

ILLINOIS IMPOSES PRICE CONTROLS IN WAKE OF COVID-19

By: Nick Kahlon and Valerie Brummel

On March 9, 2020, Illinois Governor J.B. Pritzker issued a Gubernatorial Disaster Proclamation declaring a disaster in Illinois caused by Coronavirus Disease 2019 (COVID-19) and invoking his emergency powers pursuant to the Illinois Emergency Management Agency Act, 20 ILCS 3305/1, *et seq.* Section 9 of the Proclamation prohibits certain increases in the prices of goods and services in Illinois through at least April 8:

Pursuant to Section 7(14) of the Illinois Emergency Management Agency Act, 20 ILCS 3305/7(14), increases in the selling price of goods or services, including medical supplies, protective equipment, medications and other commodities intended to assist in the prevention of or treatment and recovery of COVID-19, shall be prohibited in the State of Illinois while this proclamation is in effect[.]

In a subsequent press conference, Governor Pritzker and Attorney General Kwame Raoul referred to this as an order prohibiting “price gouging in Illinois” during the COVID-19 emergency. However, the Governor and AG left open what they consider to be price gouging. Obviously, the AG’s office does not have the resources to prosecute every individual or business who increases prices during the emergency. The Proclamation may have been written broadly so that what conduct constitutes price gouging can be left to prosecutorial discretion. The AG’s press release announcing its anti-price gouging efforts warns businesses to maintain “fair” (not static) prices and stresses the need to prevent businesses from “exorbitantly” raising prices.

Case law and other regulations offer additional guidance to businesses trying to comply with the Proclamation. Prior to the Proclamation, there was no law in Illinois explicitly prohibiting gouging apart from 14 Ill. Admin. Code § 465, which prohibits price gouging as to petroleum products. However, courts had held that “unconscionably high prices” were potentially actionable as an “unfair” practice under the Illinois Consumer Fraud and Deceptive Business Practices Act (“ICFA”), 815 ILCS 505/1, *et seq.*, where the price “violate[s] public policy, [is] so oppressive that it leaves the consumer with little alternative except to submit to it, and injure[s] the consumer.” *Rockford Memorial Hospital v. Havrilesko*, 368 Ill. App. 3d 115, 124–25 (2d Dist. 2006).

While 14 Ill. Admin. Code § 465 is limited to petroleum products, it described price gouging as charging “an unconscionably high price,” defined as follows:

A price is unconscionably high if:

(1) the amount charged represents a *gross disparity* between the price of the petroleum product and:

(A) the price at which the same product was sold or offered by sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or

(B) the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and

(2) the disparity is *not substantially attributable to increased prices charged by petroleum-related business suppliers* or increased costs due to an abnormal market disruption.

Ill. Admin. Code § 465.30 (emphasis added).

Reading the petroleum regulation with the ICFA cases offers a potential working definition: (1) price gouging occurs when there is an unconscionably high price during an emergency and (2) a price is unconscionably high if there is a gross disparity between the seller's pre- and post-emergency prices that cannot be fairly attributed to an increase in the seller's costs.

This proposed definition tracks the law in other states. In New York, price gouging occurs when “a merchant used the leverage provided by a market disruption to extract a higher price,” and requires the plaintiff to show “a gross disparity of prices coupled with proof that the disparity is not attributable to supplier costs.” *People ex rel. Spitzer v. My Service Center, Inc.*, 2007 WL 102463, at *3 (N.Y. App. Div. Jan. 17, 2007). California has a price gouging statute, *see* Cal. Penal Code § 396, which defines price gouging as an increase in “price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency,” unless the “person can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or material used to provide the services.”

Illinois businesses that are considering raising prices would be wise to document the reasons for the price increase and their linkage to additional costs as a result of COVID-19. The AG has already received over 100 complaints about price-gouging and is actively monitoring online ads for potential infractions. While the AG is currently prioritizing price gouging on medical supplies, the Governor stated at their press conference that “price gouging in general” will “not be tolerated” in Illinois during the emergency.