

Price Gouging and Bad Intent: How Much Does it Matter?

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Although much of the coverage relating to price gouging enforcement has focused on bad actors hoarding pandemic-related goods, businesses that make good faith efforts to comply with the panoply of price gouging restrictions may nevertheless find themselves in the crosshairs. The relevant statutes typically impose a form of strict liability, and do not take motive into account [as we have discussed](#). Even if we assume that states should be able to freeze prices out of their desire to protect their citizens, it is not clear that states should impose strict criminal liability for price gouging violations.

Criminal offenses tend to have two essential parts: the actus reus, or prohibited act, and the mens rea, or required mental state. The Supreme Court [has observed](#) that this intent requirement reflects a sense of culpability:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Though a mens rea requirement, our justice system attempts to differentiate between an actor who did not mean to commit a crime and an actor who intentionally or recklessly committed one.

There are some exceptions to this general rule, including for strict liability laws. Strict liability is a standard under which an actor who did not intend to commit a crime can nonetheless be held liable. A common example of a strict liability crime is a traffic offense, like speeding.

Some criminal price gouging laws impose this kind of strict liability. For example, only “knowing and willful” price gouging in Mississippi can lead to felony charges and up to 5 years imprisonment. However, other states, like California, have no such qualifying intent language, and nonetheless contemplate fines of up to \$10,000 and/or imprisonment of up to one year. (Note: these maximums are per “violation.”)

The decision to treat price gouging as a strict liability offense is a judgment call; it reflects a weighing of the burdens on business activities and their possible damages. Courts are typically reluctant to hold industries strictly liable for possible harms caused by their activities, out of concern that this kind of liability would lead a disproportionate impairment of business. Other standards, like negligence, may allow more room for businesses to operate, while still allowing for injured parties to seek redress when appropriate.

The strict standards imposed in the majority of the price gouging laws presently in place are not likely to change midstream. But, should the federal government ultimately pass a price gouging law, and as local governments evaluate the impact of their laws and contemplate revisions, strong consideration must be given to the standards applicable to liability under these type of broad pricing restrictions.

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