Proskauer

Q&A Follow-Up from “The Price is Right…or Is It? What Supply Chain Businesses Should Know” Webinar

Minding Your Business Blog on **June 11, 2020**

On June 3, 2020, Proskauer’s Antitrust Group hosted a webinar on what supply chain businesses should know about price gouging laws and regulations, and, during and after the webinar, we fielded some thoughtful follow-up questions from clients and friends who attended. We have collected and provided answers to the questions we received below in an effort to further inform and share insights on price gouging concerns raised by attendees. Thank you to all who joined us for the webinar.

Background: State price gouging laws have been activated around the country due to the COVID-19 pandemic. As a result, businesses at all levels of the supply chain are faced with complying with at least 34 individual state price gouging laws. Several class actions lawsuits have already been filed against supply chain businesses and we expect to see lawsuits to continue in the coming months and beyond.

Q: How much of a risk is there really of enforcement?

We have seen over the last several months that the risk of enforcement is real. Some state Attorneys General, such as AG Bob Ferguson (WA), AG Letitia James (NY), and AG Keith Ellison (MN) have been very active. The majority of AGs are actively investigating price gouging complaints on an ongoing basis, even in states where there is no price gouging statute. Attorneys General are also taking measures to inform the public of their efforts to fight price gouging. New Jersey, for example, posts updates on its enforcement efforts weekly. As of June 5, 2020, AG Gurbir Grewal (NJ) had issued 1,586 cease-and-desist letters and 108 subpoenas. Beyond government enforcement, several class actions have been filed against companies accused of price gouging. We expect to see enforcement proceedings and private class actions continue in the coming weeks, months and beyond.

Q: Is raising prices to meet a supplier's minimum advertised price ("MAP") during a state of emergency—even if more than 10%—a defense under price gouging statutes?

The majority of state statutes do not contemplate minimum advertised pricing as a defense. However, some states may take this into consideration. Tennessee, for example, does not prohibit price increases that are directly attributable to prices set forth in a pre-existing agreement. Kentucky's price gouging law also provides that a price does not violate the statute if it is "[a] contract price, or the result of a price formula, established prior to the order implementing" the statute. Further, this could potentially be taken into consideration in those states that apply an "excessive" or "unreasonable" standard.

Q: I typically provide notice to retailers prior to increasing my prices. If my effective date lands right before the pandemic, can I still execute the increase? What if that execution date falls after the effective date of the prohibition?

Whether a planned price increase—which becomes effective during a state of emergency—could trigger liability under price gouging laws depends on many factors. At a high level, there are no explicit exceptions for planned price increases. However, assuming your goods are sold in California, for example, such increases may be permitted under certain circumstances. If the planned price increase would not increase the prices on covered goods or services above the 10 percent cap, the increase may be permissible. Even a price increase of greater than 10 percent ay be permissible if: (1) the increase was "directly attributable" to certain additional costs during the state of emergency, and (2) the new price is no greater than 10 percent more than the "total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business," as compared to the period immediately preceding the emergency.

Q: If I raise my prices to cover my costs, can I keep my profit margin the same?

Most state price gouging statutes do not specifically address profit margins. The majority of states that do include defenses or exceptions for a seller's customary markup do not provide guidance as to whether this is profit margin or profit dollars. For example, Utah prohibits charging an "excessive price" which is defined as a price that "exceeds by more than 10% the average price charged by that person for that good or service in the 30-day period immediately preceding the day on which the state of emergency is declared." Utah's statute also includes an exception for increased costs, as well as the seller's customary markup. It does not, however, define what customary markup is.

Wisconsin, on the other hand, prohibits certain price increases greater "than 15% above the highest price at which the seller sold like consumer goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration." The statute, however, also provides an exemption to this if the "selling price does not exceed the seller's cost plus normal markup." The statute defines "normal markup" as a percentage markup. Therefore, Wisconsin's statute likely allows for a seller to maintain its profit *margin*. Similarly, Missouri also includes an exception for "customary profit margin," which likely allows the seller to maintain its profit margin as well.

Q: If I can't raise my price in line with increased costs, do I have to sell at a loss?

The majority of states have a defense for increased costs. So long as you have sufficient documentation that your costs increased, it is likely that you can raise your prices to cover the increased costs. However, whether you may also increase your profit margin depends on the state. As discussed in Question 4, some states do expressly allow sellers to keep their pre-emergency profit margins. Even in states that do not specifically say anything about profit margins, it may be arguable that maintaining profit margins on top of increased costs is allowed, but needs to be analyzed on a state-by-state basis.

Q: Are promotional prices factored into my baseline price?

Not all states explicitly address whether promoted prices are factored into the baseline price for a good. In many states, however consideration will be given to documentation that those promoted prices do not reflect "normal" pricing. Several states explicitly exclude factoring "temporar[y] discount[s]" (Mississippi), "discounted prices" (Rhode Island), or "limited discounts or rebates" (Rhode Island) into the average price calculation, and instead identify price gouging by comparing sales prices to the "normal average retail price" (D.C.) or the "average price at which the same or similar commodity was readily obtainable" (Florida) during the relevant baseline period.

Q: Is there a maximum financial penalty a company could face for price gouging?

While penalties vary from state to state, civil penalties range from $99 to $40,000 *per* violation. Some states limit the amount a person found guilty of price gouging can be fined for in one day. For example, Rhode Island's price gouging law provides that a court may impose a civil penalty of "not more than one thousand dollars ($1,000) per violation with an aggregate total not to exceed twenty-five thousand dollars ($25,000) for any twenty-four-hour (24) period." Other states, however, provide for more severe penalties. Texas' price gouging law provides an enhanced penalty of no more than $250,000 if "the act or practice that is the subject of the proceeding was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older."

Further, violators of price gouging statutes could face hefty civil damages in some states. North Carolina, for example, provides for a private right of action under its consumer protection laws, which may allow victims to recover treble damages, as well as attorneys' fees if the judge finds that the defendant willfully engaged in price gouging. Similarly, New Jersey's Consumer Fraud Act states that "[i]n any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. [T]he court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."

Q: Once you've raised your prices, is it too late to avoid liability?

The majority of states do not take into account a price reduction after a statutory violation has occurred where the price increase does not fall into a defense or exception. However, note Hawaii's price gouging statute which provides "the defendant shall be deemed not to have violated this section if …(1) [t]he violation of the price limitation was unintentional; (2) [t]he defendant voluntarily rolled back prices to the appropriate level upon discovering that this section was or may have been violated; and (3) [t]he defendant has instituted a restitution program for all consumers who may have paid excessive prices.

Q: What can I do if my supplier raises prices?

Most states provide an exception for increased costs. While you may be able to raise prices if your costs increase, maintaining and not increasing margins will be an important element of any defense. Accordingly, it is essential to maintain documentation to accurately track your price movements in order to be prepared to demonstrate why applicable defenses may apply.

Q: How long are price gouging laws in effect?

Price gouging laws are temporary restrictions that are activated by local, state, or national emergencies. While most laws end when state of emergencies expire, some states take a different approach. For example, New Jersey and Pennsylvania's price gouging laws remain in effect for 30 days after the state of emergency expires. Other states, like California, have provided an explicit date indicating when the price gouging law expires. Note though that lawsuits and enforcement actions may be brought for years to come until the applicable statutes of limitations have expired.

Compliance with price gouging prohibitions is manageable but requires stepped-up compliance efforts and scrutiny of pricing movements. Proskauer's antitrust practice group counsels clients on a wide range of business issues, including price gouging issue spotting and compliance best practices. Please contact any of our lawyers if we can answer any questions on these issues.

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