

PUBLICATION

Fair Pricing in Times of Need: Price Gouging Controls Expanded at Federal and State Levels in Response to COVID-19

Authors: Amelia W. Koch, Thomas H. Barnard, Hal Kemp Litchford, Noah Benjamin Kressler, Alexander M. McIntyre, Jr.

April 6, 2020

The COVID-19 pandemic has sparked great and inspiring humanitarian aid efforts but has also brought out some baser human instincts: email scams and frauds are rampant and there is much buzz about hoarding and price gouging of critical services and goods. The United States Department of Justice (DOJ) and many states have targeted these activities to protect consumers and to assure critical supplies get where they are needed. In particular, the U.S. Attorney General has formed a COVID-19 Hoarding and Price Gouging Task Force to address concerns on the federal level and many states have prohibitions against price gouging in emergency situations. All are encouraging the reporting of concerns and a complaint could lead to investigation and enforcement action. Business owners should protect their legitimate business activities by knowing about these enforcement mechanisms, what the general prohibitions are, and how to avoid pitfalls. This Alert explains the Task Force aims and outlines the price gouging prohibitions in several states in the Baker Donelson footprint.

I. FEDERAL RESPONSE TO PRICE GOUGING

There is no federal counterpart to state statutes specifically outlawing price gouging. But, on March 25, 2020, pursuant to a Presidential Executive Order and the Defense Production Act, the Department of Health & Human Services issued a Notice designating certain health and medical resources as "scarce materials or threatened materials" subject to hoarding prevention measures. The designated materials include N95 and other masks and face shields; respirators; ventilators and related equipment; medicine containing chloroquine phosphate or hydroxychloroquine; disinfecting devices; medical gowns or other medical apparel; and other items of personal protective equipment (PPE).

On March 24, 2020, in response to hoarding and fraudulent schemes involving fake COVID-19 tests, treatment, supplies, and charities, U. S. Attorney General William Barr established a COVID-19 Hoarding and Price Gouging Task Force, to be led by the U.S. Attorney for the District of New Jersey. Similar task forces, some including both federal and state enforcers, are being established locally throughout the country. For example, on March 31, 2020, the U.S. Attorney for the Western District of Louisiana, which includes Shreveport, Lafayette, Alexandria, Lake Charles and Monroe, announced a multi-agency COVID-19 anti-fraud and anti-hoarding task force to investigate activity in the Western District.

In addition to DOJ-led COVID-19 task forces, the Federal Trade Commission has received and is investigating thousands of complaints of price gouging, possibly involving more than \$5 million in overpayments. Also, many members of Congress have asked the FTC to step up its enforcement efforts regarding hoarding and price gouging. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices in or affecting commerce" and empowers the FTC to investigate and punish individuals and businesses engaging in such unfair acts or practices. Historically the FTC has not focused on price gouging during times of emergency, but it is anticipated that the FTC will be far more active in reaction to fraudulent schemes and other unfair practices centered on exploiting the COVID-19 pandemic.

II. STATES: ALABAMA, FLORIDA, GEORGIA, LOUISIANA, MARYLAND, MISSISSIPPI, SOUTH CAROLINA, TENNESSEE AND TEXAS

ALABAMA'S PRICE GOUGING STATUTE

When Does it Apply?

The Alabama Unconscionable Pricing Act applies during the period of a declared state of emergency. Ala. Code § 8-31-3. On March 13, 2020, the Governor of Alabama issued a Proclamation that, among other things, declared a state of emergency statewide.

What Does it Cover?

Alabama's price gouging statute is broadly applicable to the sale or rental of rental facilities and any "commodity" within the designated state of emergency area, which in this case includes the entire State of Alabama. Ala. Code §§ 8-31-3, 4. "Commodity" is broadly defined to include "any goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce." *Id.* § 8-31-2(1)

What Does it Prohibit?

The Alabama Unconscionable Pricing Act prohibits "unconscionable prices" during the period of a declared state of emergency. ALA. CODE § 8-31-3. Specifically, the Act provides, "It is unlawful and a violation of [the Deceptive Trade Practices Act (discussed below)], for any person to impose unconscionable prices for the sale or rental of any commodity or rental facility during the period of a declared state of emergency." *Id.*

It is "*prima facie* evidence" that a price is unconscionable (and therefore violates the Act) if the price "exceeds, by an amount equal to or in excess of twenty-five percent the average price at which the same or similar commodity . . . was obtainable in the affected area during the last 30 days immediately prior to the declared state of emergency and the increase is not attributable to reasonable costs incurred in connection with the rental or sale of the commodity." *Id.* § 8-31-4.

FLORIDA'S PRICE GOUGING STATUTE

When Does it Apply?

Florida's price gouging statute applies during a declared state of emergency. § 501.160, Fla. Stat. Florida Governor Ron DeSantis declared the COVID-19 State of Emergency on March 9, 2020. The declaration is valid for 60 days unless extended.

What Does it Cover?

The statute broadly and flexibly defines "essential commodity" to cover goods and services of all types that are necessary for consumption or use as a direct result of the emergency. The Florida Attorney General, who is primarily responsible for enforcement of the law, interprets "essential commodity" to mean "its consumption or use is critical to the maintenance of the public health, safety or welfare during the declared emergency." Essential commodities for the COVID-19 State of Emergency specifically include, without limitation:

- Protective masks used to protect you from others if you are sick

- Sanitizing and disinfecting supplies, such as hand sanitizer, gel, wipes, cleaning supplies for surface cleaning, and all commercial cleaning supplies
- All PPE, including gowns, booties, gloves and other protective gear
- COVID-19 test kits, swabs and related consumable medical supplies used in administering test

What Does it Prohibit?

The statute prohibits "unconscionable" pricing or leasing terms. Unconscionability is determined by a subjective benchmark. If the amount charged "grossly exceeds" the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to the declaration of the state of emergency, then it is presumptively "unconscionable." There is a "passing on" of costs exception if the increase in the amount charged is attributable to increased costs incurred by the seller or lessor.

GEORGIA'S PRICE GOUGING STATUTE

When Does it Apply?

Georgia's price gouging statute applies during a declared state of emergency. GA. CODE § 10-1-393.4(a). On March 14, 2020, the Governor of Georgia issued an Executive Order that, among other things, declared a state of statewide emergency through April 13, 2020.

What Does it Cover?

The price gouging restrictions apply to the sale or offer for sale at retail of "any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property" GA CODE § 10-1-393.4(a). The Governor's Executive Order identifies "goods and services necessary to support Public Health" as items to which the price gouging restrictions apply. A prefatory clause within the Executive Order identifies as essential "[t]he uninterrupted supply of medical goods and other emergency related materials, supplies, goods, and services" Medical-related goods can therefore be safely assumed to fall within the scope of the price gouging restrictions. The outer limits are more difficult to fix, but items such as fuel, cleaning supplies, and consumer food items are likely also covered.

What Does it Prohibit?

For covered goods and services, it is prohibited to "price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency" GA. CODE § 10-1-393.4(a). However, the statute does permit price increases to accurately reflect an increase in the cost of the goods and services to the seller or an increase in transportation-related costs. *Id.* In addition, the statute includes a safe-harbor type provision that permits a retailer to increase the price of goods or services if the price is no greater than the retailer's cost plus the retailer's "average markup percentage applied during the ten days immediately prior to the declaration of a state of emergency." GA. CODE § 10-1-393.4(b).

LOUISIANA'S PRICE GOUGING STATUTE

When Does it Apply?

Louisiana's price gouging statute applies during "a state of emergency as declared by the governor or as

declared by the parish president." LA. R.S. 29:732(A). On March 11, 2020, the Governor of Louisiana issued a Proclamation that, among other things, declared a statewide state of emergency through April 9, 2020.

What Does it Cover?

Louisiana's price gouging statute is generally applicable to goods or services sold within the designated emergency area, which in this case is the entire State of Louisiana. LA. R.S. 29:732(A).

What Does it Prohibit?

Louisiana's price gouging prohibition does not use a bright-line approach to define gouging, as some states do. Instead, Louisiana uses as its bench mark "prices ordinarily charged . . . at, or immediately before" the state of emergency and forbids increases above that except in certain circumstances. LA. R.S. 29:732(A). The statute looks to "prices ordinarily charged" but does not require that a sale have actually been made at that price.

MARYLAND'S NEW PRICE GOUGING STATUTE

When Does it Apply?

Unlike many other states, Maryland had no general price gouging statute prior to the COVID-19 outbreak. However, Maryland's General Assembly swiftly passed emergency legislation in response to the pandemic and on March 19, 2020, Maryland's price gouging statute went into effect. The statute applies during a declared state of emergency "relating to the outbreak of COVID-19." 2020 Md. Laws Chapter 14. On March 23, 2020, the Governor of Maryland issued an Executive Order that, among other things, invoked the price gouging statute for the duration of the current state of emergency set to expire on April 21, 2020.

What Does it Cover?

Only certain goods and services are covered, as stated in the Executive Order. These include medical, building, and home improvement supplies or equipment, cleaning products, and internet services. But the enabling legislation permits the Governor to apply the price gouging restriction to "any" good or service. Constant monitoring is necessary to determine whether the Governor has broadened the scope of goods or services to which the price gouging restrictions apply.

What Does it Prohibit?

For covered goods and services, the statute prohibits any "retailer from increasing the sale or rental price" of any covered good or service "to a price that increases the retailer's value of profit by more than 10%". There are no price caps, and the bright-line rule appears to permit increases if they are attributable to traditional market factors outside the state of emergency, such as costs and business risks

MISSISSIPPI'S PRICE GOUGING STATUTE

When Does it Apply?

The Mississippi price gouging statute applies whenever a state of emergency has been declared pursuant to Mississippi law. Miss. Code § 75-24-25. Governor Tate Reeves signed a declaration of emergency for the

State of Mississippi on March 14, 2020, so the statute applies throughout the state.

What Does it Apply to?

The statute applies to "all goods and services sold within the designated emergency impact area." *Id.*

What Does it Prohibit?

The price gouging law prohibits receiving value for goods and services which "exceed[s] the prices ordinarily charged for comparable goods and services at or immediately before the declaration of emergency." *Id.* However, the value received can include any increased cost to the seller in procuring the goods and services to be sold during the emergency. *Id.* Finally, the Statute provides that the pre-emergency "ordinarily charged" comparison price refers to normal pricing, and does not include temporarily discounted goods and services. *Id.*

SOUTH CAROLINA'S PRICE GOUGING STATUTE

When Does it Apply?

South Carolina's price gouging statute applies during a declared state of emergency. S.C. CODE ANN. § 39-5-145. On March 28, 2020, the Governor of South Carolina issued an Executive Order that, among other things, declared a state of emergency to exist statewide for a period of 15 days, which may be extended by further Executive Order.

What Does Cover?

The statute generally applies to the sale or rental of any rental unit or "commodity." S.C. CODE ANN. § 39-5-145(B)(1)(a)-(b). "Commodity" is broadly defined as "goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce" *Id.* at § 39-145(A)(2).

What Does it Prohibit?

South Carolina's price gouging prohibition does not use a bright-line approach to define gouging. Instead, South Carolina uses an "unconscionability" standard, defined as "(i) a gross disparity between the price of the commodity . . . and the average price at which the commodity . . . was rented, leased, sold, or offered in the usual course of business during the thirty days immediately before declaration of [an state of emergency]; or (ii) [a price that] grossly exceeds the average price at which the same or similar commodity . . . was readily obtainable in the trade area during the thirty days immediately before a declaration of a state of emergency[.]" S.C. CODE ANN. § 39-5-145(A)(5)(a)(i-ii). It is *prima facie* evidence that a price is unconscionable if it meets the definition of subsection (i) or (ii). S.C. CODE ANN. § 39-5-145(A)(5)(b).

TENNESSEE'S PRICE GOUGING STATUTE

When Does it Apply?

Tennessee's Price Gouging Act of 2002 applies during a declared "abnormal economic disruption." TENN. CODE ANN. §§ 47-18-5103(a)(1) (2018). On March 12, 2020, the Governor of Tennessee issued an Executive Order that, among other things, declared an "abnormal economic disruption" statewide through March 26, 2020. On March 19, 2020, the Governor issued another Executive Order that extended the period of "abnormal

economic disruption" through April 2, 2020. By statute, the period of "abnormal economic disruption" may last no longer than 15 days. TENN. CODE ANN. §§ 47-18-5103(a)(1) (2018). Further extensions of the period of "abnormal economic disruption" are possible and likely.

What Does it Cover?

Only goods and services enumerated in the statute are covered, although this includes a number of broad categories, including consumer food items, repair or construction services, emergency supplies, medical supplies, building materials, gasoline, transportation, freight, storage services, and housing. TENN. CODE ANN. § 47-18-5103(a)(1)(A)-(H).

What Does it Prohibit?

Tennessee's Price Gouging Act does not use a bright-line "percentage of average prices" approach to define gouging, or the like, as some states do. Instead, Tennessee uses as its benchmark "prices generally charged for the same or similar goods or services in the usual course of business" and forbids increases above those which are "grossly in excess" of those prices. TENN. CODE ANN. § 47-18-5103(a)(1). Finally, the statute provides that prices set forth in any pre-existing agreement are not "grossly excessive."

TEXAS' PRICE GOUGING STATUTE

When Does it Apply?

The Texas Deceptive Trade Practices Act (DTPA) prohibits price gouging after the declaration of a state of disaster by the Governor or the President. Tex. Bus. & Com. Code § 17:46(b)(27). Governor Abbott declared a state of disaster in Texas on March 13, 2020, followed by a Presidential disaster declaration for Texas on March 25, 2020. The DTPA's prohibition of price gouging lasts from the date of the disaster proclamation until the 30th day after the declaration expires or is terminated. *Id.* at §17:4625.

What Does it Cover?

The price gouging prohibition applies to "fuel, food, medicine, lodging, building materials, construction tools, or other necessity" during a declared state of disaster. *Id.* at § 17:46(b)(27). The term "other necessity" is not defined but the Attorney General has filed suit over price gouging in the sale of face masks and interprets the term as including "face masks, N95 particulate respirators, hand soap, all-purpose cleaner, and disinfectant wipes." *State of Texas v. Auctions Unlimited, LLC*, No. 2020-19535 (129th Judicial District Court, Harris County), *filed*, 3/26/20.

What Does it Prohibit?

The price gouging provision prohibits "[t]aking advantage of a disaster . . . by: (a) selling or leasing fuel, food, medicine or other necessity at an exorbitant or excessive price; or (b) demanding an exorbitant or excessive price in connection with the sale of fuel, food, medicine or other necessity." Tex. Bus. & Com. Code § 17:46(b)(27).

Unlike states which set a certain percentage increase as an "excessive" price, the DTPA does not define "exorbitant or excessive" and no court has addressed the issue. But the Auctions Unlimited Complaint alleges the listing price for over 750,000 N95 respirator masks was hiked from a typical email price of \$10-20 a box to

as high as \$180 for a package of 16 masks, and that the defendant "earned as much as \$40,000" on sales of \$154,400.