

Practice Update

# The Reach of Price Gouging Laws: Why Wholesale Distributors Are Not Exempt

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As COVID-19 continues to spread globally and impact more individuals and businesses in the United States, wholesale distributors may be concerned about how the price gouging statutes in certain states apply to them. These distributors are often responsible for supplying essential retail and commercial businesses with safety and hygiene products that are currently in high demand. Below, we summarize the applicability of price gouging statutes to wholesale distributors, the importance of showing proof of increased costs, and the exclusion of discounted prices.

## Statute Application to Wholesale Distributors

Some statutes, like California's,<sup>[1]</sup> limit the applicability of its language to sales by retailers to consumers. In most statutes, the language indicates that the provision applies where entities "sell or offer to sell" to consumers. Other statutes, however, apply to non-retail sales manufacturers and wholesale distributors.

Under Arkansas law,<sup>[2]</sup> after a state of emergency is declared, a "person, contractor, business, or other entity" must not sell or offer to sell specific items "for a price more than ten percent." The products protected under the statute's terms include consumer food items or goods, emergency and medical supplies, building materials, or gasoline, among others. Arkansas classifies a violation of the

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statute as an unfair or deceptive practice,[3] and any person that violates the provision may be charged with a Class A misdemeanor that is punishable by a fine of up to \$2,500 and up to one year in jail.

Similarly, New Jersey law prohibits excessive and unjustified price increases in the sale of specific merchandise.[4] An excessive price increase occurs if a good or service is sold or offered for sale by the seller for a price that “exceeds by more than 10 percent” the price at which it was sold immediately before the declared state of emergency.[5] Pursuant to the statute, price gouging is punishable by civil penalty of up to \$10,000 for the first violation and \$20,000 for each subsequent violation.

Under Pennsylvania law, any party within the chain of distribution is prohibited from charging an unconscionably excessive price.[6] Whether a price is unconscionably excessive depends if it “exceeds an amount equal to or in excess of 20% of the average price” at which the good or service was valued seven days before the declared state of emergency.[7] Price gouging under the statute is penalized by civil penalty of up to \$10,000 for each act, injunctive relief, and restitution.

Other states, like New York, do not include specific percentage provisions but, instead, prohibit “grossly excessive prices for essential consumer goods and services.”[8] Under New York’s price gouging statute, “any party within the chain of distribution” must not sell or offer to sell goods or services for an amount that is an “unconscionably excessive price.”[9] Whether a price is considered unconscionably excessive will be determined by the court as a question of law. A violation of New York’s price gouging law may result in a civil penalty of up to \$25,000 per violation and restitution.

### Proof of Increased Costs

Notably, these statutes often include provisions that preclude application when the price increase in the

goods or services is due to additional costs imposed by the supplier of the goods or directly attributable to additional costs for labor and material used to provide the services.[10] Even though the respective state's Attorney General has the burden to prove that the price gouging statute has been violated, defendant entities need to provide sufficient proof of the increased costs.

For example, in *People v. Beach Boys Equipment Co.*, the Appellate Division of the New York Supreme Court held that the Attorney General had established that the respondent, Beach Boys Equipment, had violated the price gouging statute by charging an "unconscionably excessive price" for its electric generators following the January 1998 ice storm.[11] The respondent argued that the increased cost of the generators was due to additional costs imposed by its suppliers.[12] The court, however, rejected this argument because the respondent did not explain why it had paid its supplier double the amount of the price at which the generators were valued.[13]

Similarly, in *People v. Two Wheel Corp.*, the New York Court of Appeals recognized that all price increases are not prohibited during "periods of abnormal market disruptions." [14] The Court stated, however, that entities arguing that increased prices were due to additional costs had to provide more than "conclusory assertions" and had to demonstrate why the additional costs justified the price increase.[15]

These two cases highlight the importance of providing proof of additional costs. Entities that are obligated to increase costs of goods or services because of additional costs not within their control should specifically track and retain a record of the additional costs. Maintaining a record will later be crucial to demonstrate that a price gouging violation has not occurred.

## Application of Price Gouging Restrictions to Discounted Prices

Moreover, some price gouging statutes recognize that limited discounted prices that went into effect before the declared state of emergency will not result in a violation of the price gouging laws if the price cut is discontinued.<sup>[16]</sup> In these instances, businesses are allowed to use the price at which they *usually* sell the goods or services to calculate an increase in price that meets the required limitation in the statute.<sup>[17]</sup> If wholesale distributors are concerned about price gouging claims, they may include contractual language that mirrors this exemption.

## Conclusion

In the current emergency climate caused by the COVID-19 pandemic, wholesale distributors must be careful to comply with the price gouging statutes in the states where they are conducting business. If wholesale distributors are raising prices due to increased costs resulting from the sudden increase in demand, they must diligently document these expenses. As some case law demonstrates, keeping a record of these costs is significant to defend a claim of price gouging violation.

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[1] Cal. Penal Code § 396(b) (2020).

[2] Ark. Code Ann. § 4-88-303(a)(1) (2020).

[3] Ark. Code Ann. § 4-88-304 (2020).

[4] N.J. Rev. Stat. § 56:8-107 (2019).

[5] N.J. Rev. Stat. § 56:8-108(2) (2019).

[6] 73 Pa. Cons. Stat. § 232.4(a) (2020).

[7] 73 Pa. Cons. Stat. § 232.4(b) (2020).

[8] N.Y. Gen. Bus. Law § 396-r(1.) (McKinney 2020).

[9] N.Y. Gen. Bus. Law § 396-r(2.) (McKinney 2020).

[10] *See* Ark. Code Ann. § 4-88-303(b)(2) (2020); N.J. Rev. Stat. § 56:8-108(2)( (2019); 73 Pa. Cons. Stat. § 232.4(c)(1) (2020); N.Y. Gen. Bus. Law § 396-r(3.) (b) (ii) (McKinney 2020).

[11] *People v. Beach Boys Equip. Co.*, 709 N.Y.S.2d 729, 851 (N.Y. App. Div. 2000).

[12] *Id.*

[13] *Id.*

[14] *People v. Two Wheel Corp.*, 525 N.E.2d 692, 700 (N.Y. 1988).

[15] *Id.*

[16] *See* Ark. Code Ann. § 4-88-303(d) (2020); Cal. Penal Code § 396(l) (2020).

[17] *See id.*

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