

# Can a Declaratory Judgment Protect My Company From a Price Gouging Lawsuit?

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Much of the discussion to date regarding price gouging laws has rightly focused on the two core elements of a price gouging lawsuit: what constitutes a violation and what are the defenses? And while these defenses are valid, most would prefer to never have to spend the time and expense getting a case dismissed in the first place – raising the question of whether a declaratory judgment may be the right solution.

A declaratory judgment allows a court to define the relationship between parties where there is an “actual controversy” between the parties at or before the filing of the suit. Declaratory judgments are creatures of statute, and both the federal government and most states have a form of declaratory judgment. While declaratory judgments cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts, this does not mean that plaintiffs need wait for liability in order to bring a declaratory judgment action. Indeed a chief purpose of a declaratory judgment action is to define one’s rights before they are violated.

In the price gouging context, a declaratory judgment action would likely challenge a price gouging law in one of two ways: by arguing that the law or its application was unconstitutional or otherwise invalid. Under either scenario, a party would potentially be able to affirmatively bring suit to determine whether its conduct was prohibited, without having to wait for a lawsuit.

Declaratory actions are often used by plaintiffs to challenge laws they find unconstitutional. In 2018, for example, the Sixth Circuit held that a district court properly ruled that Tennessee’s durational-residency requirement for retail alcohol licenses was unconstitutional in violation of the Dormant Commerce Clause. The suit arose when two non-Tennessee companies applied for retail alcohol licenses, prompting Tennessee’s Attorney General to bring a declaratory judgment action seeking to construe the constitutionality of the durational-residency requirement.

While this may potentially provide a path to avoiding price gouging liability with a declaratory judgment action, questions remain. The first is standing, a legal concept that limits who may bring a suit to those that have actually been harmed by the offending conduct in question. Generally, in order to have standing, a plaintiff must show that it suffered an injury, that there is a causal connection between the defendant's conduct and the plaintiff's injury, and that it is likely that the injury would be redressed by the court's decision.

Where there exists only the specter of a suit, but not a sufficiently definite threat of one actually occurring, a declaratory judgment may not always be appropriate. However, standing may potentially or arguably arise for instance, where a company is foreclosed from engaging in normal course of business pricing practices as a result of an extended state of emergency declaration and attendant pricing restrictions. Similarly, where a company is the subject of a government investigation or private lawsuit – the question of standing will be easily decided in the affirmative. Even if there is standing, a court may nevertheless view the question as unresolvable at the declaratory judgment stage if it involves questions of fact. This could be particularly so in the price gouging context where a company's pricing decisions may be the result of a complex process. Proving that such complicated pricing decisions were or were not caused by some other (or many other) set of facts may be just the type of investigation that a judge would find appropriate to let play out in discovery.

Businesses should consider whether, in the appropriate circumstances, they may be able to head off a significant expense, or even ultimate liability, with a well-constructed declaratory judgment action. As price gouging law develops, it is important for companies to remain agile and consider all options to avoid price gouging lawsuits.

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