laws 1937, ch. 102, § 10; 1941 Comp., § 69-510; 1953 Comp., § 65-6-10; Laws 1959, ch. 302, § 4; 1971, ch. 78, § 1; 1977, ch. 71, § 2; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-10 NMSA 1978, as enacted by Laws 1937, ch. 102, § 10, relating to gasoline specifications, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-11. Repealed.

**History:** Laws 1937, ch. 102, § 11; 1941 Comp., § 69-511; Laws 1951, ch. 178, § 1; 1953 Comp., § 65-6-11; Laws 1959, ch. 302, § 5; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-11 NMSA 1978, as enacted by Laws 1937, ch. 102, § 11, relating to low grade motor fuel, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-12. Repealed.

**History:** 1953 Comp., § 65-6-11.1, enacted by Laws 1977, ch. 71, § 3; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-12 NMSA 1978, as enacted by Laws 1977, ch. 71, § 3, relating to standards for lubricating oils, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-13. Repealed.

**History:** 1953 Comp., § 65-6-11.2, enacted by Laws 1977, ch. 71, § 4; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-13 NMSA 1978, as enacted by Laws 1977, ch. 71, § 4, relating to labeling, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-14. Repealed.

**History:** Laws 1937, ch. 102, § 12; 1941 Comp., § 69-512; 1953 Comp., § 65-6-19; Laws 1959, ch. 302, § 11; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-14 NMSA 1978, as enacted by Laws 1937, ch. 102, § 12, relating to testing standards, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-15. Repealed.

**History:** Laws 1937, ch. 102, § 13; 1941 Comp., § 69-513; 1953 Comp., § 65-6-20; Laws 1959, ch. 302, § 12; 1973, ch. 117, § 4; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-15 NMSA 1978, as enacted by Laws 1937, ch. 102, § 13, relating to checking stations; inspection of tank trucks, marking, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-16. Repealed.

**History:** Laws 1937, ch. 102, § 14; 1941 Comp., § 69-514; 1953 Comp., § 65-6-21; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-16 NMSA 1978, as enacted by Laws 1937, ch. 102, § 14, relating to scales, measures and measuring devices; standards, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-17. Repealed.

**History:** Laws 1937, ch. 102, § 15; 1941 Comp., § 69-515; 1953 Comp., § 65-6-22; Laws 1973, ch. 117, § 5; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-17 NMSA 1978, as enacted by Laws 1937, ch. 102, § 15, relating to inspection of measuring and dispensing equipment, sealing faulty equipment, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-18. Repealed.

**History:** Laws 1937, ch. 102, § 17; 1941, ch. 160, § 1; 1941 Comp., § 69-516; 1953 Comp., § 65-6-23; Laws 1959, ch. 302, § 13; 1977, ch. 71, § 5; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-18 NMSA 1978, as enacted by Laws 1937, ch. 102, § 17, relating to penalties for violations of Petroleum Products Standards Act, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-19. Repealed.

**History:** 1953 Comp., § 65-6-24, enacted by Laws 1971, ch. 78, § 2; 1973, ch. 117, § 6; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-19 NMSA 1978, as enacted by Laws 1971, ch. 78, § 2, relating to short title of the Petroleum Products Standards Act, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-20. Repealed.

**History:** 1953 Comp., § 65-6-25, enacted by Laws 1973, ch. 117, § 7; 1977, ch. 71, § 6; 1979, ch. 171, § 1; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-20 NMSA 1978, as enacted by Laws 1973, ch. 117, § 7, relating to administration, inspection fees, regulations, stop-sale and stop-use authority, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-21. Repealed.

**History:** 1953 Comp., § 65-6-26, enacted by Laws 1973, ch. 117, § 8; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-21 NMSA 1978, as enacted by Laws 1973, ch. 117, § 8, relating to transfer of records, materials and equipment, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-22. Repealed.

**History:** 1953 Comp., § 65-6-27, enacted by Laws 1973, ch. 117, § 9; repealed by Laws 1993, ch. 98, § 14.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-22 NMSA 1978, as enacted by Laws 1973, ch. 117, § 9, relating to enjoining a person not complying with the provisions of this act from continuing in business, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-23. [Oxygenated fuels]; prohibited acts.

No supplier of gasoline shall prohibit or prevent a wholesaler or retailer of gasoline from selling oxygenated fuels at a location owned by the wholesaler or retailer, provided that:

A. a wholesaler or retailer shall not represent any oxygenated fuel as the branded product of the supplier without the consent of the supplier and shall sell and represent such oxygenated fuels in a manner not inconsistent with reasonable and material terms and conditions in any contract with the supplier and in conformity with the provisions of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 et seq. However, no contractual term or condition shall be construed to prohibit or prevent the blending of oxygenates with gasoline by the wholesaler or retailer; and

B. any supplier who furnishes during any month fifty percent or more of its gasoline sold in New Mexico in such manner and form that any oxygenate can be added by the wholesaler or retailer is exempt from the requirements of this section during each such month.

**History:** 1978 Comp., § 57-19A-1, enacted by Laws 1987, ch. 91, § 1.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

**Compiler's notes.** — Laws 1988, ch. 15, § 2, effective February 25, 1988, repealed Laws 1987, ch. 91, § 3, which repealed this section effective July 1, 1989.

Although Laws 1987, ch. 91, § 1 codified this section in Article 19A, this section was recompiled in Article 19 as a more logical location.

## 57-19-24. Repealed.

**ANNOTATIONS**

**Repeals.** — Laws 1993, ch. 98, § 14 repealed 57-19-24 NMSA 1978, as enacted by Laws 1987, ch. 91, § 2, relating to injunctions, effective July 1, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

## 57-19-25. Short title.

This act [57-19-25 to 57-19-37 NMSA 1978] may be cited as the "Petroleum Products Standards Act".

**History:** Laws 1993, ch. 98, § 1.

## 57-19-26. Purpose.

It is the purpose of the Petroleum Products Standards Act to guarantee adequate quality and quantity standards for petroleum products through a strong and comprehensive program involving inspection, sampling, testing and enforcement measures.

**History:** Laws 1993, ch. 98, § 2.

## 57-19-27. Definitions.

As used in the Petroleum Products Standards Act:

A. "biodiesel" means a renewable, biodegradable, mono alkyl ester combustible liquid fuel that is derived from agricultural plant oils or animal fats and that meets American society for testing and materials specification for biodiesel fuel, B100, blend stock for distillate fuels;

B. "board" means the board of regents of New Mexico state university;

C. "dealer" means a dealer as defined by the Special Fuels Supplier Tax Act [Chapter 7, Article 16A NMSA 1978];

D. "department" means the New Mexico department of agriculture;

E. "diesel fuel" means any diesel-engine fuel used for the generation of power to propel a motor vehicle;

F. "director" means the director of the New Mexico department of agriculture;

G. "distributor" means a distributor as defined by the Gasoline Tax Act [Chapter 7, Article 13 NMSA 1978];

H. "lubricating oil" means any oil used to lubricate transmissions, gears or axles;

I. "motor fuel" means any liquid product used for the generation of power in an internal combustion engine, excluding liquified petroleum gases and aviation fuels;

J. "motor oil" means oil for use in lubricating internal combustion engines;

K. "person" means any natural person, firm, partnership, association or corporation;

L. "petroleum product" means motor fuel, kerosene, lubricating oil, motor oil, anti-freeze or brake fluid; and

M. "retailer" means any person who sells motor fuel and delivers the motor fuel into the supply tanks of motor vehicles.

**History:** Laws 1993, ch. 98, § 3; 2007, ch. 208, § 1.

**ANNOTATIONS**

**Cross references.** — For the department of agriculture, *see* 76-1-1 NMSA 1978.

**The 2007 amendment,** effective June 15, 2007, added Subsections A and E to provide definitions of "biodiesel" and "diesel fuel".

## 57-19-28. Duties of the board; authority of the director.

A. The board is responsible for the administration and enforcement of the provisions of the Petroleum Products Standards Act. The board shall adopt rules and regulations necessary to administer and enforce the provisions of that act. The board shall provide public notice and allow public comment on all proposed rules and regulations.

B. The director shall have the authority to:

(1) inspect, investigate, analyze and take appropriate actions to administer and enforce the provisions of the Petroleum Products Standards Act;

(2) enter any commercial premises from which petroleum products are offered for sale during normal business hours. If the premises are not open to the public, the director shall present the director's credentials and enter only with consent from the commercial entity. If no consent is given, the director shall obtain a search warrant;

(3) collect or cause to be collected samples of petroleum products offered for sale and cause such samples to be tested or analyzed to determine if they are in compliance with the provisions of the Petroleum Products Standards Act and regulations adopted pursuant to that act;

(4) issue and enforce stop-sale, hold and removal orders with respect to a petroleum product kept, offered or exposed for sale in violation of the provisions of the Petroleum Products Standards Act and regulations adopted pursuant to that act;

(5) require distributors and retailers to retain records pertaining to petroleum product purchases and sales for a period of not more than one year;

(6) maintain and operate a petroleum product testing laboratory to ensure that all petroleum products offered for sale in New Mexico meet standards prescribed in the Petroleum Products Standards Act and regulations adopted pursuant to that act;

(7) issue and enforce stop-use orders for measuring equipment or vehicle tanks that are used commercially and that do not conform to the provisions of the Petroleum Products Standards Act and regulations adopted pursuant to that act; and

(8) delegate to authorized representatives any of the responsibilities for the proper administration of the Petroleum Products Standards Act.

C. If in consultation with the secretary of energy, minerals and natural resources and pursuant to regular, periodic monitoring, the director determines that sufficient amounts of biodiesel are not available to meet the requirements of Section 57-19-29 NMSA 1978 or that the price of the biodiesel blend significantly exceeds the price of diesel fuel for at least two months, the director shall suspend those requirements for a period of up to six months.

**History:** Laws 1993, ch. 98, § 4; 2007, ch. 208, § 2.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, added Subsection C.

## 57-19-29. Quality standards.

A. Unless modified by regulation of the board, the quality standards, tests and methods of conducting analyses on petroleum products manufactured, kept, stored, sold or offered for sale in New Mexico shall be those last adopted and published by the American society for testing and materials or the society of automotive engineers and shall be used to determine compliance with the Petroleum Products Standards Act and regulations adopted pursuant to that act. In the absence of a petroleum product quality standard, test or method from the American society for testing and materials or the society of automotive engineers, the board may adopt a regulation that establishes a quality standard, test or method to conduct analyses on petroleum products.

B. After July 1, 2010 and before July 1, 2012, all diesel fuel sold to state agencies, political subdivisions of the state and public schools for use in motor vehicles on the streets and highways of this state shall contain five percent biodiesel, except that this standard may be temporarily suspended by the director in accordance with Section 57-19-28 NMSA 1978.

C. On or after July 1, 2012, all diesel fuel sold to consumers for use in motor vehicles on the streets and highways of this state shall contain five percent biodiesel, except that this standard may be temporarily suspended by the director in accordance with Section 57-19-28 NMSA 1978.

**History:** Laws 1993, ch. 98, § 5; 2007, ch. 208, § 3.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, added Subsections B and C.

## 57-19-30. Inspection of measuring devices.

A. The director shall inspect all equipment used commercially in measuring or dispensing petroleum products in the state. The director shall ascertain that all such equipment is correct and accurate. The specifications, tolerances and other requirements for equipment used commercially in measuring petroleum products shall be set by regulations adopted by the board.

B. No person shall refuse to permit the director or his authorized representative to inspect, test and seal as necessary any commercial device designed to measure and dispense petroleum products. No person shall break the seal without permission from the director or his authorized representative. A broken seal on a commercial device designed to measure or dispense petroleum products shall be prima facie evidence of a violation of the Petroleum Products Standards Act.

**History:** Laws 1993, ch. 98, § 6.

## 57-19-31. Inspection and certification of vehicle tanks used as measures.

A. The director shall establish calibration stations to inspect, measure and calibrate the capacity of a vehicle tank used as a measure to deliver petroleum products in New Mexico. The director shall determine where to locate the stations.

B. The owner or operator of a vehicle tank used as a measure to deliver petroleum products in the state shall notify the director before he uses the vehicle tank, and the director shall set a time to inspect and calibrate the vehicle tank at a calibration station. The director may accept calibration certificates from other agencies.

**History:** Laws 1993, ch. 98, § 7.

## 57-19-32. Labeling.

A. No person shall sell, offer for sale or permit the sale of any petroleum product unless there is firmly attached or painted on the container or dispenser from which the petroleum product is offered for sale a sign or label stating the grade or type of product being offered for sale. The sign or label shall be plainly, visibly and prominently displayed in a manner prescribed by regulation of the board.

B. The board may identify petroleum products of a special nature, composition or quality, and it may establish labeling requirements for such products.

C. A sign or label used in connection with automotive motor or lubricating oil shall include the society of automotive engineers viscosity grade classification number preceded by the letters "SAE".

**History:** Laws 1993, ch. 98, § 8; 1998, ch. 20, § 1.

**ANNOTATIONS**

**The 1998 amendment,** effective March 5, 1998, deleted "and the American petroleum institute service classification preceded by the words 'API service'" at the end of Subsection C.

## 57-19-33. Deceit; petroleum products; purchasers.

No person shall store, sell, offer or advertise for sale a petroleum product that may deceive, tends to deceive or has the effect of deceiving the purchaser of that product about the composition, grade, quantity or price of the product or that the product meets the standards prescribed by the Petroleum Products Standards Act and regulations adopted pursuant to that act.

**History:** Laws 1993, ch. 98, § 9.

## 57-19-34. Fees.

The board may authorize the director to establish and publish a schedule of fees to recover the cost of services performed by the director at the request of a person or firm.

**History:** Laws 1993, ch. 98, § 10.

## 57-19-35. Money collected.

All money collected pursuant to the provisions of the Petroleum Products Standards Act shall be deposited with the board of regents of New Mexico state university for use by the department in carrying out the provisions of that act.

**History:** Laws 1993, ch. 98, § 11.

## 57-19-36. Penalties; administrative procedures; appeals.

A. No person, by himself, by his servant or agent or as the servant or agent of another person shall:

(1) violate the provisions of the Petroleum Products Standards Act;

(2) violate any regulation adopted pursuant to the Petroleum Products Standards Act; or

(3) misrepresent a petroleum product as meeting the standards of the Petroleum Products Standards Act.

B. Any person who violates Subsection A of this section is guilty of a petty misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

C. The board shall establish a system of administrative penalties for violations of the Petroleum Products Standards Act. The administrative penalties may be assessed by the director in lieu of or in addition to other penalties provided by statute. In establishing the system of administrative penalties, the board, after public notice and public hearing, shall adopt rules that meet the following minimum requirements:

(1) the maximum amount of any administrative penalty shall not exceed one thousand dollars ($1,000) for any one violation of the Petroleum Products Standards Act by any person;

(2) violations for which administrative penalties may be assessed shall be clearly defined, along with a scale of administrative penalties relating the amount of the administrative penalty to the severity and frequency of the violation;

(3) provisions shall be included for due process, including proper notification of administrative proceedings, right to discovery of charges and evidence and appeal procedures; and

(4) prior to assessing administrative penalties pursuant to the provisions of the Petroleum Products Standards Act, the department shall comply with Paragraphs (2) and (3) of this subsection.

D. Appeals from decisions of the director regarding the assessment of an administrative penalty shall be to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

**History:** Laws 1993, ch. 98, § 12; 1998, ch. 55, § 51; 1999, ch. 265, § 54.

**ANNOTATIONS**

**Cross references.** — For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

**The 1999 amendment,** effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection D.

**The 1998 amendment,** effective September 1, 1998, in Subsection B, substituted "is" for "shall be"; in Subsection C, substituted "rules" for "regulations"; and rewrote Subsection D.

## 57-19-37. Injunction.

A. In order to ensure compliance with, and in order to enforce the provisions of, the Petroleum Products Standards Act the director may apply to a court of competent jurisdiction to have a person enjoined from engaging in a practice prohibited by that act.

B. Upon application to a court for the issuance of an injunction against a person who is not complying with the provisions of the Petroleum Products Standards Act, the court may issue an order to restrain the person temporarily from engaging in the prohibited practice. The court shall hear the matter and, upon a preponderance of the evidence that the person is not complying with the provisions of the Petroleum Products Standards Act, the court shall enjoin the person from engaging in the prohibited practice.

**History:** Laws 1993, ch. 98, § 13.

**ANNOTATIONS**

**Severability clauses.** — Laws 1993, ch. 98, § 15 provided for the severability of the act if any part or application thereof is held invalid.

## 57-19-38. Aversive or bittering agent in engine coolant and antifreeze; liability limitation; exceptions; penalty.

A. Engine coolant or antifreeze sold in this state after January 1, 2006 that is manufactured after July 1, 2005 and that contains more than ten percent ethylene glycol shall include denatonium benzoate at a minimum of thirty parts per million and a maximum of fifty parts per million as an aversive or bittering agent within the product so as to render it unpalatable. A manufacturer or packager of engine coolant or antifreeze subject to the provisions of this section shall maintain a record of the trade name, scientific name and active ingredients of an aversive or bittering agent used pursuant to this section. Information and documentation maintained pursuant to this section shall be furnished to a member of the public upon request.

B. The requirements of this section apply only to manufacturers, packagers, distributors, recyclers or sellers of engine coolant or antifreeze.

C. A manufacturer, packager, distributor, recycler or seller of engine coolant or antifreeze that is required to contain an aversive or bittering agent pursuant to this section is not liable to any person for personal injury, death, property damage, damage to the environment or natural resources or economic loss that results from the inclusion of denatonium benzoate in engine coolant or antifreeze.

D. The limitation on liability provided in Subsection B of this section is only applicable if denatonium benzoate is included in engine coolant or antifreeze in the concentrations mandated by this section. The limitation on liability provided in Subsection B of this section does not apply to a particular liability to the extent that the cause of that liability is unrelated to the inclusion of denatonium benzoate in engine coolant or antifreeze.

E. No political subdivision of this state shall have authority to establish or continue in effect a prohibition, limitation, standard or other requirement relating to the inclusion of an aversive or bittering agent in engine coolant or antifreeze, with respect to retail containers containing less than fifty-five gallons of engine coolant or antifreeze, which is different from, or in addition to, the provisions of this section.

F. The provisions of this section do not apply to the sale of a motor vehicle that contains engine coolant or antifreeze.

G. The New Mexico department of agriculture has the authority to inspect, investigate, analyze and take appropriate actions to administer and enforce the provisions of this section.

H. A person who violates the provisions of this section is guilty of a petty misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

**History:** Laws 2005, ch. 62, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2005, ch. 62 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

# ARTICLE 19A
# Petroleum Products Fair Trade Practices

## 57-19A-1. Short title.

Sections 1 through 9 [57-19A-1 to 57-19A-9 NMSA 1978] of this act may be cited as the "Petroleum Products Fair Trade Practices Act".

**History:** Laws 1991, ch. 243, § 1.

## 57-19A-2. Definitions.

As used in the Petroleum Products Fair Trade Practices Act:

A. "person" includes natural persons, corporations, trusts, partnerships, associations, cooperative associations, clubs, companies, firms, joint ventures or syndicates; and

B. "petroleum product" includes liquid fuels, lubricating oils, greases and similar products.

**History:** Laws 1991, ch. 243, § 2.

## 57-19A-3. Imitation of design, symbol or trademark.

No person shall knowingly disguise or camouflage his equipment by imitating the design, symbol or trade name under which recognized brands of petroleum products are generally marketed, and no person shall deceive any purchaser of the kind, quality or brand of petroleum products sold or offered for sale.

**History:** Laws 1991, ch. 243, § 3.

## 57-19A-4. Pumps and containers for storage or sale; improper marking.

No person shall knowingly possess or use a pump, tank, container or other device or equipment to store, keep, expose for sale, offer for sale or sell any petroleum product other than that manufactured, sold or distributed by the person whose name, trademark or trade name is affixed to the pump, tank, container or other device or equipment.

**History:** Laws 1991, ch. 243, § 4.

## 57-19A-5. Adulteration or blending of products sold under different names.

No person shall knowingly expose or offer for sale or sell a petroleum product of a manufacturer or distributor that has been mixed, blended or compounded with the products of other manufacturers or distributors under the trade name, trademark or name or other distinguishing mark of either of the manufacturers or distributors or as the unadulterated product of a manufacturer or distributor. Nothing in this section shall prevent the lawful owner from applying his own trademark, trade name or symbol to any product or material.

**History:** Laws 1991, ch. 243, § 5.

## 57-19A-6. Adulteration of [or] blending of products sold under same name.

No person shall knowingly expose for sale, offer for sale or sell any petroleum product as a[n] unadulterated product of a manufacturer or distributor or as the unadulterated product of any other manufacturer or distributor if it has been mixed, blended, compounded or adulterated with a petroleum product of the same manufacturer or distributor that is of a different quality or character from the quality or character of the other petroleum products. Nothing in this section shall prevent the lawful owner of a petroleum product from applying his own trademark, trade name or symbol to any product or material.

**History:** Laws 1991, ch. 243, § 6.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

## 57-19A-7. Mislabeling.

No person shall knowingly aid or assist any other person in depositing or delivering into any tank, pump, receptacle or other container or distributing device any petroleum product other than the petroleum product that is intended to be stored in the tank, pump, receptacle or other container or distributing device as indicated by the name of the

manufacturer or distributor or by the trademark, trade name or other distinguishing mark of the product displayed on the tank, pump, receptacle or other container or distributing device.

**History:** Laws 1991, ch. 243, § 7.

## 57-19A-8. Private remedies.

A. A person damaged by a violation of the provisions of the Petroleum Products Fair Trade Practices Act may be granted an injunction under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits or intent to deceive or take unfair advantage of any person is not required.

B. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

**History:** Laws 1991, ch. 243, § 8.

## 57-19A-9. Construction.

The Petroleum Products Fair Trade Practices Act neither enlarges nor diminishes the rights of parties in private litigation.

**History:** Laws 1991, ch. 243, § 9.

# ARTICLE 20
# Beverage Containers

## 57-20-1. Short title.

This act [57-20-1 to 57-20-3 NMSA 1978] may be cited as the "Beverage Container Act".

**History:** Laws 1981, ch. 289, § 1.

## 57-20-2. Definitions.

As used in the Beverage Container Act:

A. "beverage" means beer or other malt beverages, fruit juice, vegetable juice and mineral waters, soda water and similar carbonated soft drinks, in liquid form and intended for human consumption; and

B. "beverage container" means the individual, separate, metal can containing a beverage.

**History:** Laws 1981, ch. 289, § 2.

## 57-20-3. Metal beverage containers; pull tabs; penalty.

A. On and after January 1, 1983, it is unlawful for any person to sell or offer for sale at retail within New Mexico any metal beverage container designed and constructed with a metal opening device that detaches from the container when the container is opened in a manner normally used to empty the contents of the container.

B. Any person violating the provisions of Subsection A of this section is guilty of a misdemeanor and shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100) provided, however, that no penalty shall be imposed on a retailer who sells or offers to sell any beverage container acquired by the retailer prior to January 1, 1983.

**History:** Laws 1981, ch. 289, § 3.

# ARTICLE 21
# Advertisement of Health Care Services

## 57-21-1. Purpose of act.

The purpose of this act [57-21-1 to 57-21-3 NMSA 1978] is to protect the health and welfare of the people of New Mexico.

**History:** Laws 1983, ch. 79, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers §§ 141 to 143.

70 C.J.S. Physicians, Surgeons, and Other Health-Care Providers §§ 55, 56.

## 57-21-2. Definition.

As used in this act [57-21-1 to 57-21-3 NMSA 1978], "health care practitioner" means anyone licensed or certified to provide health care services in this state and includes but is not limited to nurses, physicians, dentists, osteopaths, chiropractors, optometrists, podiatrists, acupuncturists, psychiatrists, psychologists and physical therapists; provided that "health care practitioner" shall not include anyone licensed to provide health care services in this state who employs ten or more physicians.

**History:** Laws 1983, ch. 79, § 2.

## 57-21-3. Advertising requirements; penalty.

A. Any health care practitioner advertising services to the public shall state in the advertisement his name, address or telephone number and the designation of the profession in which he is licensed or certified to practice.

B. Anyone violating the provisions of Subsection A of this section is guilty of a misdemeanor.

**History:** Laws 1983, ch. 79, § 3.

# ARTICLE 22
# Charitable Solicitations

## 57-22-1. Short title.

Chapter 57, Article 22 NMSA 1978 may be cited as the "Charitable Solicitations Act".

**History:** Laws 1983, ch. 140, § 1; 1999, ch. 124, § 1.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, substituted "Chapter 57, Article 22 NMSA 1978" for "This act", and deleted "Organizations and" preceding "Solicitations Act".

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 60 Am. Jur. 2d Peddlers, Solicitors, and Transient Dealers §§ 21, 23, 26 et seq.

Validity, as for a charitable purpose, of trust for publication or distribution of particular books or writings, 34 A.L.R.4th 419.

Lack of consideration as barring enforcement of promise to make charitable contribution or subscription - modern cases, 86 A.L.R.4th 241.

## 57-22-2. Purpose.

The purpose of the Charitable Solicitations Act is to authorize the attorney general to monitor, supervise and enforce the charitable purposes of charitable organizations and regulate professional fundraisers operating in this state.

**History:** Laws 1983, ch. 140, § 2; 1999, ch. 124, § 2.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, deleted the introductory language which read "Whereas charitable organizations which have been granted tax exempt status are required to serve the public interest", deleted "Organizations and" preceding "Solicitations Act", deleted "those" following "purposes of", and inserted "and regulate professional fundraisers".

**Role of attorney general.** — The attorney general is not limited to regulating professional fund raisers; it is also authorized to monitor, supervise, and enforce charitable purposes of charitable organizations. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

**The Coulston foundation is subject to Charitable Solicitations Act.** *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

**Federal law does not preempt operation of Act** against the foundation. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

Where the foundation does not point to any language in any federal statute expressly displacing the Charitable Solicitations Act, and the foundation has failed to demonstrate Congress' intent to preempt the field covered by the act, the foundation's argument that the act does not apply to it is rejected and the district court had subject matter jurisdiction to enforce the civil investigative demands. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

## 57-22-3. Definitions.

As used in the Charitable Solicitations Act:

A. "charitable organization" means any entity that has been granted exemption from the federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or identifies itself to the public as having a charitable purpose;

B. "charitable purpose" means a benevolent, social welfare, scientific, educational, environmental, philanthropic, humane, patriotic, public health, civic or other eleemosynary objective or an activity conducted in support of or in the name of law enforcement officers, firefighters or other persons who protect public safety;

C. "contribution" means the promise, grant or pledge of any money, credit or property of any kind or value provided to a charitable organization in response to a solicitation, but does not include program service revenue or bona fide membership fees, dues or assessments; provided that bona fide membership fees, dues or assessments do not include contributions made in exchange for membership in a charitable organization unless membership confers rights and benefits in addition to receiving literature of the charitable organization;

D. "educational institution" means:

(1) an entity organized and operated primarily as a school, college or other instructional institution with a defined curriculum, student body and faculty, conducting classes on a regular basis; and

(2) auxiliary entities, including parent-teacher organizations, booster and support clubs that support, encourage or promote a school, college or other instructional institution and its defined curriculum, student body, faculty, facilities or activities;

E. "professional fundraiser" means a person that solicits or employs or directs others to solicit contributions from the public on behalf of a charitable organization in exchange for compensation and has custody or control of the contributions; provided that "professional fundraiser" does not include a director, officer, bona fide employee or salaried officer, volunteer, attorney, accountant or investment counselor of a charitable organization;

F. "professional fundraising counsel" means a person that provides services or employs or directs others to provide services for compensation to a charitable organization in the solicitation of contributions, including managing or preparing materials to be used in conjunction with any solicitation; provided that the person does not:

(1) directly solicit contributions; or

(2) receive, have access to or control any contribution received in response to the solicitation; provided further that "professional fundraising counsel does not include a director, officer, bona fide employee or salaried officer, volunteer, attorney, accountant or investment counselor of a charitable organization;

G. "religious organization" means a church, organization or group organized for the purpose of divine worship or religious teaching or other specific religious activity or any other organization that is formed in association with or to primarily encourage, support or promote the work, worship, fellowship or teaching of the church, organization or group; and

H. "solicit" or "solicitation" means any communication requesting a contribution or offering an opportunity to participate in a game of chance, raffle or similar event with the representation that the contribution or participation will support a charitable purpose, and includes:

(1) any verbal request made in person or by telephone, radio, television, electronic communication or other media;

(2) any written or published request mailed, sent, delivered, circulated, distributed, posted in a public place, advertised or communicated through any medium to the public;

(3) any sale or attempt to sell a good or service; and

(4) any invitation to attend an assembly, event, exhibition, performance or social gathering of any kind.

A contribution is not required for a solicitation to have occurred, and "solicit" or "solicitation" does not include direct grants or allocation of funds received or solicited from any affiliated fundraising organization by a member agency or unsolicited contributions received from any individual donor, foundation, trust, governmental agency or other source, unless such contributions are received in conjunction with a solicitation drive.

**History:** Laws 1983, ch. 140, § 3; 1999, ch. 124, § 3.

**ANNOTATIONS**

**Cross references.** — For the United States Internal Revenue Code, *see* 26 U.S.C. § 1 et seq. Section 501(c)(3) of the code, referred to in Subsection A(1), appears as 26 U.S.C. § 501(c)(3).

**The 1999 amendment,** effective July 1, 1999, rewrote Subsections A and B; inserted Subsection C; redesignated former Subsection C as Subsection D, and rewrote it; inserted Subsections E and F; redesignated former Subsection D as Subsection G, and rewrote it; and redesignated former Subsection E as Subsection H, and rewrote it.

## 57-22-4. Application of act.

A. The Charitable Solicitations Act shall not apply to a religious organization, even if it is a charitable organization.

B. Exempt from the registration and reporting requirements of the Charitable Solicitations Act are:

(1) educational institutions and organizations defined in Section 6-5A-1 NMSA 1978; and

(2) persons soliciting for an individual or group that has suffered a medical or other catastrophe and:

(a) the individual or group is identified by name at the time of the solicitation;

(b) the purpose for the solicited contribution is clearly stated; and

(c) the gross contributions collected, without any deductions for or by the solicitor or any other person, are deposited directly to an account in the name of the individual or group in a local federally insured financial institution established for that sole purpose and solely used for the direct benefit of the named individual or group as beneficiary.

C. The Charitable Solicitations Act shall apply to charitable organizations and professional fundraisers.

**History:** Laws 1983, ch. 140, § 4; 1999, ch. 124, § 4.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, rewrote this section to the extent that a detailed comparison is impracticable.

## 57-22-5. Attorney general to maintain register of charitable organizations as public record.

The attorney general shall establish and maintain a register of all documents filed by charitable organizations in accordance with the Charitable Solicitations Act. The register shall be open to public inspection except that the attorney general may withhold from public inspection documents or information obtained in the course of an investigation undertaken pursuant to the provisions of that act or that otherwise may be withheld from public inspection by law.

**History:** Laws 1983, ch. 140, § 5; 1999, ch. 124, § 5.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, in the first sentence, deleted "Organizations and" preceding "Solicitations Act" and, in the second sentence, substituted "that" for "which" preceding "otherwise may be withheld".

## 57-22-6. Filing of required documents.

A. A charitable organization existing, operating or soliciting in the state, unless exempted by Section 57-22-4 NMSA 1978, shall register with the attorney general on a form provided by the attorney general; correct any deficiencies in its registration upon notice of deficiencies provided by the attorney general; and provide a copy of its IRS Form 1023 or IRS Form 1024 application for exempt status with its registration.

B. The attorney general shall notify each charitable organization required to register within ten business days of receipt of the registration form of any deficiencies in the registration and may make rules in accordance with the State Rules Act [Chapter 14,

Article 4 NMSA 1978], as are necessary for the proper administration of this section, including:

(1) requirements for filing additional information, including disclosure of professional fundraising counsel retained by the charitable organization; and

(2) provisions for suspending the filing of reports or granting an exemption from the registration and reporting requirements of this section for a charitable organization subject to audit, registration, charter or other requirements of a statewide, regional or national association and if it is determined that such reports or registration is not necessary for the protection of the public interest.

C. In addition to any other reporting requirements pursuant to the Charitable Solicitations Act, every charitable organization that has received tax-exempt status pursuant to Section 501(c)(3) of the federal Internal Revenue Code of 1986, as amended, and that is required to file a Form 990, 990EZ or 990PF pursuant to the Internal Revenue Code of 1986, as amended, shall file that form and the accompanying schedule A annually with the office of the attorney general up to six months following the close of the charitable organization's fiscal year. Extensions of time for filing may be allowed at the discretion of the attorney general for good cause shown. Such forms shall be public records and available for public inspection. Organizations that do not file a Form 990, 990EZ or 990PF pursuant to the Internal Revenue Code of 1986, as amended, shall file an annual report, under oath, on the form provided by the attorney general for that purpose. A charitable organization with total expenses in excess of seven hundred fifty thousand dollars ($750,000) shall be audited by an independent certified public accountant. Audits shall be performed in accordance with generally accepted accounting principles. If the attorney general has reason to believe it is in the public interest, the attorney general may, prior to the institution of a civil proceeding, require a charitable organization to submit an audit in accordance with generally accepted accounting principles. A charitable organization shall correct any deficiencies in an annual report upon notice of deficiencies provided by the attorney general.

D. A charitable organization that fails to register before a solicitation is made or fails to timely file its tax filings with the attorney general pursuant to Subsection C of this section may be assessed a late filing fee of one hundred dollars ($100).

E. The attorney general may accept information filed by a charitable organization with another state or the federal government in lieu of the registration and reporting requirements of the Charitable Solicitations Act if such information is determined by the attorney general to be in substantial compliance with the registration and reporting requirements of that act."

**History:** Laws 1983, ch. 140, § 6; 1993, ch. 73, § 1; 1999, ch. 124, § 6; 2023, ch. 43, § 2.

## ANNOTATIONS

**Cross references.** — For Section 501(c)(3) of the federal Internal Revenue Code of 1986, *see* 26 U.S.C. § 501.

**The 2023 amendment,** effective January 1, 2024, raised the threshold from five hundred thousand dollars in total revenue to seven hundred fifty thousand dollars in total expenses for organizations that currently are required to provide an annual audit, and authorized the attorney general to require a charitable organization to submit an audit if the attorney general has reason to believe it is in the public interest; and in Subsection C, after "A charitable organization", deleted "that received total revenue" and added "with total expenses", after "in excess of", deleted "five hundred thousand dollars ($500,000)" and added "seven hundred fifty thousand dollars ($750,000)", and added "If the attorney general has reason to believe it is in the public interest, the attorney general may, prior to the institution of a civil proceeding, require a charitable organization to submit an audit in accordance with generally accepted accounting principles.".

**The 1999 amendment,** effective July 1, 1999, rewrote this section to the extent that a detailed comparison is impracticable.

**The 1993 amendment,** effective July 1, 1993, added Subsection E.

## 57-22-6.1. Professional fundraisers; registration.

A. Professional fundraisers shall, before entering into a contract with any charitable organization, except a religious organization, to solicit for or on its behalf:

(1) register with the attorney general on a form provided by the attorney general;

(2) file with the attorney general a surety bond pursuant to the Charitable Solicitations Act; and

(3) file with the attorney general a copy of the intended written contract between the professional fundraiser and the charitable organization on whose behalf the professional fundraiser intends to conduct a solicitation campaign.

B. The contract between the professional fundraiser and the charitable organization shall clearly describe the:

(1) compensation and authority of the professional fundraiser;

(2) solicitation campaign;

(3) location and telephone numbers from where solicitations are intended to be conducted;

(4) list of names and addresses of all employees, agents or other persons who are to solicit during the campaign; and

(5) copies of the solicitation literature, including scripts of any written or verbal solicitation.

C. The charitable organization on whose behalf the professional fundraiser is acting shall certify that the contract and solicitation materials filed with the attorney general are true and complete.

D. Within ten business days after receiving a registration pursuant to this section, the attorney general shall notify the professional fundraiser of any deficiencies in the registration, contract or bond; otherwise the filing is deemed approved as filed.

E. A professional fundraiser who fails to register with the attorney general may be assessed a late registration fee of five hundred dollars ($500).

**History:** Laws 1999, ch. 124, § 12.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 12 effective July 1, 1999.

## 57-22-6.2. Professional fundraisers; bond.

A professional fundraiser shall file a surety bond at the time of the registration with the attorney general in an amount and on a form provided by the attorney general. The professional fundraiser shall maintain the surety bond, or alternative financial assurances approved by the attorney general, as long as the professional fundraiser solicits in the state.

**History:** Laws 1999, ch. 124, § 13.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 13 effective July 1, 1999.

## 57-22-6.3. General provisions; charitable organizations; professional fundraisers; prohibited practices.

A charitable organization or a professional fundraiser shall not:

A. engage in deceptive fundraising practices, meaning any false or misleading verbal or written statement, description or representation of any kind

knowingly made in connection with a solicitation and that may, tends to or does deceive or mislead any person and includes:

(1) using the name or likeness of any person in solicitation literature without the express written consent of the person; provided that publication of previous contributors' names to acknowledge their contributions shall not require their express written consent;

(2) using a name, symbol or statement that is so closely related or similar to that used by another charitable organization or governmental agency that the use would tend to confuse or mislead the public; and

(3) misrepresenting, confusing or misleading any person to reasonably believe incorrectly that the contributions being solicited are or will be used for purposes, persons or programs in the state; or

B. collect or attempt to collect a contribution in person or by courier unless:

(1) the solicitation and collection or attempt to collect occur contemporaneously; or

(2) the solicitation includes the sale of goods or items and the collection or attempt to collect occurs contemporaneously with the delivery of the goods or items agreed to be purchased by the contributor.

**History:** Laws 1999, ch. 124, § 14.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 14 effective July 1, 1999.

## 57-22-6.4. Professional fundraiser; records and reports.

A. At least every six months, the professional fundraiser shall account in writing to the charitable organization for all contributions received and all expenses incurred under their contract. The charitable organization shall maintain a copy of the accounting of contributions and expenses for three years and make it available to the attorney general upon request.

B. All contributions of money received by the professional fundraiser shall be deposited in an account at a federally insured financial institution within two days after receipt. The account shall be established and maintained in the name of the charitable organization. Disbursements from the account shall be made upon warrants signed by an authorized representative of the charitable organization and may also be signed by the professional fundraiser.

C. The professional fundraiser shall include the following information in its accounting required by Subsection A of this section to the charitable organization:

(1) the name and address of each person contributing to the charitable organization and the date and amount of the contribution. This information shall not be publicly disclosed and shall be used only for law enforcement purposes;

(2) the name and residence address of each employee, agent or other person involved in the solicitation;

(3) the script or other instructional information provided by the charitable organization or professional fundraiser to employees, agents or other persons conducting solicitations;

(4) a record of expenses incurred by the professional fundraiser that the charitable organization paid; and

(5) the name and address of each financial institution and the account number of each account in which the professional fundraiser deposited contributions received from the solicitation.

D. The professional fundraiser and the employees of the professional fundraiser shall disclose the following in solicitations:

(1) the name of the charitable organization; and

(2) the fact that the solicitation is made by or through a professional fundraiser.

E. Every professional fundraiser and charitable organization shall have either a registered agent in the state or shall file a consent to service of process with the attorney general. The consent to service shall be in the form prescribed by the attorney general and shall be irrevocable.

**History:** Laws 1999, ch. 124, § 15.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 15 effective July 1, 1999.

## 57-22-7. Restriction on use of fact of filing in solicitation.

No solicitation for charitable purposes shall use the fact or requirement of registration or of the filing of any report with the attorney general pursuant to the Charitable Solicitations Act with the intent to cause or in a manner tending to cause any

person to believe that the solicitation, the manner in which it is conducted, its purposes, any use to which the proceeds will be applied or the person or organization conducting it has been or will be in any way endorsed, sanctioned or approved by the attorney general or any governmental agency or office.

**History:** Laws 1983, ch. 140, § 7; 1999, ch. 124, § 7.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, deleted "of funds" following "No solicitation", deleted "Organizations and" preceding "Solicitations Act", and made two stylistic changes.

## 57-22-8. Disclosure of fundraising costs.

A. All charitable organizations subject to the Charitable Solicitations Act shall disclose upon request the percentage of the funds solicited that are spent on the costs of fundraising. For purposes of this section, costs of fundraising shall include all money directly expended on fundraising and that portion of all administrative expenses and salaries of the charitable organization attributable to fundraising activities.

B. Whenever a solicitation on behalf of a charitable organization subject to the Charitable Solicitations Act is undertaken by a professional fundraiser, the professional fundraiser shall disclose that fact to prospective contributors.

**History:** Laws 1983, ch. 140, § 8; 1999, ch. 124, § 8.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, deleted "Organizations and" preceding "Solicitations Act" in Subsections A and B; in Subsection B, deleted the final sentence, which read: "For purposes of this section, a professional fundraiser shall mean any individual, corporation, association or other enitity employed or retained or otherwise compensated by or on behalf of a charitable organization to solicit funds"; and made stylistic changes throughout the section.

## 57-22-9. Authority of the attorney general.

A. The attorney general may, on behalf of the state, examine and investigate any charitable organization subject to the Charitable Solicitations Act to ascertain the conditions of its affairs and to what extent, if at all, it fails to comply with the trusts that it has assumed or if it has departed from the purposes for which it was formed. In the case of failure or departure, the attorney general may institute, in the name of the state, a proceeding necessary to correct the noncompliance or departure by any remedy available under the common law.

B. The attorney general may, in the name of the state, seek injunctive relief, civil penalties, financial accounting or restitution from any person who has failed to comply with the registration, filing or disclosure provisions of the Charitable Solicitations Act or who has otherwise violated the provisions of that act.

C. The attorney general, in the name of the state, may initiate appropriate proceedings to seek compliance with the provisions of the Charitable Solicitations Act and with any rules promulgated by the attorney general pursuant to that act. The attorney general may promulgate rules for the proper administration of that act.

D. Nothing in this section shall be construed to preclude a person or group of persons from asserting a private cause of action against a charitable organization or professional fundraiser.

**History:** Laws 1983, ch. 140, § 9; 1999, ch. 124, § 9.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, rewrote Subsection B; in Subsection C, deleted "and regulations duly" preceding "promulgated", substituted "pursuant to that act" for thereunder", and added the final sentence; In Subsection D, deleted "they might have" following "cause of action", and added "or professional fundraiser"; and throughout the section, substituted "may" for "is authorized", deleted "Organizations and" following "Charitable", and made stylistic changes.

**Authority to investigate and enforce are separate.** — The attorney general's authority to investigate possible violations of the Charitable Solicitations Act, and in that capacity, to issue civil investigative demands and its authority to enforce the act are two separate powers and functions. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

## 57-22-9.1. Investigative demand; civil penalty.

A. Whenever the attorney general has reason to believe that any person may be in possession, custody or control of information or documentary material, including an original or copy of any book, record, report, memorandum, paper, communication, tabulation, chart, photograph, mechanical transcription or other tangible document or recording, that the attorney general believes to be relevant to the subject matter of an investigation of a probable violation of the Charitable Solicitations Act, the attorney general may, prior to the institution of a civil proceeding, execute in writing and cause to be served upon the person a civil investigative demand. The demand shall require the person to answer interrogatories or to produce documentary material and permit the inspection and copying of the material. The demand of the attorney general shall not be a matter of public record and shall not be published by him except by order of the court.

B. Each demand shall:

(1) state the general subject matter of the investigation;

(2) describe with reasonable certainty the information or documentary material to be provided;

(3) identify the time period within which the information or documentary material is to be provided, which in no case shall be less than ten days after the date of service of the demand; and

(4) state the date on which any documentary material shall be available for inspection and copying.

C. No demand shall:

(1) contain any requirement that would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the state;

(2) require the disclosure of any documentary material that would be privileged or that for any other reason would not be required by a subpoena duces tecum by a court of the state; or

(3) require the removal of any documentary material from the custody of the person upon which the demand is served except in accordance with the provisions of Subsection E of this section.

D. Service of the demand may be made by:

(1) delivering a duly executed copy of the demand to the person to be served or, if the person is not a natural person, to the registered or statutory agent for the person to be served;

(2) delivering a duly executed copy of the demand to the principal place of business in New Mexico of the person to be served; or

(3) mailing by registered mail or certified mail a duly executed copy of the demand addressed to the person to be served at his principal place of business in the state or, if the person has no place of business in the state, to his principal place of business.

E. Documentary material demanded pursuant to Subsection A of this section shall be produced for inspection and copying during normal business hours at the principal place of business of the person served or may be inspected and copied at such other times and places as may be agreed upon by the person served and the attorney general.

F. Documentary material and its contents produced pursuant to a demand or answers to interrogatories shall not be produced for inspection or copying by anyone other than an authorized employee of the attorney general. The district court in the county in which the person resides or has his principal place of business or is about to perform or is performing the practice that is alleged to be unlawful under the Charitable Solicitations Act may order documentary material, its contents or answers to interrogatories to be produced for inspection or copying by someone other than an authorized employee of the attorney general.

G. At any time before the return date of the demand, a petition to set aside the demand, modify the demand or extend the return date on the demand may be filed in the district court in the county in which the person resides or has his principal place of business or is about to perform or is performing the practice that is alleged to be unlawful under the Charitable Solicitations Act, and the court upon showing of good cause may set aside the demand, modify it or extend the return date on the demand.

H. If after service of the demand the person neglects or refuses to comply with the demand, the attorney general may invoke the aid of the court in the enforcement of the demand.

I. This section shall not be applicable to criminal prosecutions.

J. In an action brought pursuant to the Charitable Solicitations Act, if the court finds that a person has violated a provision of that act or rules promulgated pursuant to that act, the attorney general may recover, on behalf of the state, a maximum civil penalty of five thousand dollars ($5,000) per violation.

**History:** Laws 1999, ch. 124, § 16.

## ANNOTATIONS

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 16 effective July 1, 1999.

**Authority to investigate and enforce are separate.** — The attorney general's authority to investigate possible violations of the Charitable Solicitations Act, and in that capacity, to issue civil investigative demands and its authority to enforce the act are two separate powers and functions. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

**Civil investigative demands properly enforced.** — Where it is not disputed that the attorney general was conducting an investigation of The Coulston Foundation and it is also undisputed that the foundation admitted to processing the audited financial statements sought by the attorney general and that those statements are relevant to the attorney general's investigation into funds used in the chimpanzee endowment program, although the attorney general's affidavit lacks an ideal factual foundation, the attorney

general substantially complied and the civil investigative demands were properly enforced. *The Coulston Found. v. Madrid*, 2004-NMCA-060, 135 N.M.667, 92 P.3d 679.

## 57-22-9.2. Exchange of information with other states.

The attorney general may exchange information obtained by the civil investigative demand with comparable authorities of other states or the federal government regarding charitable organizations, professional fundraisers and professional fundraising counsel. Information acquired by exchange with other states or the federal government shall be exempt from inspection pursuant to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978]. Information shall not be exchanged with comparable authorities of other states or the federal government unless the information is similarly exempt from inspection pursuant to applicable laws of such other states or the federal government.

**History:** Laws 1999, ch. 124, § 17.

**ANNOTATIONS**

**Effective dates.** — Laws 1999, ch. 124, § 18 made Laws 1999, ch. 124, § 17 effective July 1, 1999.

## 57-22-10. Standard of care.

All officers, directors, managers, trustees, professional fundraisers, professional fundraising counsel or other persons having access to the money of a charitable organization intended for use for charitable purposes shall be held to the standard of care defined for fiduciary trustees under common law.

**History:** Laws 1983, ch. 140, § 10; 1999, ch. 124, § 10.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, inserted "professional fundraisers, professional fundraising counsel", and substituted "money" for "funds".

## 57-22-11. Exemptions from state and local taxation.

Every officer, agency, board or commission of this state, or political subdivision of this state receiving applications for exemption from taxation shall provide to the attorney general copies of all the applications, supporting documents and official responses.

**History:** Laws 1983, ch. 140, § 11; 1999, ch. 124, § 11.

**ANNOTATIONS**

**The 1999 amendment,** effective July 1, 1999, substituted "of this state" for "thereof" and substituted "the" for "such" preceding "applications".

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity, as for a charitable purpose, of trust for publication or distribution of particular books or writings, 34 A.L.R.4th 419.

# ARTICLE 23
# Franchise Termination

## 57-23-1. Short title.

This act [57-23-1 to 57-23-8 NMSA 1978] may be cited as the "Franchise Termination Act".

**History:** Laws 1985, ch. 229, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** 62B Am. Jur. 2d Private Franchise Contracts §§ 506 to 748.

## 57-23-2. Definitions.

As used in the Franchise Termination Act:

A. "current price" means an amount equal to the price listed in the supplier's printed price list in effect when the franchise is terminated, less applicable trade and cash discounts;

B. "dealer cost" means an amount equal to the sum of the original invoice price that the dealer paid for inventory and the cost to the dealer of its delivery from the supplier to the dealer, less applicable discounts;

C. "dealer" means a person in the business of the retail sale of farm tractors, farm implements or the attachments to or repair parts for farm tractors or farm implements;

D. "franchise" means a written or oral contract or agreement between a supplier and a dealer, that may be called a "dealership" or by any other name, by which the dealer is authorized to engage in the business of the retail sale of inventory according to the methods and procedures prescribed by the supplier;

E. "inventory" means new or unused farm tractors, farm implements, utility tractors, industrial tractors, attachments and repair parts that are provided by a supplier to a dealer under a franchise agreement and that were purchased within thirty-six months of

the termination of the franchise or were listed in the supplier's current sales manual at the time of termination; and

F. "supplier" means a manufacturer, wholesaler or distributor of farm tractors, farm implements, utility tractors or industrial tractors or the attachments to or repair parts for that equipment.

**History:** Laws 1985, ch. 229, § 2.

## 57-23-3. Termination of franchise; return of inventory.

A. If on termination of a franchise, the dealer delivers to the supplier the inventory that was purchased from the supplier and that is held by the dealer on the date of termination, the supplier shall pay to the dealer:

(1) the dealer cost of the new, unsold, undamaged and complete farm tractors, farm implements, utility tractors, industrial tractors and attachments returned by the dealer;

(2) an amount equal to ninety percent of the current price of new, undamaged repair parts returned by the dealer; and

(3) an amount equal to an additional five percent of the current price of new, undamaged repair parts returned by the dealer, unless the supplier performs the handling, packing and loading of the parts, in which case no additional amount is required under this paragraph.

B. The supplier may subtract from the sum due under Subsection A of this section the amount of debts owed by the dealer to the supplier. The supplier and dealer are each responsible for one-half of the cost of delivering the inventory to the supplier.

C. The supplier shall pay the amount due under this section before the sixty-first day after the day that the supplier receives inventory from the dealer and after the dealer has furnished proof that the inventory was purchased from the supplier.

D. On payment of the amount due under this section, title to the inventory is transferred to the supplier.

**History:** Laws 1985, ch. 229, § 3.

## 57-23-4. Exceptions.

A supplier is not required to repurchase:

A. inventory:

(1) that the dealer orders after the dealer receives notice of the termination of the franchise from the supplier; or

(2) for which the dealer cannot furnish evidence of clear title that is satisfactory to the supplier; or

B. a repair part that:

(1) has a limited storage life;

(2) is in a broken or damaged package;

(3) is usually sold as part of a set, if the part is separated from the set; or

(4) cannot be sold without reconditioning or repackaging.

**History:** Laws 1985, ch. 229, § 4.

## 57-23-5. Warranty claim.

If after the termination of a franchise, the dealer submits a warranty claim to the supplier for work performed prior to the effective date of the termination, the supplier shall accept or reject the claim not later than the forty-fifth day after the day that the supplier receives the claim. A claim not rejected before the deadline shall be deemed accepted. The supplier shall pay an accepted claim not later than the sixtieth day after the day that the supplier receives the claim.

**History:** Laws 1985, ch. 229, § 5.

## 57-23-6. Late payment.

If a supplier does not make the payment required by the Franchise Termination Act before the sixty-first day after the day that the supplier received the final shipment of the inventory from the dealer, the supplier shall be liable to the dealer for:

A. the greater of the dealer cost or current price of the inventory;

B. the expenses incurred by the dealer in returning the inventory to the supplier;

C. interest on the greater of the dealer cost or current price of the inventory, at the rate applicable to a judgment of a court of this state, for the period beginning on the sixty-first day after the day the supplier received the inventory;

D. reasonable attorney's fees; and

E. costs.

**History:** Laws 1985, ch. 229, § 6.

## 57-23-7. Security interest.

The Franchise Termination Act does not affect a supplier's security interest in inventory.

**History:** Laws 1985, ch. 229, § 7.

## 57-23-8. Application of bulk transfer law.

The provisions of the Uniform Commercial Code - Bulk Transfers [repealed] do not apply to a transaction between a supplier and dealer that is required by the Franchise Termination Act.

**History:** Laws 1985, ch. 229, § 8.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law.

Laws 1992, ch. 114, § 237C repealed the Uniform Commercial Code - Bulk Transfers, 55-6-101 to 55-6-110 NMSA 1978, as enacted by Laws 1961, ch. 96, §§ 6-101 to 6-110, effective July 1, 1992. For provisions of former sections, *see* the 1991 NMSA 1978 on *NMOneSource.com*.

# ARTICLE 24
# Food Products Delivery Guarantees

## 57-24-1. Short title.

This act [57-24-1 to 57-24-4 NMSA 1978] may be cited as the "Food Products Delivery Guarantee Act".

**History:** Laws 1991, ch. 116, § 1.

**ANNOTATIONS**

**Cross references.** — For Food Donors Liability Act, *see* ch. 41, art. 10 NMSA 1978.

## 57-24-2. Food products delivery guarantees; definition.

As used in the Food Products Delivery Guarantee Act, "food products delivery guarantee" means any statement guaranteeing or warranting the time of delivery of any food product or service.

**History:** Laws 1991, ch. 116, § 2.

## 57-24-3. Civil penalty.

Pursuant to a finding by any court that a person made a food products delivery guarantee that proximately resulted in injury or damage to another or another's property, the attorney general, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty not exceeding five thousand dollars ($5,000) for each occurrence of injury or damage.

**History:** Laws 1991, ch. 116, § 3.

## 57-24-4. Civil remedies.

Any person may bring a civil action for injuries or damages proximately caused by any food products delivery guarantee. Damages shall include nominal, compensatory or punitive damages. Costs and attorneys' fees shall be awarded by the court to a prevailing party. The relief provided in this section is in addition to remedies otherwise provided by law.

**History:** Laws 1991, ch. 116, § 4.

# ARTICLE 25
# Carnival Ride Insurance

## 57-25-1. Short title.

This act [57-25-1 to 57-25-6 NMSA 1978] may be cited as the "Carnival Ride Insurance Act".

**History:** Laws 1993, ch. 284, § 1.

**ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references. —** Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron, 54 A.L.R.5th 513.

## 57-25-2. Definitions.

As used in the Carnival Ride Insurance Act:

A. "carnival ride" means any mechanical device, aquatic device or combination of devices that carries or conveys passengers on, along, around, through or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, pleasure, thrills or excitement, including bungee jumping facilities and state fair rides, but does not include playground equipment, a single-passenger, coin-operated device secured by a stationary foundation or a small promotional event or operation consisting of fewer than six kiddie rides designed for children twelve years of age or younger, including merry-go-rounds;

B. "department" means the regulation and licensing department;

C. "inspection" means a physical examination of a carnival ride by an inspector of the regulation and licensing department prior to issuing a certificate of inspection, including reinspection;

D. "operator" means a person actually engaged in or directly controlling the operation of a carnival ride; and

E. "owner" means a person, including the state or any political subdivision of the state, who owns or leases a carnival ride.

**History:** Laws 1993, ch. 284, § 2; 1995, ch. 79, § 1.

**ANNOTATIONS**

**The 1995 amendment,** effective June 16, 1995, in Subsection A, inserted "aquatic device or combination of devices", substituted "on, along, around, through" for "along, around", inserted "including bungee jumping facilities and state fair rides", substituted a comma for "or" following "equipment" and added the language at the end of the subsection beginning "or a small promotional event"; added Subsection C; and redesignated former Subsections C and D as Subsections D and E.

## 57-25-3. Liability insurance required; certificate of inspection required; carnival ride insurance fund created.

A. No person shall operate a carnival ride without a policy of insurance in an amount not less than three million dollars ($3,000,000) against liability for injury to persons arising out of the operation of the carnival ride.

B. Either a copy of the policy furnished to the insured or a certificate stating that the insurance required by this section is in effect shall be filed with the department and a local government entity.

C. The policy shall contain a schedule listing by name and serial number each carnival ride insured by the policy. In the event of additions or deletions of carnival rides during the policy terms, such changes shall be shown on a change endorsement, a copy of which shall be submitted to the department and the local government entity.

D. In the event of policy cancellation by either the insured owner or operator or the insurance company, the insured shall furnish notice of the cancellation to the department and the local government entity not later than ten days prior to cancellation.

E. No person, owner or operator of a carnival ride shall operate any carnival ride without obtaining a certificate of inspection for each ride by an inspector of the department or its designee and filing the certificate of inspection with the local government. The owner or operator shall annually have each carnival ride inspected and annually file the certificate of inspection. The certificate of inspection shall state that the carnival ride operator or owner has had the rides independently inspected by a national amusement ride safety official class 1, 2 or 3 inspector within twelve months of the operation of the ride within the state and whether any deficiencies noted by the engineer have been corrected. In addition, the owner or operator of the ride shall inspect the ride each day the ride is operated before any member of the public is permitted to board the ride. The owner or operator shall keep a current log of such inspections which shall be available for review by local enforcement officials during operating hours.

F. The insured shall pay a fifty dollar ($50.00) per carnival ride per inspection filing fee with the department.

G. The "carnival ride insurance fund" is created in the state treasury. The fund shall consist of all filing fees received by the department pursuant to the Carnival Ride Insurance Act. Money in the carnival ride insurance fund is appropriated to the department for the purpose of carrying out the provisions of the Carnival Ride Insurance Act. The fund shall not be expended for any purpose other than carrying out the provisions of the Carnival Ride Insurance Act.

**History:** Laws 1993, ch. 284, § 3; 1995, ch. 79, § 2; 1996, ch. 60, § 1.

## ANNOTATIONS

**The 1996 amendment,** substituted "three million dollars ($3,000,000)" for "five million dollars ($5,000,000)" in Subsection A, rewrote the second sentence of Subsection E, substituted "national amusement ride safety official class 1, 2 or 3 inspector" in the third sentence of Subsection E, and added the fourth and fifth sentences in Subsection E. Laws 1996, ch. 60 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective May 15, 1996, 90 days after adjournment of the legislature.

**The 1995 amendment,** effective June 16, 1995, in the section heading, deleted "for liability" following "liability insurance"; in Subsection A, substituted "five million dollars

($5,000,000)" for "one million dollars ($1,000,000)"; in subsection D, substituted "the" for "such" preceding "cancellation"; rewrote Subsection E; and, in Subsection F, inserted "per carnival ride per inspection" preceding "filing fee".

**Punitive damages.** — Where defendants failed to comply with the terms of their contract with the New Mexico state fair and with the Carnival Ride Insurance Act, which required defendants to conduct daily inspections of the rides, because the purpose of such inspections is to prevent the type of harm that occurred, and because the responsibility to conduct such inspections was set forth in the contract and statute, defendants' conduct was sufficiently reprehensible to justify the award of punitive damages and was not excessive. *Atler v. Murphy Enters., Inc.*, 2005-NMCA-006, 136 N.M. 701, 104 P.3d 1092, cert. quashed, 2005-NMCERT-008, 138 N.M. 330, 119 P.3d 1267.

## 57-25-4. Penalty.

A. The department or its authorized representative may issue a written order for the temporary cessation of operation of a carnival ride if it has been determined that the owner or operator has not acquired a policy of insurance or has not maintained inspections of his carnival rides. The operation of the ride shall not resume until the requisite insurance is in effect, inspections have been made and the requisite certificates have been filed with the department and the local government entity.

B. The department may appear in its own name in the district court of Santa Fe county or any other county having jurisdiction to prevent violations or to enforce the provisions of the Carnival Ride Insurance Act, the orders, rules and regulations, codes and minimum standards made pursuant to this act by injunction, mandamus or any other proper legal proceeding without bond, including an order not to move the carnival ride.

C. The local law enforcement agency shall have the authority to enforce the provisions of the Carnival Ride Insurance Act. Any person who does not maintain liability insurance on a carnival ride, operates a carnival ride or authorizes the operation of a carnival ride that does not have insurance, does not annually have his carnival rides inspected or does not file the proper certificates as set forth in the Carnival Ride Insurance Act is guilty of a misdemeanor and upon conviction the court shall impose a fine of up to one thousand dollars ($1,000) a day for the operation of each ride.

**History:** Laws 1993, ch. 284, § 4.

## 57-25-5. Liability; limitations.

No provision of the Carnival Ride Insurance Act shall be construed to place any liability on the state or on the department with respect to any claim by any person, firm or corporation relating to a carnival ride or to any injury or damages arising from a carnival ride.

**History:** Laws 1993, ch. 284, § 5.

## 57-25-6. Exemptions.

The provisions of the Carnival Ride Insurance Act shall not apply to nonprofit organizations that own and operate a carnival ride ten days or less each year.

**History:** Laws 1993, ch. 284, § 6.

# ARTICLE 26
# Rental-Purchase Agreements

## 57-26-1. Short title.

Sections 1 through 12 [57-26-1 to 57-26-12 NMSA 1978] of this act may be cited as the "Rental-Purchase Agreement Act".

**History:** Laws 1995, ch. 38, § 1.

## 57-26-2. Definitions.

As used in the Rental-Purchase Agreement Act:

A. "advertisement" means a commercial message in any medium that solicits a consumer to enter a rental-purchase agreement;

B. "cash sale price" means the price stated in a rental-purchase agreement for which the lessor would have sold and the consumer would have bought the goods that are the subject matter of a rental-purchase agreement if the transaction had been a sale for cash and may include any taxes and charges for delivery, installation, servicing, repairs, alterations or improvements;

C. "consumer" means an individual who rents goods under a rental-purchase agreement to be used primarily for personal, family or household purposes;

D. "consummation" means the date on which a consumer enters a rental-purchase agreement;

E. "goods" means personal property of which a consumer acquires use under a rental-purchase agreement;

F. "lessor" means a person who regularly provides the use of goods under rental-purchase agreements and to whom rental payments are initially payable on the face of the rental-purchase agreement; and

G. "rental-purchase agreement" means an agreement for the use of goods by an individual for personal, family or household purposes, for an initial period of four months or less, that is automatically renewable with each payment after the initial period, that does not obligate or require the consumer to continue renting or using the goods beyond the initial period and that permits the consumer to become the owner of the goods.

**History:** Laws 1995, ch. 38, § 2.

## 57-26-3. Exempted transactions; relationship to other laws.

A. The Rental-Purchase Agreement Act does not apply to the following:

(1) rental-purchase agreements made primarily for business, commercial or agricultural purposes;

(2) a lease of a safe deposit box;

(3) a lease or bailment of personal property that is incidental to the lease of real property and provides that the consumer has no option to purchase the leased property;

(4) a lease of a "motor vehicle", as defined in Subsection C of Section 56-1-1 NMSA 1978; or

(5) a lease of a "mobile home", as defined in Subsection D of Section 56-1-1 NMSA 1978.

B. Rental-purchase agreements are not governed by the provisions of:

(1) the Uniform Commercial Code [Chapter 55 NMSA 1978];

(2) Chapter 56, Articles 1 and 8 NMSA 1978; or

(3) Chapter 58, Article 15 NMSA 1978.

**History:** Laws 1995, ch. 38, § 3.

## 57-26-4. General requirements of rental-purchase agreements.

A. Each rental-purchase agreement shall be in writing, dated, signed by the consumer and lessor and completed as to all essential provisions.

B. The printed or typed portion of the rental-purchase agreement, other than instructions for completion, shall be in a size equal to at least eight-point type. The rental-purchase agreement shall be designated "rental-purchase agreement".

C. The lessor shall deliver to the consumer, or mail to him at his address shown on the rental-purchase agreement, a copy of the agreement as accepted by the consumer. Until the lessor does so, a consumer who has not received delivery of the rented goods shall have the right to rescind his rental-purchase agreement and receive a refund of all payments made. An acknowledgment by the consumer of delivery of a copy of the rental-purchase agreement shall be in a size equal to at least ten-point bold type and, if contained in the agreement, shall appear directly above the consumer's signature.

D. The rental-purchase agreement shall contain the names of the lessor and consumer, the lessor's business address and the residence or other address of the consumer as specified by the consumer.

E. The lessor shall disclose to the consumer the information required by Section 5 [57-26-5 NMSA 1978] of the Rental-Purchase Agreement Act on the face of the rental-purchase agreement above the line for the consumer's signature. The disclosures shall be made at or before consummation of the rental-purchase agreement. In a transaction involving more than one lessor, only one lessor need make the disclosures, but all lessors shall be bound by the disclosures. If a disclosure becomes inaccurate as a result of any act, occurrence or any agreement by the consumer after delivery of the required disclosures, the resulting inaccuracy is not a violation of the Rental-Purchase Agreement Act.

F. A lessor who provides an advertisement in any language other than English shall have rental-purchase agreements printed in each non-English language of the advertisement and shall make those rental-purchase agreements available to consumers.

**History:** Laws 1995, ch. 38, § 4.

## 57-26-5. Disclosures.

A. For each rental-purchase agreement, the lessor shall disclose in the agreement the following items, as applicable:

(1) whether the periodic payment is weekly, monthly or otherwise, the dollar amount of each payment and the total number and total dollar amount of all periodic payments necessary to acquire ownership of the goods;

(2) a statement that the consumer will not own the goods until the consumer has paid the total amount necessary to acquire ownership;

(3) a statement advising the consumer whether the consumer is liable for loss or damage to the goods and, if so, a statement that the liability will not exceed the fair market value of the goods as of the time they are lost or damaged;

(4) a brief description of the goods, sufficient to identify the goods to the consumer and the lessor, including an identification number, if applicable, and a statement indicating whether the goods are new or used. A statement that indicates new goods are used is not a violation of the Rental-Purchase Agreement Act;

(5) a statement of the cash sale price of the goods, but if one rental-purchase agreement involves a lease of two or more items as a set, a statement of the aggregate cash price of all items shall satisfy this requirement;

(6) the total of initial payments paid or required at or before consummation of the rental-purchase agreement or delivery of the goods, whichever is later;

(7) a statement that the total amount of payments does not include other charges or fees and a statement of all other charges or fees;

(8) a statement clearly summarizing the terms of the consumer's option to purchase, including a statement that the consumer has the right to exercise an early purchase option, and the price, formula or method for determining the early purchase price;

(9) a statement identifying the party responsible for maintaining or servicing the goods while they are being rented, together with a description of that responsibility and a statement that if any part of a manufacturer's express warranty covers the goods at the time the consumer acquires ownership of them, it shall be transferred to the consumer, if allowed by the terms of the warranty;

(10) a statement that the consumer may terminate the rental-purchase agreement without penalty by voluntarily surrendering or returning the goods in good repair, reasonable wear and tear excepted, along with any past due rental payments upon expiration of any rental period;

(11) notice of the right to reinstate a rental-purchase agreement, as provided in the Rental-Purchase Agreement Act; and

(12) the following notice printed or typed in a size equal to at least ten-point bold type:

"NOTICE TO THE CONSUMER

Do not sign this agreement before you read it or if it contains blank spaces. You are entitled to a copy of the agreement you sign."

B. With respect to matters governed by the federal Consumer Credit Protection Act, 15 U.S.C. Sections 1601 et seq., compliance with that act satisfies the requirements of this section.

**History:** Laws 1995, ch. 38, § 5.

## 57-26-6. Prohibited provisions.

A rental-purchase agreement shall not contain:

A. a confession of judgment;

B. a negotiable instrument;

C. a security interest or any other claim of a property interest in any property of the consumer;

D. a wage assignment;

E. a waiver by the consumer of claims or defenses;

F. a provision authorizing the lessor or a person acting on the lessor's behalf to enter upon the consumer's premises unlawfully or to commit any breach of the peace in the repossession of goods;

G. a provision requiring the purchase of insurance or a liability damage waiver from the lessor for goods that are the subject of the rental-purchase agreement;

H. a provision that mere failure to return goods constitutes probable cause for a criminal action;

I. a provision requiring the consumer to make a payment in addition to regular periodic payments in order to acquire ownership of the goods or a provision requiring the consumer to make periodic payments totaling more than the dollar amount necessary to acquire ownership as disclosed pursuant to Section 5 [57-26-5 NMSA 1978] of the Rental-Purchase Agreement Act;

J. a provision for more than one reinstatement fee on any one periodic payment, regardless of the period of time during which it remains unpaid; or

K. a provision for a late charge or any other type of charge or penalty for reinstating a rental-purchase agreement, other than a reinstatement fee; however, a lessor may use the term "late charge" or a similar term to refer to a reinstatement fee.

**History:** Laws 1995, ch. 38, § 6.

## 57-26-7. Reinstatement.

A. A consumer who fails to make a timely rental payment may reinstate the rental-purchase agreement without losing any rights or options that exist under the agreement

by the payment of the following charges within five days of the renewal date of an agreement with monthly periodic payments or within two days of the renewal date of an agreement requiring periodic payments more frequently than monthly:

(1) all past due rental charges;

(2) if the goods have been picked up, the reasonable costs of pickup and redelivery; and

(3) any applicable reinstatement fee.

B. If a consumer has paid less than two-thirds of the total of payments necessary to acquire ownership of the goods and has returned or voluntarily surrendered the goods within seven days of the renewal date, other than through judicial process, the consumer may reinstate the rental-purchase agreement during a period of not less than twenty-one days after the date of the return of the goods.

C. If a consumer has paid two-thirds or more of the total of payments necessary to acquire ownership of the goods and has returned or voluntarily surrendered the goods within seven days of the renewal date, other than through judicial process, the consumer may reinstate the rental-purchase agreement during a period of not less than thirty days after the date of the return of the goods.

D. Nothing in this section shall prevent a lessor from attempting to repossess property during the reinstatement period, but such a repossession shall not affect the consumer's right to reinstate. Upon reinstatement, the lessor shall provide the consumer with the same goods, if available, or with substitute goods of comparable quality and condition.

**History:** Laws 1995, ch. 38, § 7.

## 57-26-8. Receipts.

Upon request by the consumer, a lessor shall provide the consumer with a written receipt for each payment made.

**History:** Laws 1995, ch. 38, § 8.

## 57-26-9. Renegotiations and extensions.

A. A renegotiation occurs when any term of a rental-purchase agreement that is required to be disclosed by Section 5 [57-26-5 NMSA 1978] of the Rental-Purchase Agreement Act is changed by agreement between the lessor and consumer. A renegotiation creates a new rental-purchase agreement requiring the lessor to give all the disclosures required by Section 5 of the Rental-Purchase Agreement Act.

B. A renegotiation shall not include:

(1) reinstatement of a rental-purchase agreement in accordance with Section 7 [57-26-7 NMSA 1978] of the Rental-Purchase Agreement Act;

(2) a lessor's waiver or failure to assert any claim against the consumer;

(3) a deferral, extension or waiver of a portion of a periodic payment or of one or more periodic payments; or

(4) a change, made at the consumer's request, of the day of the week or month on which periodic payments are to be made.

**History:** Laws 1995, ch. 38, § 9.

## 57-26-10. Advertising.

A. An advertisement that refers to or states the dollar amount of a periodic payment and the right to acquire ownership of a specific item shall also clearly and conspicuously state:

(1) that the transaction advertised is a rental-purchase agreement;

(2) the total number and total amount of periodic payments necessary to acquire ownership of the item; and

(3) that the consumer acquires no ownership rights in the item unless the total amount necessary to acquire is paid.

B. Any owner or personnel of any medium in which an advertisement appears or through which it is disseminated shall not be liable for failure to comply with the provisions of this section.

C. The provisions of Subsection A of this section shall not apply to an advertisement that does not refer to or state the amount of any payment or that is published in the yellow pages of a telephone directory or in any similar directory of business.

D. Every item displayed or offered under a rental-purchase agreement shall bear a tag or card that clearly and conspicuously indicates in Arabic numerals each of the following:

(1) the cash price of the item;

(2) the amount of the periodic payment; and

(3) the total number and total amount of periodic payments necessary to acquire ownership.

E. An advertisement in any language other than English shall contain disclosures as required by this section in the non-English language.

**History:** Laws 1995, ch. 38, § 10.

## 57-26-11. Enforcement; remedies; limitations.

A. A lessor who fails to comply with the requirements of the Rental-Purchase Agreement Act is liable to the consumer damaged thereby in an amount equal to:

(1) the greater of the actual damages sustained by the consumer as a result of the lessor's failure to comply or twenty-five percent of the total of payments necessary to acquire ownership, but not less than one hundred dollars ($100) or more than one thousand dollars ($1,000); and

(2) the costs of the action and reasonable attorneys' fees as determined by the court.

B. A consumer may not take any action to offset the amount for which a lessor is potentially liable under Subsection A of this section against any amount owed by the consumer, unless the amount of the lessor's liability has been determined by judgment of a court of competent jurisdiction in an action in which the lessor was a party. This subsection does not bar a consumer then in default on an obligation from asserting a violation of the Rental-Purchase Agreement Act as an original action or as a defense or counterclaim to an action brought by a lessor against the consumer.

C. The remedies of a consumer, pursuant to the provisions of this section, are in addition to any other rights or remedies available to a consumer pursuant to applicable laws or regulations.

D. No action under this section may be brought in any court of competent jurisdiction more than one year after the date the consumer made his last rental payment or more than one year after the date of the occurrence of the violation that is the subject of the suit, whichever is later.

**History:** Laws 1995, ch. 38, § 11.

## 57-26-12. Lessor's defenses.

A. If a lessor establishes by a preponderance of evidence that a violation of the Rental-Purchase Agreement Act was unintentional or the result of a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid such errors, the lessor shall not be subject to the provisions of Section 11 [57-26-11 NMSA

1978] of the Rental-Purchase Agreement Act and the validity of the transaction is not affected. Examples of bona fide errors are clerical errors, calculation errors, errors due to unintentionally improper computer programming or data entry and printing errors, but do not include errors of legal judgment with respect to a lessor's obligations under the Rental-Purchase Agreement Act.

B. A lessor is not subject to the provisions of Section 11 of the Rental-Purchase Agreement Act if, within sixty days after discovering a failure to comply with a requirement of the Rental-Purchase Agreement Act and prior to the institution of an action for noncompliance and prior to the receipt of written notice of the noncompliance from the consumer, the lessor notifies the consumer of the noncompliance and makes whatever adjustments in the appropriate account are necessary to correct the noncompliance.

C. No provision of Section 11 of the Rental-Purchase Agreement Act applies to any action done or omitted in good faith in conformity with some provision of that act, notwithstanding that after the action or omission has occurred the provision is amended, rescinded or determined by judicial or other competent authority to be invalid for any reason.

**History:** Laws 1995, ch. 38, § 12.

# ARTICLE 27
# Assistive Device Lemon Law

## 57-27-1. Short title.

This act [57-27-1 to 57-27-5 NMSA 1978] may be cited as the "Assistive Device Lemon Law".

**History:** Laws 1998, ch. 29, § 1.

## 57-27-2. Definitions.

As used in the Assistive Device Lemon Law:

A. "assistive device" means manual wheelchairs, motorized wheelchairs, motorized scooters and motorized wheelchair lifts that allow access to motor vehicles; hearing aids, telephone communication devices for the deaf, assistive listening devices and other aids that enhance a person's ability to hear; and voice-synthesized or voice-activated computer software, optical scanners, augmentative communication devices and Braille printers; including a demonstrator, that a consumer purchases or accepts transfer of in New Mexico that is used for a major life activity;

B. "collateral costs" means expenses incurred by a consumer in connection with the repair of a nonconformity, including the cost of obtaining an alternative assistive device;

C. "consumer" means any of the following:

(1) the purchaser of an assistive device, if the assistive device was purchased from a dealer or manufacturer for purposes other than resale;

(2) a person to whom the assistive device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the assistive device;

(3) the person who can enforce the warranty; and

(4) a person who leases an assistive device from a lessor pursuant to a written lease;

D. "current value of the written lease" means the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination, plus the assistive device lessor's early termination costs and the value of the assistive device at the lease expiration date if the lease sets forth that value, less the assistive device lessor's early termination savings;

E. "dealer" means a person who purchases assistive devices for resale or lease to consumers;

F. "demonstrator" means an assistive device used primarily for the purpose of demonstration to the public;

G. "early termination cost" means an expense or obligation that an assistive device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive device to a manufacturer and includes a penalty for prepayment under a finance arrangement;

H. "early termination saving" means an expense or obligation that an assistive device lessor avoids as a result of both the termination of a written lease before the termination date set forth in the lease and the return of an assistive device to a manufacturer. Early termination saving includes an interest charge that the assistive device lessor would have paid to finance the assistive device or, if the lessor does not finance the assistive device, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination;

I. "manufacturer" means a person who manufactures or assembles assistive devices and agents of that person, including an importer, distributor, factory branch,

distributor branch and any warrantors of the manufacturer's assistive device, but does not include an assistive device dealer;

J. "nonconformity" or "nonconforming" means a condition or defect that substantially impairs the use, value or safety of an assistive device that was purchased or whose acceptance of transfer occurred in New Mexico and that is covered by an express warranty applicable to the assistive device or to a component of the assistive device, but does not include a condition or defect that is the result of abuse, neglect or unauthorized modification or alteration of the assistive device by a consumer; and

K. "reasonable attempt to repair" means, within the terms of an express warranty applicable to a new assistive device, that:

(1) a nonconformity within the warranty is subject to repair by the manufacturer, the manufacturer's authorized dealer or a lessor at least four times and a nonconformity continues; or

(2) the assistive device is out of service for an aggregate of at least thirty cumulative days because of warranty nonconformity.

**History:** Laws 1998, ch. 29, § 2.

## 57-27-3. Obligations and interests.

A. A manufacturer who sells an assistive device to a consumer, either directly or through a dealer, shall furnish the consumer with an express warranty for the assistive device. The duration of the express warranty shall be not less than one year after first delivery of the assistive device to the consumer. In the absence of a written warranty from the manufacturer, the manufacturer shall be deemed to have expressly warranted to the consumer of an assistive device that for a period of one year from the date of first delivery to the consumer, the assistive device will be free from any nonconformity.

B. If a new assistive device does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, dealer or lessor and makes the assistive device available for repair during the warranty period, the nonconformity shall be repaired at no charge to the consumer.

C. If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer, at the direction of the consumer, shall:

(1) accept return of the assistive device and replace it with a comparable new assistive device and refund any collateral costs within thirty days;

(2) accept return of the assistive device and refund to the consumer and to any holder of a perfected security interest in the consumer's assistive device, as their

interest may appear, the full purchase price plus any finance charge amount paid by the consumer at the point of sale and collateral costs; or

(3) if the consumer was a lessee, accept return of the assistive device, refund to the lessor and to any holder of a perfected security interest in the assistive device, as their interest may appear, the current value of the written lease and refund to the consumer the amount that the consumer paid pursuant to the written lease plus any collateral costs.

D. A reasonable allowance for use may be charged to the consumer based on the number of days that the consumer used the assistive device before the consumer first reported the nonconformity to the manufacturer, dealer or lessor.

E. To receive a comparable new assistive device or a refund due pursuant to Paragraph (1) or (2) of Subsection C of this section, a consumer shall offer to transfer possession of the nonconforming assistive device to the manufacturer. No later than thirty days after the offer, the manufacturer shall provide the consumer with a comparable new assistive device or a refund. When the manufacturer provides the new assistive device or refund, the consumer shall return the nonconforming assistive device to the manufacturer, along with any endorsements necessary to transfer legal possession to the manufacturer.

F. To receive a refund due pursuant to Paragraph (3) of Subsection C of this section, a lessor shall offer to transfer possession of the nonconforming assistive device to the manufacturer. No later than thirty days after the offer, the manufacturer shall provide the refund to the lessor and to any holder of a perfected security interest in the assistive device as his interest may appear. When the manufacturer provides the refund, the lessor shall provide to the manufacturer any endorsements necessary to transfer legal possession to the manufacturer.

G. No person shall enforce the lease against the consumer after the consumer receives a refund due pursuant to Paragraph (3) of Subsection C of this section.

H. No assistive device returned by a consumer or lessor in this or any other state because of a nonconformity shall be resold or re-leased in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee.

**History:** Laws 1998, ch. 29, § 3.

## 57-27-4. Attorney general rules; arbitration.

The attorney general may adopt and promulgate rules necessary to carry out the provisions of the Assistive Device Lemon Law, including rules concerning arbitration of disputes arising from nonconforming assistive devices and failures to comply with the Assistive Device Lemon Law.

**History:** Laws 1998, ch. 29, § 4.

## 57-27-5. Consumer rights; actions; treble damages.

A. This section shall not be construed to limit rights and remedies available to a consumer under any other law.

B. In addition to pursuing any other remedy, a consumer may bring an action to recover actual damages or the sum of one hundred dollars ($100), whichever is greater. Where the trier of fact finds that the party charged with a violation of the Assistive Device Lemon Law has willfully engaged in the violation, the court may award up to three times actual damages or three hundred dollars ($300), whichever is greater, to the party complaining of the violation.

C. The court shall award attorney fees and costs to the party complaining of a violation of the Assistive Device Lemon Law if he prevails. The court shall award attorney fees and costs to the party charged with a violation of the Assistive Device Lemon Law if it finds that the party complaining of the violation brought an action that was an action that is frivolous or brought in bad faith.

D. In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of a violation of the Assistive Device Lemon Law.

**History:** Laws 1998, ch. 29, § 5.

# ARTICLE 28
# Retainage

## 57-28-1. Short title.

Chapter 57, Article 28 NMSA 1978 may be cited as the "Prompt Payment Act".

**History:** Laws 2001, ch. 68, § 1; 2007, ch. 213, § 1.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed the title of the act from the "Retainage Act" to the "Prompt Payment Act" and the statutory reference to the act.

## 57-28-2. Definitions

As used in the Prompt Payment Act:

A. "construction" means building, altering, repairing, installing or demolishing in the ordinary course of business any:

(1) road, highway, bridge, parking area or related project;

(2) building, stadium or other structure;

(3) airport, subway or similar facility;

(4) park, trail, athletic field, golf course or similar facility;

(5) dam, reservoir, canal, ditch or similar facility;

(6) sewage or water treatment facility, power generating plant, pump station, natural gas compression station or similar facility;

(7) sewage, water, gas or other pipeline;

(8) transmission line;

(9) radio, television or other tower;

(10) water, oil or other storage tank;

(11) shaft, tunnel or other mining appurtenance;

(12) electrical wiring, plumbing or plumbing fixture, gas piping, gas appliances or water conditions;

(13) air conditioning conduit, heating or other similar mechanical work;

(14) leveling or clearing land;

(15) excavating earth;

(16) drilling wells of any type, including seismographic shot holes or core drilling; and

(17) similar work, structures or installations;

B. "contractor" means a person performing construction through a contract with an owner;

C. "owner" means a person, local public body or state agency other than the department of transportation;

D. "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture or similar legal entity; and

E. "subcontractor" means a person performing construction for the owner not through a contract with the owner.

**History:** Laws 2001, ch. 68, § 2; 2007, ch. 213, § 2.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed the title of the act and eliminates the definition of "retainage".

## 57-28-3. Applicability of act.

The provisions of the Prompt Payment Act do not apply to construction contracts for residential property containing four or fewer dwelling units.

**History:** Laws 2001, ch. 68, § 3; 2007, ch. 213, § 3.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed the title of the act.

## 57-28-4. Repealed.

**History:** Laws 2001, ch. 68, § 4; repealed by Laws 2007, ch. 213, § 6.

**ANNOTATIONS**

**Repeals.** — Laws 2007, ch. 213, § 6 repealed 57-28-4 NMSA 1978, as enacted by Laws 2001, ch. 68, § 4, relating to retainage in absence of escrow agreement, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 57-28-5. Payments; prompt pay required; withholding prohibited.

A. Except as provided in Subsection B of this section, all construction contracts shall provide that payment for amounts due shall be paid within twenty-one days after the owner receives an undisputed request for payment. Payment by the owner to the contractor may be made by first-class mailing, electronic funds transfer or by hand delivery of the undisputed amount of a pay request based on work completed or service provided under the contact. If the owner fails to pay the contractor within twenty-one days after receipt of an undisputed request for payment, the owner shall pay interest to the contractor beginning on the twenty-second day after payment was due, computed at

one and one-half percent of the undisputed amount per month or fraction of a month until the payment is issued. If an owner receives an improperly completed invoice, the owner shall notify the sender of the invoice within seven days of receipt in what way the invoice is improperly completed, and the owner has no further duty to pay on the improperly completed invoice until it is resubmitted as complete.

B. A local public body may make payment within forty-five days after submission of an undisputed request for payment when grant money is a source of funding, if:

(1) the construction contract specifically provides in a clear and conspicuous manner for a payment later than twenty-one days after submission of an undisputed request for payment; and

(2) the following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

"Notice of Extended Payment Provision

This contract allows the owner to make payment within _____ days after submission of an undisputed request for payment.".

C. All construction contracts shall provide that contractors and subcontractors make prompt payment to their subcontractors and suppliers for amounts owed for work performed on the construction project within seven days after receipt of payment from the owner, contractor or subcontractor. If the contractor or subcontractor fails to pay the contractor's or subcontractor's subcontractor and suppliers by first-class mail or hand delivery within seven days of receipt of payment, the contractor or subcontractor shall pay interest to the subcontractors and suppliers beginning on the eighth day after payment was due, computed at one and one-half percent of the undisputed amount per month or fraction of a month until payment is issued. These payment provisions apply to all tiers of contractors, subcontractors and suppliers.

D. A creditor shall not collect, enforce a security interest against, garnish or levy execution on those progress payments or other payments that are owed by an owner, contractor or subcontractor to a person, or the owner's contractor's or subcontractor's surety, who has furnished labor or material pursuant to a construction contract.

E. When making payments, an owner, contractor or subcontractor shall not retain, withhold, hold back or in any other manner not pay amounts owed for work performed.

**History:** Laws 2001, ch. 68, § 5; 2007, ch. 213, § 4.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, eliminated provisions concerning retainage and prohibited an owner, contractor or subcontractor from retaining amounts owed for work performed.

**Interest penalty.** — There is no provision in the Retainage Act (now the Prompt Payment Act) that provides a cut-off date, other than payment, for the running of interest penalty. *J.R. Hale Contracting Co., Inc. v. Union Pac. R.R.*, 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579.

**The Retainage Act** (now the Prompt Payment Act) does not require that a claim for penalty interest be raised only in a separate, distinct cause of action. *J.R. Hale Contracting Co., Inc. v. Union Pac. R.R.*, 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579.

The interest penalty can be imposed on a contractor. *J.R. Hale Contracting Co., Inc. v. Union Pac. R.R.*, 2008-NMCA-037, 143 N.M. 574, 179 P.3d 579.

**"Undisputed request for payment" construed.** — In a contractual dispute, where defendant terminated its contract with plaintiff, which called for plaintiff to perform various construction services, claiming that plaintiff materially breached the contract by failing to use contractually required construction materials and by failing to follow the manufacturer's recommended application process for the construction materials used, defendant's correspondence to plaintiff indicating dissatisfaction with the application process of the construction materials and requests for confirmation that plaintiff was applying the construction materials in accordance with the manufacturer's recommendations, was sufficient notice that a question, or dispute, existed with respect to plaintiff's entitlement to payment for the subsequently invoiced work, and such notice was sufficient to limit liability for statutory interest under the Prompt Payment Act. Raising a challenge or question as to an invoiced item limits a defendant's liability for statutory interest. *Unified Contractor, Inc. v. Albuquerque Housing Auth.*, 2017-NMCA-060.

**Plaintiff did not waive prompt payment interest in settlement agreement.** — Where the city of Las Cruces (city) entered into a $10,000,000 contract with plaintiff to perform site development and to construct a fire station and police substation, and where the contract required plaintiff to submit applications for payment and the city would make payments not later than twenty-one days after applications for payment were received, and where, in the event that the project's completion date was delayed, plaintiff would owe liquidated damages calculated at a daily rate, and where the city failed to make timely payments on twenty-three out of twenty-six of plaintiff's payment applications, causing significant delays in construction because plaintiff needed the funds from the city to pay subcontractors, and where the parties entered into a settlement agreement to resolve mutual dissatisfaction and to finalize the project, and where plaintiff filed a complaint, alleging a violation of the Prompt Payment Act (PPA), NMSA 1978, §§ 57-28-1 to 57-28-11, to recover statutory interest that had accrued on the city's late payments, and where the city claimed that plaintiff had waived recovery under the PPA

in the settlement agreement, the district court did not err in concluding that the settlement agreement did not contemplate or address the PPA interest based on evidence in the record that plaintiff repeatedly offered to waive interest under the PPA, but the city rejected those offers, explicitly declining to include the potential PPA claim as part of the settlement agreement and instead informed plaintiff that PPA interest was a claim that needed to be directed to the city's risk management department. *White Sands Constr. v. City of Las Cruces*, 2023-NMCA-056, cert. denied.

**"Month or fraction of a month" construed.** — Where the city of Las Cruces (city) entered into a $10,000,000 contract with plaintiff to perform site development and to construct a fire station and police substation, and where the contract required plaintiff to submit applications for payment and the city would make payments not later than twenty-one days after applications for payment were received, and where, in the event that the project's completion date was delayed, plaintiff would owe liquidated damages calculated at a daily rate, and where the city failed to make timely payments on twenty-three out of twenty-six of plaintiff's payment applications, causing significant delays in construction because plaintiff needed the funds from the city to pay subcontractors, and where the parties entered into a settlement agreement to resolve mutual dissatisfaction and to finalize the project, and where plaintiff filed a complaint, alleging a violation of the Prompt Payment Act (PPA), NMSA 1978, §§ 57-28-1 to 57-28-11, to recover statutory interest that had accrued on the city's late payments, and where the district court concluded that interest began to accrue twenty-two days after plaintiff submitted a payment application, that the city owed a full month of interest on the first day of each month that a payment was overdue, and that PPA interest stopped accruing three days before plaintiff received payments from the city, the district court improperly calculated when interest began to accrue, because the intent of the statute is that interest should accrue for the actual period of delinquency at a daily rate proportionate to the one-and-one-half percent statutory monthly rate. *White Sands Constr. v. City of Las Cruces*, 2023-NMCA-056, cert. denied.

**"Owner" construed.** — Where the city of Las Cruces (city) entered into a $10,000,000 contract with plaintiff to perform site development and to construct a fire station and police substation, and where the contract required plaintiff to submit applications for payment to the architect, who would review and issue certificates for payment, and the city would make payments not later than twenty-one days after applications for payment were received, and where, in the event that the project's completion date was delayed, plaintiff would owe liquidated damages calculated at a daily rate, and where the city failed to make timely payments on twenty-three out of twenty-six of plaintiff's payment applications, causing significant delays in construction because plaintiff needed the funds from the city to pay subcontractors, and where the parties entered into a settlement agreement to resolve mutual dissatisfaction and to finalize the project, and where plaintiff filed a complaint, alleging a violation of the Prompt Payment Act (PPA), NMSA 1978, §§ 57-28-1 to -11, to recover statutory interest that had accrued on the city's late payments, and where the district court concluded that interest began to accrue twenty-two days after plaintiff submitted a payment application, that the city owed a full month of interest on the first day of each month that a payment was

overdue, and that PPA interest stopped accruing three days before plaintiff received payments from the city, and where the city argued that the statutory time began to accrue not when the architect received the application for payment but when the city was in actual receipt of the application for payment because the PPA requires the "owner" to make payment within twenty-one days after the "owner" receives an undisputed request for payment, the district court did not err in its decision, because, in the present case, the architect was the party in interest who was the source of authority for payment. *White Sands Constr. v. City of Las Cruces*, 2023-NMCA-056, cert. denied.

**The district court did not abuse its discretion in determining the date of mailing.** — Where the city of Las Cruces (city) entered into a $10,000,000 contract with plaintiff to perform site development and to construct a fire station and police substation, and where the contract required plaintiff to submit applications for payment to the architect, who would review and issue certificates for payment, and the city would make payments not later than twenty-one days after applications for payment were received, and where, in the event that the project's completion date was delayed, plaintiff would owe liquidated damages calculated at a daily rate, and where the city failed to make timely payments on twenty-three out of twenty-six of plaintiff's payment applications, causing significant delays in construction because plaintiff needed the funds from the city to pay subcontractors, and where the parties entered into a settlement agreement to resolve mutual dissatisfaction and to finalize the project, and where plaintiff filed a complaint, alleging a violation of the Prompt Payment Act (PPA), NMSA 1978, §§ 57-28-1 to 57-28-11, to recover statutory interest that had accrued on the city's late payments, and where the district court concluded that interest began to accrue twenty-two days after plaintiff submitted a payment application, that the city owed a full month of interest on the first day of each month that a payment was overdue, and that PPA interest stopped accruing three days before plaintiff received payments from the city, and where the city argued that the district court erred in computing the date of mailing, the district court's determination that the payments were issued three calendar days before they were received was reasonable based on the testimony at trial that plaintiff received the payments from the city by mail, the absence of any evidence or argument from the city about when it actually mailed the checks, and the district court's familiarity with mail delivery in the area. *White Sands Constr. v. City of Las Cruces*, 2023-NMCA-056, cert. denied.

**Restitution for breaching party's part performance.** — If a non-breaching party justifiably refuses to perform a contract on the ground that the non-breaching party's remaining duties of performance have been discharged by the breaching party's breach, the breaching party is entitled to restitution for any benefit that the breaching party has conferred by way of part performance or reliance in excess of the loss that the breaching has caused by the breaching party's own breach. The contract price may be used as evidence of the value conferred on the non-breaching party. *Eker Bros., Inc. v. Rehders*, 2011-NMCA-092, 150 N.M. 542, 263 P.3d 319.

Where a subcontractor ceased all work on a project; the general contractor had to repair the subcontractor's defective work and or to perform work that was not actually

performed; based on the contract price of the work performed by the subcontractor, the court found that the value of the subcontractor's work to the date work stopped was $74,964.54 and that the general contractor was damaged in the amount of $42,448.39, the subcontractor was entitled to recover the difference between the benefit and the damages or $32,515.76. *Eker Bros., Inc. v. Rehders*, 2011-NMCA-092, 150 N.M. 542, 263 P.3d 319.

## 57-28-6. Repealed.

**History:** Laws 2001, ch. 68, § 6; repealed by Laws 2007, ch. 213, § 6.

**ANNOTATIONS**

**Repeals.** — Laws 2007, ch. 213, § 6 repealed 57-28-6 NMSA 1978, as enacted by Laws 2001, ch. 68, § 6, relating to escrow accounts, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 57-28-7. Care and protection of work.

All material and work covered by partial payments become the property of the owner, but the contractor and subcontractor are not relieved from the sole responsibility for the care and protection of materials and work for which payments have been made; provided, however, the contractor and subcontractor have no duty for the care and protection of materials and work after the owner has assumed occupancy or use of the work.

**History:** Laws 2001, ch. 68, § 7.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-28-8. Final payment.

Ten days after certification of completion, any amounts remaining due the contractor or subcontractor under the terms of the contract shall be paid upon the presentation of the following:

A. a properly executed release and duly certified voucher for payment;

B. a release, if required, of all claims and claims of lien against the owner arising under and by virtue of the contract other than such claims of the contractor, if any, as may be specifically excepted by the contractor or subcontractor from the operation of the release in stated amounts to be set forth in the release; and

C. proof of completion.

**History:** Laws 2001, ch. 68, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2001, ch. 68 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

## 57-28-9. Repealed.

**History:** Laws 2001, ch. 68, § 9; repealed by Laws 2007, ch. 213, § 6.

**ANNOTATIONS**

**Repeals.** — Laws 2007, ch. 213, § 6 repealed 57-28-9 NMSA 1978, as enacted by Laws 2001, ch. 68, § 9, relating to disputes, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 57-28-10. Repealed.

**History:** Laws 2001, ch. 68, § 10; repealed by Laws 2007, ch. 213, § 6.

**ANNOTATIONS**

**Repeals.** — Laws 2007, ch. 213, § 6 repealed 57-28-10 NMSA 1978, as enacted by Laws 2001, ch. 68, § 10, relating to failure to deposit or release retainage, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

## 57-28-11. Attorney fees.

In an action to enforce the provisions of the Prompt Payment Act, the court may award court costs and reasonable attorney fees.

**History:** Laws 2001, ch. 68, § 11; 2007, ch. 213, § 5.

**ANNOTATIONS**

**The 2007 amendment,** effective June 15, 2007, changed the title of the act.

# ARTICLE 28A
# Construction Contracts

# 57-28A-1. Construction contracts; provisions void.

A. A provision of a construction contract, agreement, understanding, specification or other documentation that is made part of a construction contract for an improvement to real property in New Mexico is void, unenforceable and against the public policy of the state if the provision:

(1) makes the construction contract subject to the laws of another state; or

(2) requires any litigation arising from the construction contract to be conducted in another state.

B. Any mediation, arbitration or other dispute resolution proceeding arising from or relating to a construction contract for work performed in this state shall be conducted in this state.

C. As used in this section, "construction contract" means a public, private, foreign or domestic contract or agreement relating to construction, alteration, repair or maintenance of any real property in New Mexico and includes agreements for architectural services, demolition, design services, development, engineering services, excavation or other improvement to real property, including buildings, shafts, wells and structures, whether on, above or under real property.

**History:** Laws 2011, ch. 28, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2011, ch. 28, § 3 made Laws 2011, ch. 28, § 1 effective July 1, 2011.

**Applicability.** — Laws 2011, ch. 28, § 2 provided that the provisions of Laws 2011, ch. 28, § 1 apply to contracts entered into on or after July 1, 2011.

**Statute inapplicable to franchise agreement.** — Where plaintiff, a hotel franchisee, brought an action against the franchisor, alleging that the franchisor fraudulently induced plaintiff into entering into a franchise agreement, and where the franchisor moved to transfer the action to another state pursuant to a forum selection clause in the franchise agreement, and where plaintiff argued that 57-28A-1 NMSA 1978 voided forum selection clauses in construction contracts, the court upheld the franchise agreement's forum selection clause, holding that this section prohibits forum selection clauses in construction contracts, but the franchise agreement in this case was not a construction contract. The franchise agreement, which gave plaintiff the license to use registered trademarks, trade names and service marks, was characterized as a license agreement and not a contractor agreement, and therefore this section did not void the forum selection clause in the franchise agreement. *Presidential Hospitality, LLC v. Wyndham Hotel Group, LLC*, 333 F. Supp.3d 1179 (D. N.M. 2018).

# ARTICLE 29
# Pharmacies

## 57-29-1. Pharmacy freedom of choice.

A contract, agreement or arrangement between a pharmacy and a wholesaler, distributor or pharmacy benefit manager for the provision of prescription drugs for resale shall not include a provision requiring the pharmacy to enter into any other contract, agreement or arrangement with the contracting wholesaler, distributor or pharmacy benefit manager to purchase prescription drugs on different terms.

**History:** Laws 2002, ch. 75, § 5 and Laws 2002, ch. 80, § 5.

**ANNOTATIONS**

**Cross references.** — For pharmacies and the sale of drugs, *see* 61-11-15 NMSA 1978.

**Compiler's notes.** — Laws 2002, ch. 75, § 5 and Laws 2002, ch. 80, § 5 enacted identical new sections of the law, effective May 15, 2002. The section was set out as enacted by Laws 2002, ch. 80, § 5. *See* 12-1-8 NMSA 1978.

# ARTICLE 30
# Sale of Recycled Metals

## 57-30-1. Short title.

Chapter 57, Article 30 NMSA 1978 may be cited as the "Sale of Recycled Metals Act".

**History:** Laws 2008, ch. 29, § 1; 2012, ch. 29, § 1; 2012, ch. 33, § 1.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, changed the statutory reference to the act and at the beginning of the sentence, deleted "This act" and added "Chapter 57, Article 30 NMSA 1978".

Laws 2012, ch. 29, § 1 and Laws 2012, ch. 33, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 3. *See* 12-1-8 NMSA 1978.

## 57-30-2. Definitions.

As used in the Sale of Recycled Metals Act:

A. "aluminum material" means a product made from aluminum, an aluminum alloy or an aluminum byproduct. "Aluminum material" includes an aluminum beer keg but does not include other types of aluminum cans used to contain a food or beverage;

B. "bronze material" means:

(1) a cemetery vase, receptacle or memorial made from bronze;

(2) bronze statuary; or

(3) material readily identifiable as bronze;

C. "business day" means any calendar day except Sunday and the following holidays: New Year's day; President's day; Memorial day; Independence day; Labor day; Indigenous Peoples' day; Armistice day and Veterans' day; Thanksgiving day; Christmas day; Martin Luther King, Jr.'s birthday; and any other legal public holiday of the state of New Mexico or the United States;

D. "copper or brass material" means:

(1) insulated or noninsulated copper wire, hardware or cable of the type used by a public utility, commercial mobile radio service carrier or common carrier that consists of at least twenty-five percent copper; or

(2) a copper or brass item of a type commonly used in construction or by a public utility, commercial mobile radio service carrier or common carrier;

E. "department" means the regulation and licensing department;

F. "lead material" means:

(1) a lead-acid battery; or

(2) material readily identifiable as being made of or containing lead;

G. "peace officer" means any full-time salaried and commissioned or certified law enforcement officer of a police or sheriff's department that is part of or administered by the state or a political subdivision of the state;

H. "personal identification document" means:

(1) a driver's license;

(2) a military identification card; or

(3) a passport issued by the United States or by another country and recognized by the United States;

I. "regulated material" means:

(1) aluminum material;

(2) bronze material;

(3) copper or brass material;

(4) steel material;

(5) lead material;

(6) a utility access cover;

(7) a water meter cover;

(8) a road or bridge guard rail;

(9) a highway or street sign;

(10) a traffic directional or control sign or signal; or

(11) a catalytic converter that is not part of an entire motor vehicle;

J. "secondhand metal dealer" means a scrap metal processor in the business of operating or maintaining a scrap metal yard in a physical location in which scrap metal or cast-off regulated material is purchased for shipment, sale or transfer;

K. "steel material" means a product made from an alloy of iron, chromium, nickel or manganese, including stainless steel beer kegs; and

L. "superintendent" means the superintendent of regulation and licensing.

**History:** Laws 2008, ch. 29, § 2; 2012, ch. 29, § 2; 2012, ch. 33, § 2; 2016, ch. 51, § 1; 2019, ch. 123, § 3.

## ANNOTATIONS

**The 2019 amendment,** effective July 1, 2019, in Subsection C, after "New Year's day", deleted "Washington's birthday" and added "President's day", after "Labor day", deleted "Columbus" and added "Indigenous Peoples'", and after the next occurrence of "day", added "Armistice day and".

**The 2016 amendment,** effective May 18, 2016, amended the Sale of Recycled Metals Act to include "lead material"; added a new Subsection F and redesignated the succeeding subsections accordingly; and in Subsection I, added new Paragraph (5) and redesignated the succeeding paragraphs accordingly.

**The 2012 amendment,** effective July 1, 2012, eliminated personal identification certificates as a personal identification document; expanded the types of materials that are regulated; simplified the definition of "secondhand metal dealer"; in Subsection C, after "Sunday and the following", deleted "business"; in Subsection G, deleted former Paragraph (4), which provided that personal identification certificates issued by the department or another state were personal identification documents; in Subsection H, added Paragraphs (5) through (10); and in Subsection I, after "means", deleted the paragraph designation of former Paragraph (1) and "an auto wrecker", after "scrap metal processor", deleted "or other person that purchases, collects or solicits regulated material; and" and deleted the paragraph designation of former Paragraph (2) and "a person who operates or maintains a scrap metal yard, or other place" and added "in the business of operating or maintaining a scrap metal yard in a physical location", and after "regulated metal is", deleted "collected or kept" and added "purchased".

## 57-30-2.1. Issuance of registration; period of registration.

The department is authorized to issue registrations to secondhand metal dealers that buy or sell regulated material. Original and renewed registrations shall be valid for a period of three years from the date of issuance, unless the registration is suspended or revoked.

**History:** Laws 2012, ch. 29, § 13 and Laws 2012, ch. 33, § 13.

**ANNOTATIONS**

**Effective dates.** — Laws 2012, ch. 33, § 17 made Laws 2012, ch. 33, § 13 effective July 1, 2012.

**Compiler's notes.** — Laws 2012, ch. 29, § 13 and Laws 2012, ch. 33, § 13 enacted identical new sections. The section was set out as enacted by Laws 2012, ch. 33, § 13. *See* 12-1-8 NMSA 1978.

## 57-30-2.2. Secondhand metal dealers; registration required; application; fee.

A. A secondhand metal dealer shall not buy or sell regulated material without a valid registration issued by the department.

B. An application for registration shall be completed, under penalty of perjury, on a form designed and provided by the department and shall include:

(1) the full name and business address of the applicant;

(2) a list of all locations at which the applicant engages or will engage in the business of buying or selling regulated material; and

(3) any other information the department may require by rule.

C. An application for registration or for renewal of a registration shall be accompanied by a nonrefundable application fee in an amount not to exceed twenty-five dollars ($25.00).

**History:** Laws 2012, ch. 29, § 14 and Laws 2012, ch. 33, § 14.

**ANNOTATIONS**

**Effective dates.** — Laws 2012, ch. 33, § 17 made Laws 2012, ch. 33, § 14 effective July 1, 2012.

**Compiler's notes.** — Laws 2012, ch. 29, § 14 and Laws 2012, ch. 33, § 14 enacted identical new sections. The section was set out as enacted by Laws 2012, ch. 33, § 14. *See* 12-1-8 NMSA 1978.

## 57-30-2.3. Duties of secondhand metal dealers.

A. A secondhand metal dealer shall:

(1) maintain a valid registration, issued by the department, and comply with the requirements of the Sale of Recycled Metals Act and rules promulgated pursuant to that act;

(2) comply with all federal requirements for scrap metal dealers, including maintaining storm water permits;

(3) register for the metal theft alert system, maintained by the institute of scrap recycling industries or its successor organization; and

(4) keep all employees who are involved in the purchasing or receiving of regulated material apprised of alerts received on theft of regulated material in the geographic area.

B. A secondhand metal dealer who becomes aware that the dealer is in possession of regulated material that was stolen or unlawfully obtained shall not remove the material from the dealer's premises and shall report the same to a local law enforcement agency within twenty-four hours.

**History:** Laws 2012, ch. 29, § 15 and Laws 2012, ch. 33, § 15.

**ANNOTATIONS**

**Effective dates.** — Laws 2012, ch. 33, § 17 made Laws 2012, ch. 33, § 15 effective July 1, 2012.

**Compiler's notes.** — Laws 2012, ch. 29, § 15 and Laws 2012, ch. 33, § 15 enacted identical new sections. The section was set out as enacted by Laws 2012, ch. 33, § 15. *See* 12-1-8 NMSA 1978.

## 57-30-2.4. Restricted transactions; additional documentation required; required record for catalytic converters.

A. A secondhand metal dealer shall not knowingly purchase or otherwise receive any of the following without written documentation indicating that the seller or offeror is the rightful owner or has permission from the rightful owner and that the material was otherwise lawfully obtained:

(1) infrastructure grade regulated material that has been burned to remove insulation, unless the seller can produce written proof that the regulated material was lawfully burned;

(2) regulated material where the manufacturer's make, model, serial or personal identification number or other identifying marks engraved or etched upon the material have been conspicuously removed or altered;

(3) regulated material marked with the name, initials or otherwise identified as the property of an electrical company, a telephone company, a cable company, a water company or other utility company, a railroad or a governmental entity;

(4) a utility access cover;

(5) a water meter cover;

(6) a road or bridge guard rail;

(7) a highway or street sign;

(8) a traffic directional or control sign or signal;

(9) a metal beer keg that is clearly marked as being the property of the beer manufacturer; or

(10) a catalytic converter that is not part of an entire motor vehicle.

B. The department shall promulgate rules that more specifically describe the type of documentation required before a secondhand metal dealer may engage in a transaction described in this section.

C. A secondhand metal dealer shall not purchase or otherwise receive any regulated material that the secondhand metal dealer knows is not lawfully possessed by the person offering to sell or provide the regulated material.

D. A secondhand metal dealer shall not knowingly purchase or otherwise receive a catalytic converter unless:

(1) the seller or offeror presents a personal identification document; and

(2) the secondhand metal dealer makes a record of the transaction, to be maintained for at least three years from the date of the transaction, that shall include:

(a) a photocopy or digital image of the seller's or offeror's personal identification document;

(b) the date and time of the transaction;

(c) the name, address, telephone number and signature of the seller or offeror;

(d) the license plate number and vehicle identification number of the vehicle used to transport the catalytic converter to the secondhand metal dealer, if applicable;

(e) a photocopy or digital image of the legal document or affidavit demonstrating ownership by the seller or offeror; and

(f) photographs of the catalytic converter.

**History:** Laws 2012, ch. 29, § 16; 2012, ch. 33, § 16; 2022, ch. 56, § 51; 2023, ch. 193, § 1.

## ANNOTATIONS

**The 2023 amendment,** effective June 16, 2023, required secondhand metal dealers to make a record of any transaction that involves the purchase or acquisition of a catalytic converter; in the section heading, added "required record for catalytic converters"; in Subsection A, in the introductory clause, after "shall not", added "knowingly", and after "purchase", added "or otherwise receive"; and added Subsection D.

**The 2022 amendment,** effective May 18, 2022, provided that a secondhand metal dealer shall not purchase or otherwise receive any regulated material that the

secondhand metal dealer knows is not lawfully possessed by the person offering to sell or provide the regulated material; and added Subsection C.

## 57-30-3. Notice to sellers.

A. A secondhand metal dealer shall at all times maintain in a prominent place in the dealer's place of business, in open view to a seller of regulated material, a notice in two-inch lettering that:

(1) includes the following language:

"A PERSON ATTEMPTING TO SELL REGULATED MATERIAL MUST PRESENT SUFFICIENT IDENTIFICATION AS REQUIRED BY STATE LAW.

WARNING: STATE LAW PROVIDES A CIVIL FINE FOR A PERSON WHO INTENTIONALLY PROVIDES A FALSE DOCUMENT OF IDENTIFICATION OR OTHER FALSE INFORMATION TO A SECONDHAND METAL DEALER WHILE ATTEMPTING TO SELL REGULATED MATERIAL."; and

(2) states the secondhand metal dealer's usual business hours.

B. The notice required by this section may be contained on a sign that contains another notice if the secondhand metal dealer is required to display another notice pursuant to applicable law.

**History:** Laws 2008, ch. 29, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2008, ch. 29, § 16 made the Sale of Recycled Metals Act effective January 1, 2009.

**Applicability.** — Laws 2008, ch. 29, § 15 provided that the provisions of the Sale of Recycled Metals Act shall not apply to a purchase of regulated material from a manufacturing, industrial or other commercial vendor that sells regulated material in the ordinary course of the vendor's business.

## 57-30-4. Information provided by seller.

A. A person attempting to sell regulated material to a secondhand metal dealer shall:

(1) display to the secondhand metal dealer the person's personal identification document;

(2) sign a written statement provided by the secondhand metal dealer that the person is the legal owner of or is lawfully entitled to sell the regulated material offered for sale;

(3) provide to the secondhand metal dealer the year, make, model and license plate number of the motor vehicle used to transport the regulated material; and

(4) allow the secondhand metal dealer to take a photograph of the seller and the regulated material.

B. The secondhand metal dealer or the dealer's agent shall visually verify the accuracy of the personal identification document and vehicle identification presented by the seller at the time of the dealer's purchase of regulated material.

**History:** Laws 2008, ch. 29, § 4; 2012, ch. 29, § 3; 2012, ch. 33, § 3.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, required the seller to permit the secondhand metal dealer to photograph the seller and the regulated material, and in Subsection A, added Paragraph (4).

Laws 2012, ch. 29, § 3 and Laws 2012, ch. 33, § 3 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 3. *See* 12-1-8 NMSA 1978.

## 57-30-5. Record of purchase.

A. A secondhand metal dealer in this state shall keep an accurate and legible written record, in a form approved by the department, of each purchase made in the course of the dealer's business of:

(1) copper or brass material;

(2) bronze material;

(3) lead material;

(4) aluminum material in excess of ten pounds; or

(5) steel material in excess of one ton, except that a written record shall be kept of each purchase of a stainless steel beer keg.

B. The record shall be in English and shall include:

(1) the place and date of the purchase;

(2) the name and address of each person from whom the regulated material is purchased or obtained;

(3) the identifying number of the personal identification document of each person from whom the regulated material is purchased or obtained;

(4) the year, make, model and license plate number of the motor vehicle used to transport the regulated material;

(5) a description made in accordance with the custom of the trade of the type and quantity of regulated material purchased;

(6) the statement required by Paragraph (2) of Subsection A of Section 57-30-4 NMSA 1978; and

(7) the written documentation required for certain transactions pursuant to Section 57-30-2.4 NMSA 1978, if applicable.

C. A secondhand metal dealer may take a digital photograph, with a date and time stamp, of:

(1) the seller of the regulated material; and

(2) the regulated material in the form in which it was purchased or obtained by the secondhand metal dealer.

**History:** Laws 2008, ch. 29, § 5; 2012, ch. 29, § 4; 2012, ch. 33, § 4; 2016, ch. 51, § 2.

**ANNOTATIONS**

**The 2016 amendment,** effective May 18, 2016, amended the Sale of Recycled Metals Act to include "lead material"; in Subsection A, added new Paragraph (3) and redesignated the succeeding paragraphs accordingly; and in Subsection B, Paragraph (7), after "Section", deleted "16 of this 2012 act" and added "57-30-2.4 NMSA 1978".

**The 2012 amendment,** effective July 1, 2012, required secondhand metal dealers to maintain written documentation indicating that the seller is the owner of or has permission from the owner to sell certain regulated material; authorized secondhand metal dealers to take photographs of sellers and the regulated material; in Subsection A, after "dealer's business", deleted "from a person"; in Subsection B, added Paragraph (7); and added Subsection C.

## 57-30-6. Preservation of records.

A secondhand metal dealer shall preserve each record required by Section 57-30-5 NMSA 1978 until the first anniversary of the date the record was made.

**History:** Laws 2008, ch. 29, § 6; 2012, ch. 29, § 5; 2012, ch. 33, § 5.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, changed the statutory reference to the applicable section and after "Section", deleted "5 of the Sale of Recycled Metals Act" and added "57-30-5 NMSA 1978".

Laws 2012, ch. 29, § 5 and Laws 2012, ch. 33, § 5 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 5. *See* 12-1-8 NMSA 1978.

## 57-30-7. Inspection of records by peace officers; holds on property.

A. Upon request, a secondhand metal dealer shall produce to a peace officer during the dealer's usual business hours the requested record of purchase as required by Section 57-30-5 NMSA 1978.

B. If a peace officer determines, through an investigation or examination of the records kept by the secondhand metal dealer, that the dealer may be in possession of stolen property or property that constitutes evidence in a criminal investigation, the peace officer may place a hold on the property prohibiting the sale or removal of the property from the premises. The hold may remain in effect for up to five days or until the hold is lifted or the property is seized, whichever occurs earlier.

C. The inspecting peace officer shall inform the secondhand metal dealer of the person's status as a peace officer.

**History:** Laws 2008, ch. 29, § 7; 2012, ch. 29, § 6; 2012, ch. 33, § 6.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, eliminated the authority of employees of the department to inspect records; authorized peace officers to place a hold on property that the officer believes may be stolen property; in Subsection A, after "peace officer", deleted "or an authorized employee of the department"; added Subsection B; and in Subsection C, after "inspecting peace officer", deleted "or authorized employee of the department", and after "status as a peace officer", deleted "or authorized employee of the department".

Laws 2012, ch. 29, § 6 and Laws 2012, ch. 33, § 6 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 6. *See* 12-1-8 NMSA 1978.

## 57-30-8. Furnishing of report to department.

A. As of January 1, 2014, a secondhand metal dealer shall, not later than the second business day after the date of the purchase or other acquisition of regulated material for which a record is required pursuant to Section 57-30-5 NMSA 1978, upload to the database maintained by the department a report containing the information required to be recorded pursuant to that section.

B. A local governmental entity may impose reporting requirements on secondhand metal dealers regarding the purchase or acquisition of catalytic converters but not other regulated material as long as the reporting requirements are no more stringent than the reporting requirements for regulated material pursuant to the provisions of the Sale of Recycled Metals Act.

**History:** Laws 2008, ch. 29, § 8; 2012, ch. 29, § 7; 2012, ch. 33, § 7; 2023, ch. 193, § 2.

**ANNOTATIONS**

**The 2023 amendment,** effective June 16, 2023, authorized a local government entity to impose reporting requirements on secondhand metal dealers regarding the purchase or acquisition of catalytic converters; and in Subsection B, after "local government entity", deleted "shall not", and added "may", after "purchase or acquisition of", added "catalytic converters but not other", and after "regulated material", added "as long as the reporting requirements are not more stringent than the reporting requirements for regulated material pursuant to the provisions of the Sale of Recycled Metals Act".

**The 2012 amendment,** effective July 1, 2012, required secondhand metal dealers to upload the record of acquisitions of regulated material to the database maintained by the department; prohibited municipalities from imposing reporting requirements on secondhand metal dealers; in Subsection A, at the beginning of the sentence, added "As of January 1, 2014, a secondhand metal dealer shall" and after "Section", deleted "5 of the Sale of Recycled Metals Act a secondhand metal dealer shall mail to or file with" and added "57-30-5 NMSA 1978, upload to the database maintained by"; and added Subsection B.

## 57-30-9. Database.

The department shall establish and maintain an electronic database containing the records required to be preserved pursuant to Section 57-30-6 NMSA 1978, which database shall be accessible to law enforcement agencies and the department. Records received by the department pursuant to Section 57-30-8 NMSA 1978 shall be available in the database by the end of the second business day following receipt by the department.

**History:** Laws 2008, ch. 29, § 9; 2012, ch. 29, § 8; 2012, ch. 33, § 8.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, restricted access to the database to law enforcement agencies and the department; in the title, deleted "Public" and in the first sentence, after "database shall be accessible to", deleted "the public" and added "law enforcement agencies and the department".

Laws 2012, ch. 29, § 8 and Laws 2012, ch. 33, § 8 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 8. *See* 12-1-8 NMSA 1978.

## 57-30-10. Powers and duties of superintendent.

The superintendent has authority to promulgate reasonable regulations for the administration and enforcement of the Sale of Recycled Metals Act and is expressly authorized to make regulations regarding records of purchase of regulated material and the database required pursuant to that act.

**History:** Laws 2008, ch. 29, § 10; 2012, ch. 29, § 9; 2012, ch. 33, § 9.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, eliminated public access to the database and after "regulated material and the" deleted the word "public".

Laws 2012, ch. 29, § 9 and Laws 2012, ch. 33, § 9 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 9. *See* 12-1-8 NMSA 1978.

## 57-30-11. Waiting period for disposal of regulated material.

A secondhand metal dealer shall not process or permit to be removed from the dealer's premises regulated material until at least twenty-four hours have elapsed since the dealer acquired the regulated material.

**History:** Laws 2008, ch. 29, § 11; 2012, ch. 29, § 10; 2012, ch. 33, § 10.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, reduced the waiting period for disposal of regulated material to twenty-four hours and after "regulated material until", deleted "the fifth business day after the date on which" and added "at least twenty-four hours have elapsed since".

Laws 2012, ch. 29, § 10 and Laws 2012, ch. 33, § 10 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 10. *See* 12-1-8 NMSA 1978.

## 57-30-12. Prohibited acts.

A person shall not, with the intent to deceive:

A. display to a secondhand metal dealer a false or invalid personal identification document in connection with the person's attempted sale of regulated material;

B. make a false material statement or representation to a secondhand metal dealer in connection with:

(1) that person's execution of a written statement required by Subsection A of Section 57-30-4 NMSA 1978;

(2) the dealer's efforts to obtain the information required pursuant to Subsection B of Section 57-30-5 NMSA 1978; or

(3) the written documentation required for certain transactions pursuant to Section 16 [57-30-18 NMSA 1978] of this 2012 act; or

C. deliberately remove or alter a manufacturer's make, model, serial or personal identification number or other identifying marks engraved or etched upon property that is regulated material.

**History:** Laws 2008, ch. 29, § 12; 2012, ch. 29, § 11; 2012, ch. 33, § 11.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, prohibited a person from making a false statement in a written document indicating that the seller is the owner of or has permission from the owner to sell certain regulated material and from removing identifying information from regulated material; in Subsection B, added Paragraph (3); and added Subsection C.

Laws 2012, ch. 29, § 11 and Laws 2012, ch. 33, § 11 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 11. *See* 12-1-8 NMSA 1978.

## 57-30-13. Civil penalty; suspension or revocation of registration.

A. A person who violates any provision of the Sale of Recycled Metals Act may be assessed a civil penalty by the superintendent not to exceed one thousand dollars ($1,000) per violation.

B. The superintendent may suspend or revoke the registration of a secondhand metal dealer when the superintendent finds that the dealer has intentionally violated a provision of the Sale of Recycled Metals Act.

C. Prior to the imposition of a civil penalty or the suspension or revocation of a registration, the superintendent shall provide notice and an opportunity to be heard pursuant to the pertinent notice and hearing provisions of the Uniform Licensing Act [Chapter 61, Article 1 NMSA 1978].

**History:** Laws 2008, ch. 29, § 13; 2012, ch. 29, § 12; 2012, ch. 33, § 12.

**ANNOTATIONS**

**The 2012 amendment,** effective July 1, 2012, provided for the suspension or revocation of the registration of secondhand metal dealers; added Subsection B; and in Subsection C, after "imposition of a", changed "civil penalty, the person being penalized shall be afforded" to "civil penalty or the suspension or revocation of a registration, the superintendent shall provide", and after "to be heard", deleted "by the superintendent".

Laws 2012, ch. 29, § 12 and Laws 2012, ch. 33, § 12 enacted identical amendments to this section. The section was set out as amended by Laws 2012, ch. 33, § 12. *See* 12-1-8 NMSA 1978.

## 57-30-14. Applicability.

The provisions of the Sale of Recycled Metals Act shall not apply to a purchase of regulated material from a manufacturing, industrial or other commercial vendor that sells regulated material in the ordinary course of the vendor's business.

**History:** Laws 2008, ch. 29, § 15.

**ANNOTATIONS**

**Compiler's notes.** — Laws 2008, ch. 29, § 15 was erroneously left out of the 2008 compilation by the compiler. The provisions of this section became effective January 1, 2009.

# ARTICLE 31
# Distributed Generation Disclosure

## 57-31-1. Short title.

Sections 1 through 5 [57-31-1 to 57-31-5 NMSA 1978] of this act may be cited as the "Distributed Generation Disclosure Act".

**History:** Laws 2017, ch. 102, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 102 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-31-2. Definitions.

As used in the Distributed Generation Disclosure Act:

A. "annual percentage rate" means the cost of credit, expressed as a yearly rate, that relates the amount and timing of value received by the consumer to the amount and timing of payments made;

B. "business day" means any day Monday through Friday, unless such day falls on a legal holiday, in which case "business day" means the next day that is not a Saturday, Sunday or legal holiday;

C. "buyer" means a person that purchases a distributed energy generation system from a seller or marketer and includes a power purchaser;

D. "distributed energy generation system" means a device or system that is used to generate or store electricity, that has an electric delivery capacity, individually or in connection with other similar devices or systems, greater than one kilowatt or one kilowatt-hour, and that is used primarily for on-site consumption, but does not include an electric generator that is intended for occasional use;

E. "energized" means that a distributed energy generation system is installed and operational for its intended purposes of generating or storing electricity;

F. "interconnected" means that a distributed energy generation system is connected to the power grid and is able to transfer electricity to the power grid;

G. "lessee" means a person that leases a distributed energy generation system from the owner of the distributed energy generation system;

H. "person" means an individual person, corporation, trust, partnership, association, cooperative association, club, company, firm, joint venture or syndicate;

I. "power purchaser" means a buyer that agrees to purchase the power generated by a distributed energy generation system from the owner of the distributed energy generation system;

J. "renewable energy certificate" means a certificate or other record, in a format approved by the public regulation commission, that represents all the environmental attributes from one kilowatt-hour of electricity generation from a renewable energy resource; and

K. "seller or marketer" means a person acting through its officers, employees, brokers or agents that markets, sells or solicits the sale or lease of distributed energy generation systems or the sale of power to a power purchaser or negotiates or enters into agreements for the sale or lease of distributed energy generation systems or the sale of power to a power purchaser.

**History:** Laws 2017, ch. 102, § 2.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 102contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-31-3. Distributed energy generation system disclosures; exception.

A. Beginning thirty days after publication in the New Mexico register of the form disclosure statements issued by the attorney general pursuant to Section 5 [57-31-5 NMSA 1978] of the Distributed Generation Disclosure Act, any agreement governing the financing, sale or lease of a distributed energy generation system, or the sale of power to a power purchaser, shall include a written statement with font no smaller than ten points and no more than four pages, unless a font larger than ten points is used, separate from the agreement and separately signed by the buyer or lessee, that includes the following provisions:

(1) the name, address, telephone number and email address of the buyer or lessee;

(2) the name, address, telephone number, email address and valid state contractor license number of the person responsible for installing the distributed energy generation system;

(3) the name, address, telephone number, email address and a valid state contractor license number of the distributed energy generation system maintenance provider, if different from the person responsible for installing the system;

(4) a provision notifying the buyer or lessee of the right to rescind the agreement for a period ending not less than three business days after the agreement is signed;

(5) a description of the distributed energy generation system design assumptions, including system size, estimated first-year production and estimated annual system production decreases, including the overall percentage degradation over the life of the distributed energy generation system;

(6) a description of any performance guarantees that a seller or marketer may include in an agreement;

(7) the purchase price of the distributed energy generation system, total projected lease or power purchase payments;

(8) a description of any one-time or recurring fees, including the circumstances triggering any late fees, estimated system removal fees, maintenance fees, Uniform Commercial Code [Chapter 55 NMSA 1978] notice removal and refiling fees, internet connection fees and automated clearing house fees;

(9) if the seller is financing or leasing the distributed energy generation system, the total amount financed, the total number of payments, the payment frequency, the amount of the payment expressed in dollars, the payment due dates and the applicable annual percentage rate; except that in the case of financing arrangements subject to state or federal lending disclosure requirements, disclosure of the annual percentage rate shall be made in accordance with the applicable state or federal lending disclosure requirements;

(10) if a seller or marketer uses a tax incentive or rebate in determining the price, a provision identifying each state and federal tax incentive or rebate used;

(11) a description of the ownership and transferability of any tax credits, rebates, incentives or renewable energy certificates in connection with the distributed energy generation system;

(12) a list of the following tax obligations that the buyer may be required to pay or incur as a result of the contract's provisions, including:

(a) the cost of any business personal property taxes assessed on the distributed energy generation system in the event of a power purchase agreement or lease;

(b) gross receipts taxes for any equipment purchased and services rendered;

(c) obligations of the power purchaser or lessee to transfer tax credits or tax incentives of the distributed energy generation system to any other person; and

(d) in the case of a commercial installation, a change in assessed property taxes in the event of a purchase of a distributed energy generation system;

(13) a disclosure regarding whether the warranty or maintenance obligations related to the distributed energy generation system may be sold or transferred to a third party;

(14) a disclosure regarding any restrictions pursuant to the agreement on the buyer's or lessee's ability to modify or transfer ownership of the distributed energy generation system, including whether any modification or transfer is subject to review or approval by a third party and the name, mailing address and telephone number of the entity responsible for approving the modification or transfer, if known to the seller or marketer at the time the agreement is made;

(15) a description of all options available to the buyer or lessee in connection with the continuation, termination or transfer of the agreement between the buyer or lessee and the seller or marketer in the event of the transfer of the real property to which the distributed energy generation system is affixed;

(16) a description of the assumptions used for any savings estimates that were provided to the buyer or lessee;

(17) a disclosure that states: "Actual utility rates may go up or down and actual savings may vary. For further information regarding rates, you may contact your local utility or the public regulation commission. Tax and other state and federal incentives are subject to change.";

(18) a disclosure notifying the buyer or the lessee of transferability of any warranty obligations to subsequent buyers or lessees; and

(19) a disclosure notifying the buyer or lessee that interconnection requirements, including time lines, are established by rules of the public regulation commission and may be obtained from either the public regulation commission or the local utility.

B. The seller or marketer shall provide the buyer or lessee with proof that, within thirty days of completion of installation or modification:

(1) all permits required for the installation or any modification of the distributed energy generation system were obtained prior to installation; and

(2) installation or any modification of the distributed energy generation system received the approval of an inspector authorized by the governmental authority having jurisdiction over the permitting and enforcement authority.

C. In the event that a seller or marketer causes a financing statement to be filed pursuant to the Uniform Commercial Code-Secured Transactions [Chapter 55, Article 9 NMSA 1978], the seller or marketer, or any successor in interest to the seller or marketer, shall provide to the buyer or lessee a copy of the filed financing statement within thirty calendar days of the filing.

D. If a promotional document or sales presentation related to a distributed energy generation system states that the system will result in certain financial savings for the

buyer or lessee, the document or sales presentation shall provide the assumptions and calculations used to derive those savings.

E. If a promotional document or sales presentation related to a distributed energy generation system states that the system will result in certain energy savings in terms of production, the document or sales presentation shall provide the assumptions and calculations used to derive those energy savings and any comparative estimates. If historical information is used, it shall be accompanied by the following statement: "Historical data are not necessarily representative of future results.".

**History:** Laws 2017, ch. 102, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 102 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-31-4. Additional requirements; exception.

A. Recurring payments under a distributed energy generation system lease or purchase agreement shall not begin until the distributed energy generation system is energized and interconnected.

B. The Distributed Generation Disclosure Act does not apply to an individual or company, acting through its officers, employees, brokers or agents, that markets, sells, solicits, negotiates or enters into an agreement for the sale, financing or lease of a distributed energy generation system as part of a transaction involving the sale or transfer of the real property to which the distributed energy generation system is or will be affixed.

C. The Distributed Generation Disclosure Act does not apply to third-party financial institutions that enter into an agreement for the financing of a distributed energy generation system.

**History:** Laws 2017, ch. 102, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 102 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

## 57-31-5. Disclosure statement forms.

A. The attorney general shall adopt rules necessary to implement and enforce the provisions of the Distributed Generation Disclosure Act. The attorney general shall, by January 1, 2018, issue form disclosure statements that may be used to provide the disclosures required by the Distributed Generation Disclosure Act for agreements with buyers or lessees.

B. Disclosure statements provided in substantially the form issued by the attorney general shall be regarded as complying with the disclosure statements required by Subsection A of Section 3 [57-31-3 NMSA 1978] of the Distributed Generation Disclosure Act.

**History:** Laws 2017, ch. 102, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2017, ch. 102 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2017, 90 days after the adjournment of the legislature.

# ARTICLE 32
# Patients' Debt Collection Protection

## 57-32-1. Short title.

Sections 1 through 10 [57-32-1 to 57-32-10 NMSA 1978] of this act may be cited as the "Patients' Debt Collection Protection Act".

**History:** Laws 2021, ch. 31, § 1.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 1 effective July 1, 2021.

## 57-32-2. Definitions.

As used in the Patients' Debt Collection Protection Act:

A. "collection action" means any of the following:

(1) selling a person's medical debt to another party, including a medical debt collector, but not including medical debt as part of the assets and liabilities when selling a health care facility or third-party health care provider; or

(2) actions that require a legal or judicial process, including:

(a) placing a lien on a person's property;

(b) attaching or seizing a person's bank account or any other personal property;

(c) commencing a civil action against a person; or

(d) garnishing a person's wages;

B. "consumer" means a natural person;

C. "department" means the human services department [health care authority department];

D. "health care facility" means:

(1) a health facility required to be licensed by the department of health, except for:

(a) an adult day care facility;

(b) a boarding home not under the control of an institution of higher learning;

(c) a child care center; and

(d) a shelter care home; or

(2) a health facility that is an urgent care center or freestanding emergency room that is required to be licensed by the regulation and licensing department;

E. "health care services" means services for the diagnosis, prevention, treatment, cure or relief of a physical, dental, behavioral or mental health condition, substance use disorder, illness, injury or disease, which services include procedures, products, devices or medications;

F. "household income" means income calculated by using the methods used to calculate medicaid eligibility;

G. "indigent patient" means a patient with a household income that does not exceed two hundred percent of the federal poverty level;

H. "medical creditor" means a person that provides health care services and to whom the consumer owes money for those services or the person that provided health care services and to whom the consumer previously owed money if the medical debt has been purchased by one or more medical debt buyers;

I. "medical debt" means a debt arising from the receipt of health care services;

J. "medical debt buyer" means a person that is engaged in the business of purchasing medical debts for collection purposes, whether that person collects the debt or hires a third party for collection or an attorney for litigation in order to collect such debt;

K. "medical debt collector" means a person that regularly collects or attempts to collect, directly or indirectly, medical debts originally owed or due or asserted to be owed or due to another person. A medical debt buyer is considered to be a medical debt collector for all purposes of the Patients' Debt Collection Protection Act;

L. "patient" means the person who received health care services or a parent or legal guardian of a minor or an adult under guardianship who received health care services;

M. "superintendent" means the superintendent of insurance; and

N. "third-party health care provider" means a licensed health care professional or an entity with revenues of at least twenty million dollars ($20,000,000) annually, when billing patients independently for health care services provided in a health care facility.

**History:** Laws 2021, ch. 31, § 2.

**ANNOTATIONS**

**Bracketed material.** — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 2 effective July 1, 2021.

## 57-32-3. Requirement to provide screening for insurance and program eligibility.

A. In addition to any other actions required by applicable state or federal law or local government ordinance, health care facilities shall take the following steps before seeking payment for emergency or medically necessary care:

(1) offer to and, if requested, verify whether a patient has any health insurance;

(2) if the patient is uninsured, offer information about, offer to screen the patient for and, if requested, screen the patient for:

(a) all available public insurance;

(b) any other public programs that may assist with health care costs; and

(c) any financial assistance offered by the health care facility;

(3) offer to and, if requested, provide assistance with the application process for programs identified during the screening; and

(4) if a third-party health care provider will bill the patient, send the information gathered during the steps required pursuant to this subsection to the third-party health care provider.

B. In addition to any other actions required by applicable state or federal law or local government ordinance, a third-party health care provider shall not seek payment for emergency or medically necessary care until the third-party health care provider receives the information required pursuant to Paragraph (4) of Subsection A of this section.

C. The superintendent shall promulgate rules to establish minimum standards governing the requirements of this section and shall provide health care facilities and third-party health care providers with guidance on billing and screening best practices, based on health care facility type and size, that includes policies to prevent the disclosure of patients' personal information to third parties.

**History:** Laws 2021, ch. 31, § 3.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 3 effective July 1, 2021.

## 57-32-4. Indigent patients; patients' debt collection protections.

A. For patients who are determined to be indigent patients, charges for health care services and medical debt shall not be pursued through collection actions. All collection actions through which charges for health care services and medical debt are pursued shall be terminated upon the determination that a patient is an indigent patient. Health care facilities, third-party health care providers and medical creditors shall not hire or otherwise engage third parties to perform collection actions against or otherwise recover debts from indigent patients.

B. The superintendent shall promulgate rules to establish the process by which a patient is determined to be an indigent patient for purposes of this section. The rules shall take into account both permanent and temporary sources of income.

**History:** Laws 2021, ch. 31, § 4.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 4 effective July 1, 2021.

## 57-32-5. Department guidance on funding sources, billing and screening.

The department shall provide health care facilities and third-party health care providers with guidance on accessing available sources of funding for care that maximizes the use of funds in the following order of priority:

A. federal funds;

B. state funds; and

C. other available funds.

**History:** Laws 2021, ch. 31, § 5.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 5 effective July 1, 2021.

## 57-32-6. Billing information.

A. All bills sent from a health care facility, third-party health care provider or medical creditor to a patient shall include a complete and plain-language description of the date, amount and nature of all charges; if the patient is verified as having health insurance; if the health care facility screened the patient for programs that assist with health care costs; and if the health care facility or third-party health care provider has billed or will bill insurance or public programs that may assist with health care costs for the services provided. Prior to initiating communication with a consumer or a collection action over medical debt, a medical debt collector shall have all billing information required in this subsection as allowed under the provisions of the federal Health Insurance Portability and Accountability Act of 1996.

B. In communications with a consumer about medical debt, including communication related to collection actions, a health care facility, third-party health care provider, medical creditor or medical debt collector shall inform the consumer of the availability of the information required pursuant to Subsection A of this section and offer to provide that information to the consumer; provided that the information required pursuant to this section need only be provided to a requester once every thirty days.

**History:** Laws 2021, ch. 31, § 6.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 6 effective July 1, 2021.

## 57-32-7. Receipts for payments.

A. Within thirty business days of receipt of a payment on a medical debt, the health care facility, third-party health care provider, medical creditor, medical debt collector or their agents receiving the payment shall send a receipt to the person who made the payment. The receipt may take the form of a billing statement. All receipts shall show:

(1) the amount paid;

(2) the date payment was received;

(3) the new balance after application of the payment;

(4) the interest rate and interest accrued since the consumer's last payment;

(5) the consumer's account number;

(6) the name of the current owner of the debt and, if different, the name of the medical creditor; and

(7) whether the payment is accepted as payment in full of the debt.

B. All health care facilities, third-party health care providers, medical creditors and medical debt collectors shall apply payments as of the date payment was received or, if received after business hours, the next business day, and use that date when assessing penalties or interest accumulation.

**History:** Laws 2021, ch. 31, § 7.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 7 effective July 1, 2021.

## 57-32-8. Indigent care reporting requirements.

A. Health care facilities and third-party health care providers shall annually report to the department how the following funds are used:

(1) indigent care funds and safety net care pool funds pursuant to the Indigent Hospital and County Health Care Act [Chapter 27, Article 5 NMSA 1978]; and

(2) funds raised to pay the cost of operating and maintaining county hospitals, pay contracting hospitals in accordance with health care facilities contracts or pay a county's transfer to the county-supported medicaid fund pursuant to the Hospital Funding Act [Chapter 4, Article 48B NMSA 1978].

B. A health care facility's or third-party health care provider's report to the department shall include:

(1) the number of indigent patients whose health care costs were paid directly from the funds described in Subsection A of this section and the total amount of funds expended for these health care costs; and

(2) as applicable, the health care facility's estimated annual amount and percentage of the health care facility's bad debt expense attributable to patients eligible under the health care facility's financial assistance policy and an explanation of the methodology used by the health care facility to estimate this amount and percentage.

C. A health care facility's or third-party health care provider's report shall be available to the public via a link from the homepage of the health care facility's or third-party health care provider's website.

**History:** Laws 2021, ch. 31, § 8.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 8 effective July 1, 2021.

## 57-32-9. Waiver of rights.

A. A consumer shall not be required to exhaust any administrative remedies provided by the provisions of the Patients' Debt Collection Protection Act or other applicable law before seeking legal or equitable relief.

B. A financial assistance policy or agreement between a patient and a health care facility, third-party health care provider, medical creditor or medical debt collector shall not contain any provision that, prior to a dispute arising, waives or has the practical effect of waiving the rights of a patient to resolve that dispute by obtaining:

(1) injunctive, declaratory or other equitable relief;

(2) multiple or minimum damages as specified by statute;

(3) attorney fees and costs as specified by statute or as available at common law; or

(4) a hearing at which that party can present evidence in person.

C. A provision in a financial assistance policy or other written agreement that violates the provisions of Subsection B of this section is void and unenforceable. A court may refuse to enforce other provisions of the financial assistance policy or other written agreement as equity may require.

D. A waiver by a patient or other consumer of any protection provided by or any right of the patient or other consumer pursuant to the Patients' Debt Collection Protection Act is void and shall not be enforced by any court or any other person.

**History:** Laws 2021, ch. 31, § 9.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 9 effective July 1, 2021.

## 57-32-10. Enforcement.

A. The attorney general shall enforce the provisions of the Patients' Debt Collection Protection Act and shall adopt rules in accordance with that act to provide for the protection of patients and their families and to assist market participants in interpreting that act.

B. The attorney general shall establish a complaint process whereby an aggrieved patient or a member of the public may file a complaint against a health care facility, third-party health care provider, medical creditor or medical debt collector that violates a provision of the Patients' Debt Collection Protection Act. All complaints shall be considered public records pursuant to the Inspection of Public Records Act [Chapter 14, Article 2 NMSA 1978], with the exception of the complainant's name, address or protected personal identifier information defined in the Inspection of Public Records Act.

**History:** Laws 2021, ch. 31, § 10.

**ANNOTATIONS**

**Effective dates.** — Laws 2021, ch. 31, § 14 made Laws 2021, ch. 31, § 10 effective July 1, 2021.