March 23, 2020

Tri-State Merchants Must Adhere To Price Gouging Prohibitions During COVID-19 Emergency

Emergency declarations by the President and Governors of Connecticut, New York and New Jersey to confront the threat of COVID-19 have activated laws that provide harsh penalties for price gouging. Each of the Attorneys General in the Tri-State area have put businesses on notice that their offices will strictly enforce these prohibitions during the COVID-19 state of emergency, and enforcement actions have already occurred.[1] Price gouging activity is also likely to expose violators to private lawsuits. While the most egregious price gouging conduct is easy to spot and avoid, certain laws may cover more pricing decisions than you might anticipate. Merchants doing business in the Tri-State area must be aware of what these laws prohibit and the potential penalties before increasing prices for many goods and services. Likewise, potential victims of price gouging must be aware of their rights.

The following is a summary of the laws in place in Connecticut, New York and New Jersey.

Connecticut: Connecticut has a robust price gouging prohibition in that it applies to price increases for any retail item. The law provides that, for the duration of the declared emergency, "[n]o person, firm or corporation shall increase the price of ***any item*** which such person, firm or corporation sells or offers for sale at retail… ."[2] However, the law does ***not*** "prohibit the fluctuation in the price of items sold at retail which occurs during the normal course of business."[3] Retail merchants must be prepared to justify any price increase at this time as a fluctuation resulting from normal course of business factors. While the statute does not define a normal course of business price fluctuation, other prohibitions concerning supply and energy emergencies suggest that it is appropriate to consider an increase in price that "is attributable to additional costs incurred" by the merchant "in connection with the acquisition, production, distribution or sale" of a product.[4]

A violation of Connecticut's price-gouging law may be punished by a fine of no more than $99. Importantly, a violation is deemed an unfair or deceptive trade practice under the Connecticut Unfair Trade Practices Act ("CUTPA").[5] CUTPA exposes violators to broad enforcement powers by the Attorney General and private suits, potentially including class actions, for compensatory and punitive damages, disgorgement of profits, and recovery of attorney's fees and costs.[6]

In addition to the already triggered retail price-gouging prohibition, in a declared emergency Connecticut law authorizes the Governor to designate products and services that are in short supply or in danger of becoming in short supply and, for such products and services, to impose price restrictions or rationing.[7] This authority may be exercised with respect to any product or service that is essential to the health, safety and welfare of the people of the state, such as food, clothing, shelter and products used or services provided for the protection of life or property.[8] Governor Lamont has not issued a proclamation pursuant to this authority as of March 22, 2020. As the COVID-19 emergency continues, merchants and service providers cannot ignore the possibility of price restrictions for essential items.

New York: New York's price-gouging law prohibits any party within the chain of distribution for consumer goods and services vital and necessary for the health, safety and welfare of consumers from selling or offering to sell such goods and services for any amount which represents "an unconscionably excessive price."[9] This prohibition applies to manufacturers, suppliers, wholesalers, distributors and retail sellers of consumer goods or services, and also applies to repairs.[10]

The Attorney General is empowered to bring suit to enjoin unlawful acts under the price-gouging statute and, in such proceeding, the court shall impose a civil penalty in an amount not to exceed $25,000 and may order restitution to aggrieved customers.[11] Courts have not expanded the statute's reach to include private rights of action.[12]

New York's statute does not define what constitutes "an unconscionably excessive price," but does provide guidance on what factors a court must consider. Those factors are: "(i) that the amount of the excess in price is unconscionably extreme; or (ii) that there was an exercise of unfair leverage or unconscionable means; or (iii) a combination of both of these factors . . . ."[13] Even a small increase in price may be deemed unconscionably excessive if the excess was obtained through unconscionable means.[14]

Furthermore, evidence of the following will be considered prima facie proof that a violation has occurred:

> (i) the amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market or
> (ii) the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area."[15]

An accused violator may rebut a prima facie case with evidence that additional costs not within its control were imposed on it for the goods or services

New Jersey: New Jersey law prohibits excessive and unjustified price increases in the sale of certain merchandise during a declared state of emergency or within 30 days of the termination of the state of emergency.[16] The prohibition applies to "any merchandise which is consumed or used as a direct result of an emergency or which is consumed or used to preserve, protect, or sustain the life, health, safety or comfort of persons or their property . . . ."[17]

An "excessive price increase" is a price that "is excessive as compared to the price at which the consumer good or service was sold or offered to for sale by the seller in the usual course of business immediately prior to the state of emergency."[18] A price will be deemed "excessive" if it "exceeds by more than 10 percent the price at which the good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of emergency, unless the price charged by the seller is attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of emergency."[19] Even in those situations where the increase in price is attributable to additional costs imposed on the seller, the price will be deemed "excessive" if it "represents an increase of more than 10 percent in the amount of markup from cost, compared to the markup customarily applied by the seller in the usual course of business immediately prior to the state of emergency."[20]

A violation of New Jersey's price-gouging law constitutes a violation of the New Jersey Consumer Fraud Act ("NJCFA"). Under the NJCFA, a violation is punishable by a civil penalty of up to $10,000 for a first violation and up to $20,000 for a second and subsequent violations.[21] Violators may also be required to pay consumer restitution and face injunctive relief.[22] The NJCFA also permits civil lawsuits to recover treble damages, attorney's fees and other appropriate legal or equitable relief.[23]

In summary, during the current state of emergency, merchants at every level of the supply chain doing business in the Tri-State area need to be prepared for regulators, consumers and customers to scrutinize price increases for their goods and services, particularly if those goods and services are consumed for health, safety and welfare purposes or as a direct result of the COVID-19 emergency. Merchants should be prepared to prove that any such price increase is due to additional costs imposed on the seller by its suppliers or otherwise the result of normal course of business factors.

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[1] *See, e.g,,* Press Release, N.J. Div. of Consumer Affairs, *AG Grewal on Price-Gouging: Stop, or Face Consequences* (Mar. 17, 2020); Press Release, Office of the Conn. Att'y Gen., *Attorney General Tong Releases Guidance on Price Gouging Enforcement* (Mar. 10, 2020); Press Release, N.Y. Att'y Gen., *AG James: Price Gouging Will Not Be Tolerated*.

[2] Conn. Gen. Stat. § 42-230 (emphasis added).

[3] *Id.*

[4] Conn. Gen. Stat. § 42-232(a).

[5] Conn. Gen. Stat. § 42-230.

[6] Conn. Gen. Stat. §§ 42-110b to -110q.

[7] Conn. Gen. Stat. § 42-231.

[8] *Id.*

[9] N.Y. Gen. Bus. Laws § 396-r(2).

[10] *Id.*

[11] N.Y. Gen. Bus. Laws § 396-r(4).

[12] *See Americana Petroleum Corp. v. Northville Indus. Corp.*, 606 N.Y.S.2d 906, 908 (App. Div. 2d Dep't 1994).

[13] N.Y. Gen. Bus. Laws § 396-r(3)(a).

[14] *People ex rel. Vacco v. Beach Boys Equip. Co.*, 709 N.Y.S.2d 729, 731 (App. Div. 4th Dep't 2000).

[15] N.Y. Gen. Bus. Laws § 396-r(3)(b).

[16] N.J. Rev. Stat. §§ 56:8-107, 56:8-109.

[17] N.J. Rev. Stat. § 56:8-109.

[18] N.J. Rev. Stat. § 56:8-108.

[19] *Id.*

[20] *Id.*

[21] N.J. Rev. Stat. § 56:8-13.

[22] N.J. Rev. Stat. § 56:8-15

[23] N.J. Rev. Stat. § 56:8-19.

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COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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