

The Price Gouging Statute: We Won't Be Fooled Again

For those of you that are either in denial or free-from-government-regulation never never land, Florida does have a price gouging statute. Mother Nature tricked the storm seers last year so maybe the ins and outs of the price gouging statute have receded in marketers' minds like some hairlines. But don't you be the unfortunate one to get caught asleep at the wheel when both the winds and consumers start to rage. Here are the basics.

The statute prohibits the sale of any essential commodity at an "unconscionable price" within an area for which a state of emergency is declared. (You can find the statute on the FPMA website, just click on "Library" and scan down to "Price Gouging Statute.")

An "essential commodity" means any goods, services, supplies, equipment, or articles of commerce which are necessary for consumption or use as a direct result of the emergency. It specifically includes not only petroleum products, but also food, water, and ice. (Many of the things sold by marketers on a daily basis.)

During a declared state of emergency, the Attorney General's office and the Department of Agriculture and Consumer Services, the statute's two enforcement agencies, have their consumer hotline call centers staffed and ready to respond to complaints about price gouging. And gas, water, and ice seem to be the most "hot button" commodities for those agencies. More importantly, the amount of the civil penalties demanded by the agencies in settlement bear absolutely no relationship to the extra gross margin realized by someone who makes a mistake, error in judgment, or is simply negligent. No intent to charge an "unconscionable price" is required, and zero tolerance has become the rule, not the exception.

Now back to the statute. The first question a rational person would ask is what is an "unconscionable price?" The statute's unhelpful answer to this is that a price is presumed to be "unconscionable" if

- ⌘ the price charged represents a gross disparity between the price of the commodity offered for sale in the usual course of business during the 30 days immediately prior to the declaration of the state of emergency; or
- ⌘ the price charged grossly exceeds the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to the declaration of the state of emergency.

The second and third questions a rational person would ask are what in the devil is a "gross disparity" and what is "grossly exceeds" all about? (The statute's use of such fuzzy terms is an example of the gross disparity between a standard that is reasonably understandable so a rational person can comply and one that creates a trip line that can't be seen or avoided.)

But wait—there is some measure of common sense to the statute's hazy, crazy language. A price will not be "unconscionable" if the increase in the amount of the price is attributable to

costs incurred in connection with sale of the commodity, or national or international market trends. The price gouging statute does not institute an automatic price or margin freeze. **Increased costs from your supplier are allowed to be passed through.**

Also, if market trends are generally increasing, your prices can increase as they normally would. But be careful, very careful. Don't rely on a "local" trend to save you. Avoid the situation where the guy across the street (who may not be aware of the price gouging statute) increases gas prices by, for example, 20 or 30 cents during a declared state of emergency; and you think you can match them legally without a corresponding increase in your costs. Not only will you and your competitor be featured in the local news as "ripping off the public," but you both will be easy targets of an investigation and the recipients of a civil penalty demand by either or both of the enforcement agencies.

And please, don't make the costly mistake some marketers have made, which is to jump the gun on price increases. The statute is clear on this point. **You cannot increase your price until you have actually "incurred" the additional costs.** Marketers get advance notice of fuel price increases. Under normal circumstances, those advance notices may start moving the street up before everyone buys a load of fuel at the higher price. In a declared state of emergency, this is a huge no-no. Before you can raise your street price, you must have bought and received fuel at the higher price. (Even if you don't pay for it until several days later, you can increase your price as long as you are going to be invoiced at the higher cost price.)

Does the statute limit the amount of your price increase to the amount of the price increase you received from your supplier? Maybe, maybe not. It depends on the average price you charged for the prior 30 days. The smart play is to only pass on your supplier's price increase, unless you get your pricing data together and then consult legal counsel familiar with the ad hoc rules the enforcement agencies use to determine "gross disparity."

So don't let the price gouging statute creep up on you like a bad pair of underwear. Pay attention now, while the sun is shining and the winds are calm. And, if the state of emergency gong sounds, feel free to call us on the Petroleum Hotline (800-226-7091).

Geoffrey B. Schwartz