Proskauer

Price Gouging Weekly Round Up

September 28, 2020

Price gouging enforcement and litigation is front and center for company counsel and business managers nationwide. Our weekly round up highlights some of the most relevant news and information to our clients and friends.

AGs Defend Kentucky's Investigation into Online Price Gouging

On September 23, 2020, a bipartisan coalition of 30 state attorneys general filed an amicus brief in the U.S. Court of Appeals for the Sixth Circuit urging the court to reverse the district court's decision in *Online Merchants Guild v. Cameron* to preliminarily enjoin Kentucky from enforcing its price gouging prohibitions against merchants that sell their products on Amazon. Amici argue that the district court erred in accepting the Online Merchant Guild's argument that applying price gouging laws to online sellers violates the dormant Commerce Clause because it constitutes an impermissible regulation of extraterritorial commerce. Instead, Amici argue that price gouging laws do not violate the dormant Commerce Clause because: 1) the dormant Commerce Clause reserves to the States broad regulatory authority to protect public health and safety; 2) regulating price gouging is a valid, non-protectionist exercise of state police powers; and 3) the extraterritoriality doctrine does not limit the States' authority to regulate price gouging within their borders. Amici conclude by stating that "because price gouging laws like Kentucky's affect only the price of goods within the State, without dictating prices in other States' markets, those laws do not run afoul of the extraterritoriality doctrine."

New Jersey Attorney General Remains Active in the Fight Against Price Gouging

In a September 21, 2020, Press Release, New Jersey Attorney General Gurbir Grewal provided an update on the actions his office and the Division of Consumer Affairs have taken to combat price gouging. According to Attorney General Grewal, the Division has sent 1,884 cease and desist letters to retailers suspected of unconscionable business practices during the pandemic, including price gouging. The Division has also issued 110 subpoenas, further investigating alleged violations of New Jersey's Consumer Fraud Act. "Since the beginning of the COVID-19 outbreak, we made clear that we would take a tough stand on price gouging and other abuses of New Jersey consumers," said Attorney General Grewal. The Press Release goes on to remind New Jersey residents that the law, which took effect following Governor Murphy's March 9, 2020, declaration of a state of emergency, prohibits excessive price increases during a declared state of emergency and for 30 days after its termination.

New York City to Allow Restaurant Surcharge

On September 16, 2020, the New York City Council voted with an overwhelming majority to allow restaurants to temporarily impose a "COVID-19 recovery charge" to assist them through their pandemic-related financial struggles. According to a spokesman for Mayor Bill de Blasio's office, the bill will allow restaurants to add up to a 10% surcharge to each bill so long as the surcharge is clearly noted on the menu. The surcharge will be allowed for 90 days after indoor dining has returned to normal, though this date is not yet determined. Some, however, do not support the surcharge, arguing that allowing it will discourage tipping due to some customers mistakenly thinking that some of the money goes to employees. While one restaurant owner, who has already raised his prices by about 5 or 6 percent, feels that unless there are new unforeseen costs that arise, "it kind of feels like price gouging."

Heat Lamp Shortage Leads to Prices Skyrocketing

As fall gets underway, some cities are seeing a shortage of an unexpected product: heat lamps. According to September 21, 2020, report by Eater, Chicago is facing a patio heat lamp shortage as the winter restaurant season approaches, leading to prices skyrocketing. With heat lamps becoming a rare find across the area, many restaurant owners are having to turn to party rental companies for the lamps. However, rental companies are reportedly charging thousands of dollars per heat lamp, compared to their usual price of around $140. Where heat lamps can be found for sale, prices are ranging for $400 to $450 a lamp. Chicago restaurant owners are not alone. Restaurant owners in California and New York are similarly seeing a shortage of heat lamps.

Price Gouging Complaints Continue in Texas Following Hurricane Laura

According to Texas officials, the state has received 68 price gouging complaints following Hurricane Laura in late August. The breakdown of the complaints is as follows: 29 related to lodging; 19 related to fuel; 11 related to hardware supplies; 6 related to food, water, and groceries; 2 unknown; and 1 related to an online retailer. The Office of Attorney General expects more complaints following Texas' most recent storm, Tropical Storm Beta. For comparison, the Texas Office of Attorney General received over 5,000 complaints following Hurricane Harvey in 2017. Read our blog post for more information on Texas' price gouging law.

Related Professionals

- **Christopher E. Ondeck**
  Partner
- **John R. Ingrassia**
  Partner
- **Kelly Landers Hawthorne**
  Associate