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Calculating Damages for Price Gouging Violations: Why Customer Refunds are Only Part of a Company's Concerns

Minding Your Business Blog on **July 30, 2020**

As the COVID-19 pandemic continues and the triggering states of emergencies are largely extended, companies are increasingly focused on compliance with state price gouging statutes. State attorneys generals have launched investigations and brought lawsuits, and several class actions have been filed by consumers against companies for alleged price gouging, up and down the supply chain. The relief sought in these actions highlights the risk that violators of price gouging statutes could find themselves facing hefty damages claims—perhaps to a greater extent than immediately obvious.

Depending on the state, damages could arise from enforcement actions by the state attorney general or by private rights of action; some states provide for damages under both enforcement mechanisms.

The categories of damages permitted vary widely. As an example of the range of relief sought in a single action, the New York Attorney General recently filed suit against a wholesale grocery distributor based on increased wholesale prices for the sale of Lysol disinfectant products to New York grocery and discount stores, and her complaint seeks a permanent injunction, an accounting, disgorgement of profits and restitution to consumers, as well as a civil penalty and costs.

Restitution: Many price gouging statutes include restitution as a penalty, with the expectation that companies refund customers any amounts those customers paid in excess of the permissible prices. But even if companies faced with price gouging lawsuits or investigations provide that restitution to customers, they can nevertheless face additional—and potentially quite onerous—financial penalties.

Penalties per transaction: Dozens of states allow for civil penalties to be imposed on a "per violation" basis, meaning that each and every sale could be tallied for purposes of determining damages. Some states impose a daily cap on potential liability, such as Utah, which allows for up to $1,000 per violation, with a maximum of $10,000 per day, and Alabama and Rhode Island, which allow for up to $1,000 per violation, with a maximum of $25,000 per day. Rather than capping penalties on a daily basis, Vermont's attorney general can seek up to $10,000 per violation, up to a maximum of $1,000,000 for a company.

Other states provide no caps for civil penalties, including:

- **Indiana** and **Tennessee** (up to $1,000 per violation)
- **North Carolina, South Carolina** and **West Virginia** (up to $5,000 per violation)
- **Washington** (up to $2,000 per violation)
- **California** and **Virginia** (up to $2,500 per violation)
- **Delaware, Maryland, Pennsylvania,** and **Texas** (up to $10,000 per violation)
- **Colorado** (up to $20,000 per violation)
- **Alaska, Michigan,** and **Oregon** (up to $25,000 per violation)
- **Iowa** (up to $40,000 per violation)

Other financial penalties: A variety of other forms of financial penalties may be available in addition to those "per violation" penalties. Some statutes allow for fees and costs incurred in investigating the price gouging at issue to be shifted, such as Delaware and Pennsylvania. Others allow for the appointment of a receiver (Georgia, Illinois, Montana), revocation of business licenses (Kansas, Mississippi, South Carolina), or corporate dissolution (Rhode Island, Illinois, Massachusetts) to be ordered if non-compliance is determined. Delaware even permits treble damages.

Other relief: In some extreme cases, depending on the circumstances, violators could be jailed for up to thirty days (South Carolina), or even for up to one year (California, Connecticut, or West Virginia), five years (Mississippi), or ten years (Oklahoma).

Some states also have special protections in place if the customers affected include senior citizens. In New Jersey, the statute provides for up to twice the amount of normal restitution to be repaid to senior citizens. In Illinois, the attorney general may seek a civil penalty of up to $50,000 per violation if there was intent to defraud, but if the violation was committed against a person 65 years or older, that ceiling on civil penalties is raised and up to an additional $10,000 per violation may be imposed.

While even a small price increase could result in such penalties, there are many justifications and exceptions that permit some price increases. To avoid these risks, companies will benefit from reliance on their compliance practices and their own internal documentation of costs and justifications. This post does not cover all the damages that may be sought, nor does it address every state whose statutes may be implicated if a price increase does not fall within those exceptions. Rather, it illustrates the most common forms of damages available to enforcers and private plaintiffs, which should counsel caution in pricing movements for the duration of the emergency.

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