

Florida Man Fined For... Price Gouging?

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In the past month, Florida's Attorney General has received thousands of complaints about price gouging across the state. As a result, Florida is taking action. Attorney General Ashley Moody has issued dozens of subpoenas to third-party sellers on Amazon and [secured thousands](#) in refunds for consumers. The AG's office has also been working with online platforms to deactivate price gouging accounts and has created a "Rapid Response Team" focused on price gouging. Florida is, and [promises](#) to remain, active on price gouging enforcement.

Florida's price gouging law was designed to prevent massive price increases during times of emergency. Like many other states, Florida does not set a specific benchmark for what constitutes price gouging. However, unlike some other states, Florida has an active enforcement history. Historically, Florida's Attorneys General have paid special attention to price gouging in order to protect consumers during and after hurricane season.

The Governor activated Florida's price gouging rules on March 9, 2020 by declaring a [state of emergency](#). The restrictions remain in effect until May 8th, unless extended.

Florida Price Gouging Basics

Florida's price gouging law covers the rental or sale of essential commodities during an emergency. The law defines commodities, but not what makes them essential.

Commodities include a broad arrange of things: "any goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce ... necessary for consumption or use as a direct result of the emergency." In practice, the current Attorney General has focused her efforts on face masks, hand sanitizers, and disinfectants. However, the law applies to much more, and specifically lists "food, water, ice, chemicals, petroleum products, and lumber." Fla. Stat. § 501.160(1)(a).

Importantly, the law covers supply-chain sales in addition to retail sales. Florida's statute applies to any person (or her or his agent or employees) that rents, sells, or offers to sell "essential commodities" within the area covered by the emergency declaration.

However, the law includes an exception for supply-chain sellers of raw or processed food products. Fla. Stat. § 501.160(5).

Like many states, Florida does not set a specific benchmark, instead prohibiting "unconscionable prices." Fla. Stat. § 501.160. Prices are prima facie unconscionable if:

1. There is a "gross disparity" between the sale or offer price now and the average sale or offer price of the commodity in the 30 days immediately before the state of emergency; or
2. The current price "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 emergency.

Both of these definitions pose new questions, *i.e.* what counts as a "gross disparity" and when does one price "grossly exceed" another? The statute does not define either term. Prior cases indicate enforcers are often looking for increases of 50% or more, though lower price increases could be unconscionable in different scenarios.

Like other states with price gouging rules, Florida includes an exception for increased costs. Florida's rule exempts "increase[s] in the amount charged [that are] attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of any dwelling unit or self-storage facility, or regional, national, or international market trends." Fla. Stat. § 501.160(1)(b)1. This exception comports with the principle that sellers should not be punished for higher prices due to increased costs elsewhere. However, this common increased costs exception also means that when investigators ask retailers why their prices jumped, their first answer will often be, "my suppliers are charging me more."

Notably, Florida’s exception for increased costs includes “regional, national, or international market trends.” Some sellers have argued this language covers index-based pricing, however, this may only be true where an increase in the index price actually increases the seller’s costs. As a result, sellers at all levels of the supply chain, and even those pricing based on an index, may consider tracking their costs and prices in the period immediately before the activation of the pricing prohibitions, along with documenting the bases for any pricing movements.

Penalties & Enforcement

Florida’s hurricane-prone climate has led to a history of active price gouging enforcement. For example, in 2004, the Governor created a Hurricane Task Force responsible for investigating price gouging during the hurricane season. The task force brought numerous civil cases against hotels, construction companies, and individuals, and recovered thousands in restitution and penalties.

In Florida, price gouging carries a \$1,000 penalty for each violation, up to \$25,000 for a 24-hour period. Fla. Stat. § 501.164. Florida has no private right of action for price gouging, so cases must be brought by the Attorney General or Department of Legal Affairs. Fla. Stat. § 501.160(8). The statute also makes it a misdemeanor to sell products during a state of emergency without a business tax receipt. Fla. Stat. § 501.160(9).

Florida’s active enforcement can be expected to continue in the weeks and months ahead. Look to Proskauer on Price Gouging for more information on these and other price gouging developments nationwide.

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