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COVID Experiences Could Play Into Gas Price-Gouging Suits

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Gasoline prices have spiked all along the U.S. Eastern Seaboard following a cyberattack on one of the largest pipelines in the country.

Retail prices hit $10 per gallon in some locations, up from $3 to $4 per gallon only days before. This has raised widespread accusations of price- gouging.

In normal times, such price increases might be distasteful, but not illegal. However, this is not a normal time.

The country still is in the midst of the COVID-19 pandemic, during which every state law against price-gouging was activated.

When triggered, these laws limit or cap the price increases permitted for consumer goods. The price-gouging laws of some states prohibit price increases in excess of 10%; other states prohibit unconscionable price increases — and any increase greater than 10% is a good rule of thumb for what may be deemed unconscionable.

In the 28 states that have specific price-gouging laws, the recent spike in retail gasoline prices poses a serious legal concern for violations of price- gouging statutes.

On May 7, the Colonial Pipeline reported a ransomware cyberattack.

In response, the company, whose pipeline serves 14 states from Texas to New Jersey, temporarily halted all pipeline operations and took certain systems offline in attempt to contain the threat.

Businesses and consumers alike grappled with the sudden pause to the usually steady stream of gasoline coming through the pipes.

Although Colonial resumed its pipeline operations on May 15, there were continuing shortages as a result of the shutdown and the public reaction. Further, it appears challenges could persist for days or weeks to come.

The public is experiencing long lines and increased prices.

Many have questioned whether these price increases run afoul of price-gouging laws in the impacted states.

A number of states have hotlines for consumers to report allegations of price-gouging. Complaints have flooded in, and several state attorneys general have made clear they are carefully scrutinizing price increases at the pump.

Reports of gas prices vary wildly across the affected region. In Virginia, the average price for gasoline increased by 8 cents overnight May 11.[1]

In North Carolina, following long lines of buyers waiting at the pump, prices were reported at $9.99 per gallon.[2] Reports of stations in the state running out of gasoline fluctuated wildly, with 70% of stations across North Carolina reportedly running dry at the peak.[3]

On May 12, a gas-tracking app — United Communications Group's GasBuddy — reported that 94% of stations in North Carolina's Raleigh-Durham area had no gasoline.[4] And for stations that still had gasoline, many increased prices.

Consumers and states, having just weathered severe winter storms where natural gas prices skyrocketed and still haunted by memories of toilet paper shortages, may apply lessons learned from these experiences to future lawsuits that arise out of the current situation.

Businesses can also draw on their COVID-19 experiences in order to ensure compliance with state laws and lay the foundation for a solid defense in the event of a price-gouging suit related to this shutdown.

Price-Gouging Prohibitions in COVID-19

Some states, like California and Oregon, have begun to allow states of emergency related to COVID-19 to expire. Additionally, where state pricing restrictions are still in force, the relevant price-gouging statutes do not always cover gas, gasoline or fuel.

In some places, such as Texas and Tennessee, the price-gouging statutes explicitly cover gasoline or fuel. As a result, the prior COVID-19 emergency declarations could remain the starting point for the emergency, and relevant price limitation considerations could date back much earlier than this cyberattack.

For other states, the pricing restrictions are only triggered for goods directly tied to the emergency. In these cases, the applicability of the COVID-19 emergency declarations to gasoline is less clear.

If the prior COVID-19 emergency declaration did not apply to gasoline prices, the beginning date of the emergency could shift from March or April 2020 dates — when the COVID-19 emergency declarations were first issued — to the pipeline-related emergency declarations issued by state governors.

Accurately calculating the beginning point of the emergency is vital in calculating the baseline price in a price-gouging analysis. Pricing above the relevant baseline may constitute a violation of the statute.

While many emergency declarations were not issued until days after the pipeline shutdown, many supply and demand factors kicked into gear upon news breaking of the pipeline attack on May 7, several days earlier.

If prices began to rise before the declarations of emergency, then the starting point for baseline prices likely will be higher, in determining whether an increased price constitutes price-gouging.

What Exactly Do These Statutes Prohibit?

When price-gouging laws are invoked, the prohibited conduct varies from state to state, and can be evaluated according to either subjective or objective standards.

One type of law prohibits charging unconscionable or excessive prices for certain products during an emergency. This is the case in Virginia, one of the states that appears to have been heavily impacted by the cyberattack and subsequent pipeline pause.

On May 11, Virginia Gov. Ralph Northam declared a state of emergency and invoked Virginia's price-gouging statute.[5] which prohibits selling "any necessary goods or services at an unconscionable price."[6]

Necessary goods and services are those "for which consumer demand does, or is likely to, increase as a consequence of the disaster," and the statute includes motor fuels as one such example.

Even if gasoline was not considered a necessary good under the ongoing state of emergency due to the pandemic, it is certainly covered by this specific state of emergency now.

The statute lays out the factors that contribute to unconscionability, which include:

- The price at which the seller sold the item in the 10 days prior to the state of emergency;
- Whether the price grossly exceeded the price of other sellers just prior to the emergency; and
- Whether the seller typically instituted a seasonal price increase, notwithstanding the emergency.[7]

North Carolina Gov. Roy Cooper also declared a state of emergency, on May 10, and that triggering event invoked that state price-gouging law.[8]

North Carolina's statute similarly prohibits charging a "price that is unreasonably excessive under the circumstances" for covered goods and services — which are those that "are consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property."

Again, even if gasoline was not considered a covered good for purposes of the ongoing pandemic-related state of emergency, it appears to be covered by this new declaration.

Factors that play into the determination of whether a price is unreasonably excessive include increased costs for the seller, fluctuations in commodity markets, and the price the seller charged during the 60 days prior to the emergency.[9]

Another category of states uses a more bright-line test for price-gouging: Their statutes impose blanket prohibitions on any price increases over the relevant baseline.

For instance, in Georgia, a person may not sell goods or services that the governor identifies in the declaration of emergency "at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency."[10]

Georgia Gov. Brian Kemp declared a state of emergency on May 10,[11] which was originally meant to be in effect through May 15, but has since been extended through May 22.[12] His order specifically covers, among other things, price-gouging on motor and diesel fuel, thereby invoking that statutory cap.

When Justifications for Price Increases Exist

Specific defenses for price-gouging allegations similarly depend on the state.

Some statutes — like those in Virginia, North Carolina and Florida — offer businesses the opportunity to present a full view of the situation that led to the price increase.

Courts will consider the prices charged prior to the emergency declaration, but that alone is not dispositive, and the entire state of the marketplace can be taken into account.

In New York v. Quality King Distributors, a pandemic price-gouging case decided by the New York Supreme Court in September 2020, the larger context was a full defense to a price- gouging allegation.

According to the state price-gouging law, defendants can rebut a prima facie case of price- gouging with evidence that the increase either preserved a normal profit margin or reflects "additional costs not within the control of the defendant were imposed on the defendant for the goods or services."[13]

Where Quality King provided evidence of increased costs and comparable pricing with its competitors, the court concluded that even a 200% price increase on certain cleaning products did not violate the statute.[14]

Though state statutes are often silent on this point, profit margins have been salient in other price-gouging cases or investigations. For example, the Idaho Attorney General Lawrence Wasden investigated several gasoline retailers whose profit margins allegedly rose from the 10 cents per gallon margin the companies had been collecting, before COVID-19, to up to 70 cents per gallon.[15]

Wasden concluded that such markups violated Idaho's price-gouging statute, and the retailers ended up settling with the state.

However, the Idaho Legislature then amended the price-gouging statute to clarify that courts "shall not consider any increase in the margin earned," but instead should consider a host of potentially exculpatory factors.[16]

Attorney General for the District of Columbia Karl Racine brought a similar case against gasoline retailer Capitol Petroleum Group LLC, invoking to use the seller's increased profit margins as a factor in its analysis.[17]

Specifically, it was alleged that prior to the COVID-19 emergency declaration, Capitol Petroleum's average profits per gallon on regular gasoline was 44 cents, but following the emergency declaration the same seller's margin doubled to an average profit of 88 cents per gallon. That case remains pending.

Many states with objective or benchmark price-gouging rules allow for specific defenses related to increased costs.

For example, in Georgia and Mississippi, the blanket prohibition on any price increase during an emergency is softened by explicit statutory exceptions, including an exception for increased costs.

If a seller faces additional expenses, whether directly from their supplier or from increased transportation costs, these can justify price increases.

Reminiscent of the artificial toilet paper crisis in the spring of 2020, panic buying can often add additional disruptions to the supply chains, increasing costs or interfering with deliveries.

Sellers seeking to justify a price increase based on even temporary scarcity should consider how the supply chain disruptions directly contribute to any price increase. Sellers should seek to make individualized determinations as to increased costs and not rely solely on the broader market trends.

Coverage and Risks

While the current news cycle is heavily focused on gas stations and their prices at the pump to the consuming public, many states do not limit the application of their price-gouging laws solely to retailers.

Some statutes, such as Georgia's, refer broadly to any person or to sellers, while others, such as Maryland, explicitly limit the scope of the statute to retailers.

These statutes, therefore, could apply to business-to-business price increases farther up the supply chain, including wholesalers and refiners.

North Carolina's statute specifically notes that it covers "all parties in the chain of distribution," including "manufacturer, supplier, wholesaler, distributor, or retail seller of goods or services."

Thus, price-gouging risk assessment and compliance is not solely a matter for gas stations, but is necessary for every business in the distribution chain for gasoline that may have increased prices.

Penalties for price-gouging violations can compound quickly. In some cases, sellers found to have violated the statute must refund their customers the amount charged in excess of the statutorily permitted price.

But many states also impose civil penalties. Florida allows courts to impose up to $1,000 per violation, up to $25,000 per 24-hour period.[18]

In Virginia and North Carolina, civil penalties can be up to $2,500 and $5,000 per violation, respectively, with no cap on the total damages available.[19] As evidenced by long lines at gas stations in many states, the sheer number of transactions can quickly add up.

It is unclear how long the emergency declarations might be in place. While gas is beginning to flow through the Colonial Pipeline once again, it will take time to normalize the supply.

As a result, business could be grappling with the fallout for several weeks to come. Monitoring prices, price increases, and margins will be important even after the panic is over.

While price increases that coincide with an emergency can trigger quick judgments and reactions, it is vital to consider specific questions to understand whether such price-gouging accusations are justified.

The key questions include:

- Does the state in question have a price-gouging law that covers gasoline?
- It is active?
- Who can enforce it?
- Does this specific price increase appear to run afoul of its limits?
- What parties in the supply chain appear to be covered by the statute?
- What are the defenses and justifications set forth by the statute?
- What are the damages?

The answers to these questions vary state-by-state for the impacted areas along the eastern seaboard, and it is clear that both buyers and sellers should consider the responses to these questions.

Based on the public outcry over increased gasoline prices, it is virtually certain that some of these questions will be resolved in the courts in forthcoming lawsuits.

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[1] See Kate Andrews, Report: Virginia Gas Shortage Leaps to 52% in One Day, Virginia Business (May 12, 2021), https://www.virginiabusiness.com/article/virginia-gas-shortage-leaps-to-44-in-less-than-24-hours.

[2] See Lauren Lindstrom and Jonathan Limehouse, $9.99 a Gallon? Officials Receive Complaints about Price Gouging at NC Gas Stations, The Charlotte Observer (May 13, 2021), https://www.charlotteobserver.com/news/local/article251384113.html.

[3] See North Carolina gas stations experience 'some improvement' in fuel outage numbers Thursday, WXII12 (May 13, 2021) https://www.wxii12.com/article/north-carolina-loves- travel-stop-country-store-gas-shortage/36398578.

[4] Id.

[5] Virginia Governor Ralph Northam, Exec. Order No. 78-2021 (May 11,

2021) https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO- 78-Declaration-of-a-State-of-Emergency-Due-to-the-Shutdown-of-the-Colonial-Pipeline.pdf.

[6] VA Code §59.1-527.

[7] Id.

[8] North Carolina Governor Roy Cooper, Exec. Order No. 213 (May 10, 2021) https://files.nc.gov/governor/documents/files/EO213-SOE-Transportation-Waivers-Pipeline.pdf.

[9] NC Gen. Stat. §75-38(a).

[10] Ga. Code §10-1-393.4.

[11] Georgia Governor Brian Kemp, Exec. Order No. 05.10.21.02 (May 10, 2021) https://gov.georgia.gov/document/2021-executive-order/05102102/download

[12] Georgia Governor Brian Kemp, Exec. Order No. 05.14.21.01 (May 14,

2021) https://gov.georgia.gov/document/2021-executive-order/05142101/download.

[13] N.Y. Gen. Bus. Law § 396-r(3).

[14] See New York v. Quality King Distributors, Case No. 052720-n442 (N.Y. Cty. Sup. Ct.).

[15] See Press Release, Office of the Idaho Attorney General, Wasden Announces Settlement of Gas Price Investigation (Nov. 30, 2020) https://www.ag.idaho.gov/newsroom/wasden-announces-settlement-of-gas-price-investigation/; John Sowell, Records reveal how much Idaho dealers boosted margins on gas sales early in pandemic, Idaho Statesman (Feb. 3, 2021) https://www.idahostatesman.com/news/business/article248133380.html.

[16] S.B. 1041, 66th Leg., 1st Reg. Sess. (Idaho 2021) (available at https://legislature.idaho.gov/wp- content/uploads/sessioninfo/2021/legislation/S1041.pdf).

[17] Press Release, Office of the Attorney General for the District of Columbia, AG Racine Sues Major Gasoline Seller for Price Gouging at Dozens of DC Gas Stations (Nov. 12, 2020) https://oag.dc.gov/release/ag-racine-sues-major-gasoline-seller-price-gouging.

[18] Fla. Stat. § 501.164.

[19] V.A. Code § 59.1-206; N.C. Gen. Stat. § 75-15.2.

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