

Legal Consequences to Consider Before Raising Prices

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Businesses routinely raise their prices in response to changing economic conditions and competition. Now might be a particularly dangerous time to raise prices without careful consideration of the legal consequences of pricing decisions.

Price Gouging

The coronavirus pandemic has resulted in shortages of many goods in numerous countries. This can be a consequence of supply chain disruption, hoarding or attempts at price gouging. In response, the federal government and almost every state are using existing laws or executive orders to prevent hoarding and price gouging from causing shortages. These laws and orders need to be carefully considered when making pricing decisions.

State Response

Many states have laws that explicitly prohibit price gouging generally or in times of declared emergency. Sometimes these prohibitions only relate to specific products. For example, Illinois has a law prohibiting price gouging in relation to “petroleum products during any marketing emergency” (Ill. Admin. Code Tit. 14 §§ 465.10 – 465.30). Regardless of the specificity of state price gouging statutes, many states, including Illinois and Michigan, have broad consumer fraud and deceptive practices acts that are modeled, in whole or part, on the Federal Trade Commission Act (15 U.S.C. § 45). These acts often can be the source of a private cause of action. Further, a number of state attorneys general, including Illinois, have announced their intention to use these mini-FTC acts to pursue price gouging. Finally, many governors have issued executive orders that prohibit and provide penalties for price gouging as defined in the order. For example, in Michigan, the governor’s order applies to any “individual, business or legal entity” and all products “with a fair market value of \$1,000 or less” as well as “emergency supplies” (Executive Order 2020-53). This order has been extended until June 12, 2020.

Federal Response

As with the states, it is entirely possible and maybe likely that the Federal Trade Commission decides to pursue legal action in relation to price gouging as a part of its mandate to prohibit “[u]nfair methods of competition ... and unfair or deceptive acts or practices” (15 U.S.C. § 45). Further, the Defense Production Act has already been invoked by the President to prevent hoarding and price gouging in relation to health and medical supplies necessary to combat the spread of the coronavirus. Penalties for violation of the act are criminal and punishable by fine not in exceed \$10,000 and/or imprisonment for up to a year (50 U.S.C. § 2073).

Take Away

The devil is in the details. Price gouging statutes and executive orders covering price gouging vary widely from state to state. Accordingly, pricing decisions by businesses now need to be taken in light of this new heightened focus on enforcing existing laws against price gouging and the executive orders promulgated by the governors of various states. While there are a number of defenses, often statutory, to a claim that a company has engaged in price gouging, failing to be familiar with the laws and executive orders covering the practice is not among them.

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Tail Risk

The states' executive orders will eventually expire. The heightened enforcement focus on pricing decisions in light of the executive orders and state and federal laws will likely also wane as the threat from the coronavirus recedes. Yet, many companies will go into reorganization or liquidation as a consequence of the pandemic. Such companies will all have incentives to use whatever private causes of action they or creditors can possibly utilize to recover money for the bankruptcy estate. These remedies include voidable transactions (i.e., paying more for a good than it reasonably is worth) and preferential transfers (e.g., receiving more from a debtor than given to the debtor). The pricing decisions made today need to bear that risk in mind.

Additional Resources

Below we have attached links and a chart summarizing state price gouging laws and executive orders. Please bear in mind that while these materials are useful, we do not regard them as comprehensive and in some instances (Michigan for one) case law may affect their application to any given situation.

Please contact your Miller Canfield attorney or any of the authors to discuss further.

State Price Gouging Laws - Chart Overview

This information is based on the facts and guidance available at the time of publication, and may be subject to change.