

insights

TYPES NOT MAPPED YET March 25, 2020 | TTR not mapped yet | Christopher M. Hohn

Retailers, manufacturers, wholesalers: Be aware of price gouging laws during COVID-19

As businesses and consumers scramble to purchase essential products and services during the current public health crisis, regulators are looking closely at any allegations of price gouging up and down the supply chain.

The Missouri Attorney General's Office reported it has received more than 100 consumer complaints of price gouging over the last few weeks, mostly for essential items like hand sanitizer and cleaning products. To encourage consumers to submit their complaints, this week the office rolled out a specific [complaint form for price gouging](#) and added a large banner to its home page: "REPORT PRICE GOUGING." Similarly, the State of Illinois has reported hundreds of recent price gouging complaints related to household and other goods. The Illinois Attorney General's Office has indicated it is now in the process of investigating those complaints.

Given these strong signals from regulators, retailers, wholesalers and product manufacturers should consider taking steps to monitor and prevent any substantial or unjustified increases in pricing. Here are some frequently asked questions about price gouging.

Which laws govern price gouging in Missouri?

Section 60-8.030 of the Missouri Code of State Regulations describes specific unfair practices that are in violation of Missouri's Merchandising Practices Act (Mo. Rev. Stat. § 407.010 et seq.).

Section 60-8.030 states:

(1) It is an unfair practice for any person in connection with the advertisement or sale of merchandise to—

(A) Take advantage of a person's physical or mental impairment or hardship caused by extreme temporary conditions, and charge a price substantially above the previous market price of the merchandise in seller's trade area;

(B) Charge within a disaster area an excessive price for any necessity; or

(C) Charge any person an excessive price for any necessity which the seller has reason to know is likely to be provided to consumers within a disaster area.

Mo. Code Regs. Ann. tit. 15, § 60-8.030.

During a state and federal disaster declaration like the one we're operating under now, Sections (B) and (C) will apply. For Sections (B) and (C), Missouri law defines "excessive price," as "a seller's price that is not justified by the seller's actual cost of acquiring, producing, selling, transporting, and delivering the actual product sold plus the seller's **usual and customary profit margin prior to the onset of the natural disaster**" (emphasis added). The regulation notes that an "excessive price" does not include "any price agreed to by a buyer and seller prior to the declaration of an applicable disaster."

"Actual cost" is defined as "money expended or credit incurred." The statute provides that "no allowance shall be made for the replacement cost of merchandise that the seller is reasonably assured of recouping as part of the price of subsequent sales of the merchandise."

Which laws govern price gouging in Illinois?

Illinois Administrative Code Sections 465.10 through 465.30 prohibits selling or offering to sell any **petroleum product** for an “unconscionably high price.” A price is unconscionably high if:

(1) the amount charged represents a gross disparity between the price of the petroleum product and:

(A) the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or

(B) the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and

(2) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

Ill. Admin. Code tit. 14, § 465.30.

While the Illinois statute only applies to petroleum products, on March 16, Governor J. B. Pritzker issued an executive order extending the state’s authority to police price hikes on household products and medical supplies. Governor Pritzker issued his executive order in light of an increasing number of consumer complaints. From March 1 to March 23, Illinois received [700 consumer complaints](#) relating to price gouging. Most of these complaints involved toilet paper and hand sanitizer but some consumers also cited increases on food and beverage products.

Which states have similar price gouging statutes?

Most of the 50 states and the District of Columbia have adopted laws governing price gouging, all with varying applicability. Notably, the California and New York statutes are comprehensive and, like Missouri’s statute, apply to a broad range of products and services.

The current state of emergency has also prompted certain states, like [Arizona](#), to consider adopting price gouging laws. In addition, some governors in states without price gouging laws, like [Maryland](#) and [Minnesota](#), have issued executive orders (similar to the order issued by Governor Pritzker) allowing the state to combat price gouging during the current emergency.

What is the penalty for violating price gouging laws?

Under Missouri regulations, price gouging is an unfair practice and would subject a violator to civil or criminal liability. The violation could be pursued as a civil action under the Missouri Merchandising Practices Act, which provides for the recovery of actual damages, punitive damages and attorneys’ fees. The statute also provides for claims to be brought as possible class action proceedings.

In Illinois, price gouging is considered an unfair or deceptive act and could subject a violator to criminal or civil liability. The violation could be pursued as an individual or class action under the Illinois Consumer Fraud and Deceptive Business Practices Act, which allows a plaintiff to recover three times the prohibited fees or a minimum of \$1,000 in punitive damages, attorneys’ fees, and costs.

What types of products could be subject to price gouging laws?

Food, medicine, and cleaning products would be considered essential services during a public health crisis. But given the severity of the pandemic and its widespread impact, those seeking to enforce the laws may take a very broad view of what is an “essential” item or “necessity” that would trigger a claim under state price gouging laws. For example, in most emergencies, computer equipment probably wouldn’t be considered a necessity. However, with many people working remotely (including those working in “essential” industries such as health care, government, legal, etc.), regulators and others may consider that equipment a necessity.

The same could possibly be said of personal care products, child care products, and any other communications equipment sold to consumers. Also, in this particular emergency, services can be considered to be essential and could be subject to price gouging laws.

Which types of companies should be aware of possible price gouging?

Retailers are obviously on the front lines of pricing essential products. But under Missouri’s regulations, manufacturers need to be concerned and mindful about price gouging, too. Missouri’s laws contain a subsection specifying that a company violates the law if it charges an “excessive price” and “has reason to know” that its goods are being sold to consumers at an excessive price. This means manufacturers and those in the supply chain cannot simply turn a blind eye if the wholesalers or retailers they sell to are turning around and excessively increasing their prices.

Manufacturers, wholesalers, and retailers should be mindful that they are not increasing prices above and beyond what they were charging pre-disaster-declaration unless that price increase is justified by the increasing cost of production or transportation.



What steps should companies take now?

Consider keeping records of any increased costs so you can be prepared to justify material price increases. Manufacturers and wholesalers should also consider requiring some form of disclosure or certification from their wholesalers or retailers that those companies are not increasing customary prices beyond what is justified by their increased costs.

Chris Hohn is the co-chair of Thompson Coburn's Business Litigation group.

authorsTest

christopher m.

Christopher M. Hohn