

Practice Update

Price Gouging in the Time of Coronavirus

March 26, 2020

Consumers are continually searching for products to protect themselves from the new coronavirus, and many businesses are struggling to keep these items in stock because of the surge in demand. Due to the rise in demand and decrease in supply, some businesses and third-party sellers have increased the prices of essential products.

However, when a formal emergency is declared (as was the case with Covid-19), state “price gouging” statutes prohibit such price increases. Price gouging occurs when prices relating to goods or services are “unconscionably” raised following a declaration of a state of emergency or local emergency.

To quickly address whether price gouging is occurring, government officials have asked the public to beware of (and report) gross disparities in pricing before and after a declared state of emergency.

Even though raising prices based on demand is usually lawful, in the current emergency climate sellers must avoid grossly or unconscionably exceeding pre-emergency prices unless those increased prices are due to documented increased costs.

State Specific Price Gouging Statutes

Although many states have price gouging statutes, these statutes vary in terminology and penalties. Under California law, after a state of emergency is

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declared, prices on goods or services must not be raised “more than 10 percent greater than the price charged... immediately prior to the proclamation or declaration of emergency.” Cal. Penal Code § 396(b) (2020). If a seller is charged with price gouging, the seller may be imprisoned for up to one year in jail or fined up to \$10,000. Cal. Penal Code § 396(h) (2020).

Michigan Gov. Gretchen Whitmer (D) prohibited the resale of a product at a price that is “grossly in excess of the purchase price.” Additionally, the executive order banned the sale or offer of sale of a product “at a price that is more than 20% higher” than the price charged for that product as of March 9. Price gouging is penalized under Michigan’s Consumer Protection Act, which allows civil penalties of up to \$25,000 per violation.

In contrast, other statutes do not include a specific percentage increase to determine whether price gouging has occurred. For example, Florida law prohibits charging “unconscionable” prices for commodities or services during an emergency. Whether a price is unconscionable is determined if it “represents a gross disparity” or “grossly exceeds” the average prices in the thirty-day period immediately preceding a declaration of a state of emergency.

Florida classifies price gouging as a second-degree misdemeanor that is punishable by imprisonment of up to sixty days and/or a fine of up to \$1,000 for the first offense and \$25,000 fines for subsequent violations within a 24-hour period.

Under a recently amended Massachusetts law, after a “declared statewide or national emergency,” businesses are prohibited from selling or offering to sell goods or services “necessary for the health, safety or welfare of the public” at an “unconscionably high price.” An unconscionably high price occurs if there is a “gross disparity” between the price charged and the price “immediately prior to the... declared statewide or

national emergency” or the price at which the product is “readily obtainable from other businesses.” Price gouging is punishable by civil penalty of up to \$5,000 per violation.

Under New York law, it is prohibited to sell goods or services at an “unconscionably excessive price” during a declared state of emergency. The New York statute reserves the right to the courts to determine whether a price is unconscionably excessive. Some of the factors the courts consider include the exercise of unfair leverage or unconscionable means and that the “amount of the excess in price is unconscionably extreme.”

Notwithstanding these restrictions, not all price increases are prohibited during a state of emergency. Florida’s price gouging statute, like California’s statute, carves out an exception for increase in pricing that is attributable to additional costs “incurred in connection with the rental or sale of the commodity.”

Consumers seeking to invoke the price gouging statutes within their jurisdiction must file a complaint, which is often found on the respective state’s attorney general office’s website. For the jurisdictions that lack an objective test, the outcome of a formal charge or complaint against a seller will rely on whether the enforcing government officer determines that a violation has occurred. For the most part, state price gouging statutes do not provide a private cause of action.

Recent Price Increases in Coronavirus-Related Products

As the coronavirus continues to spread, consumers seek to buy supplies that are necessary to protect themselves from the virus. Some of these products include hand sanitizer gel, disinfecting wipes, cleaning supplies, and surgical masks.

In the past few weeks, consumers have reported that the prices on these items have significantly increased. Because many stores are either low in supply or do not have these products in stock at all, consumers have resorted to purchasing online. However, third-party online sellers have used the increase in demand to their advantage by raising the prices on these highly-desired household products. Reports show that from January to March this year, the prices for items such as hand sanitizer and N95 face masks have doubled or tripled.

Both Amazon and eBay have received complaints due to the tremendously increased prices that third-party sellers are placing on products such as hand sanitizer and surgical masks. To respond to these complaints, Amazon has blocked and removed thousands of listings and suspended thousands of sellers' accounts for price gouging. Following with stricter measures, eBay has banned the sale of hand sanitizer, disinfecting wipes, and face masks on their website.

Additionally, the attorney general's offices in several different states have warned sellers that the price gouging laws will be strictly enforced against those who unconscionably increase prices on necessary products. For example, Attorney General Ashley Moody (R) stated that her team will rapidly respond to allegations of price gouging occurring in Florida. Likewise, Attorney General Xavier Becerra (D) warned that price gougers may face criminal prosecution or civil fines in California.

Strategies for Compliance

To the extent companies utilize pricing policies or software which incorporates "surge pricing," this may inadvertently lead to a price gouging violation. In general, "surge pricing" relates to automatic increases in prices of goods and services due to consumer demand.

However, once the state price gouging statutes are triggered (via a declaration of emergency from the President of the U.S. or the state's governor), those automatic price increases may need to stop. Unless the price increase is due to an increased cost of supply or doing business, demand-based price increases may be problematic. It is, therefore, important to retain all records and documentation that prove that the increased costs led to the price increase.

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