Antitrust ADVISORY

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The East Coast Pipeline Shutdown and Price Gouging

by Jason Levine

The recent ransomware attack on a major East Coast pipeline on May 7 has triggered fuel shortages and increased retail gasoline prices in many areas of the country. As often happens in such situations, these events have been accompanied by claims of retail price gouging. In response, the governors of Georgia, Virginia, North Carolina, and South Carolina have declared states of emergency and enacted executive orders triggering statewide prohibitions on price gouging for gasoline. This begs the questions of whether spiking gasoline prices are necessarily price gouging and what state governments can do in response. It also serves as a reminder for how companies should handle pricing issues during emergencies.

Overview of Price-Gouging Laws

"Price gouging" refers to unjustified and extreme price increases intended to profiteer from a natural disaster or emergency, typically for essential products or basic necessities. Federal law does not specifically target price gouging, although the federal government has taken steps to respond to those attempting to profit illegally from the coronavirus pandemic. The U.S. Department of Justice's National Center for Disaster Fraud is also focused on finding and prosecuting those who take advantage of disasters through fraud, including price gouging.

As a practical matter, price gouging is addressed at the state level. Thirty-one states plus the District of Columbia have laws specifically banning price gouging. Nearly all other states have statutes banning "unfair" or "unconscionable" trade practices that effectively prohibit price gouging without using the term. Typically, state price-gouging laws are triggered by the declaration of a public emergency by the governor (or for D.C., the mayor), such as those declared in Georgia, Virginia, and the Carolinas in response to the East Coast pipeline shutdown. When evaluating price-gouging claims, prices of covered products are usually measured against those charged either immediately (e.g., Alabama, California, Georgia), or within some prescribed timeframe such as 30 days (e.g., Florida, Rhode Island), before the emergency declaration and through the duration of the emergency period.

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The level of price increase that constitutes potential "gouging" varies widely among states. California, for example, prohibits price increases of more than 10% above those charged immediately before an emergency declaration, whereas the threshold is 15% in Maine and North Carolina, and 20% in Michigan. Other states, such as New Jersey and Utah, broadly outlaw "excessive" price increases during a public emergency. The scope of products covered by price-gouging statutes varies among states as well. Some state laws encompass essentially all goods and services (e.g., Alabama, Florida, Mississippi). Others are limited to items that might naturally be in higher demand as a result of an emergency (e.g., Kansas) or those necessary for the "health, safety, and welfare" of consumers (e.g., New York). No state would realistically exclude gasoline from the range of covered products, and two states (Indiana and Vermont) limit their price-gouging statutes to include *only* fuel. Safe harbors and exceptions also differ among states and generally include allowances for the "pass-on" of cost increases incurred by the seller or increased production or distribution costs caused by the emergency. This is important to bear in mind with the East Coast pipeline shutdown.

Most price-gouging statutes do not provide a private right of action but vest prosecutorial authority in the state attorney general's office. Remedies typically include injunctive relief, restitution orders, and civil penalties calculated per violation. Some states – for example, Michigan, Mississippi, and Nevada – also specify criminal charges for willful acts of price gouging. Additional penalties and private rights of action may be available under a state's unfair trade practice laws as well.

The Pipeline Shutdown and Gasoline Prices

The ransomware attack on the pipeline on May 7 and its shutdown have had a sharp and immediate impact on gasoline supply and prices charged by retailers (not the pipeline company itself). It has been reported that demand for gasoline nationwide rose by 20% in the following week, and by 40.1% in five states served by the pipeline – Florida, Georgia, North and South Carolina, and Virginia. Local gasoline shortages are occurring as well; for example, 70% of gas stations in Charlotte were reportedly out of fuel as of May 12. Relatedly, average gasoline prices have increased nationwide by 6 cents per gallon, to their highest levels since 2014, and they are expected to rise higher if the impacts of the pipeline shutdown continue. Price increases in several states far outstripped the national average, reaching 15 cents per gallon in Michigan, 12 cents per gallon in Kentucky, and 10 cents per gallon in Florida.

In addition, there are anecdotal reports of extreme price increases at certain gas stations, giving rise to concerns about price gouging. For example, one gas station in Richmond, VA, reportedly charged $6.99 per gallon, despite an average price in that area of $2.83 per gallon. In North Carolina, the state attorney general's office announced 39 complaints of price gouging. If supply disruptions continue, reports of such incidents will undoubtedly increase.

It bears emphasis, however, that gasoline price increases in the wake of the pipeline shutdown are not necessarily indicative of price gouging. For example, price hikes on the order of 10 cents per gallon – roughly 4% – would not likely be considered price gouging under any current state law. The same is true for even larger price spikes if they are rooted in cost increases to the seller, or increased production or distribution costs, that are being passed on to the consumer, given that this is a nearly universal safe harbor. The vast majority of retail gasoline price increases can probably be explained by these dynamics. In contrast, doubling

or tripling the price per gallon, particularly when other sellers in the same geographical area have not also done so, *would* tend to indicate price gouging, because the price increases presumably are *not* the result of increased costs to the seller.

Price-Gouging Lessons from the Pipeline Shutdown

The pipeline shutdown and its attendant supply shock and price increases provide several important reminders for companies. Most importantly, businesses that consider raising prices for goods and services during an emergency, particularly while emergency declarations are still in effect, should bear in mind that they may be vulnerable to complaints of price gouging. Although state laws differ, it is advisable to raise prices – if at all – only to the extent necessary to offset increased costs of production, supplies, or distribution. Such increases often fall within safe harbors and exceptions in price-gouging regulations. Any such cost increases should be documented in detail. To the extent that a price increase was planned before the emergency declaration – for example, if a temporary discount period was scheduled to end on a specified date – it is crucial to keep detailed records showing that the increase was expected (and, ideally, publicized) before an emergency declaration went into effect. If it is possible to delay the price increase, and thus extend a discount period, the long-term goodwill to be gained may outweigh the additional short-term revenue from a higher price. Finally, businesses should think twice about raising prices, particularly for essential goods, merely because it appears the market will bear temporary emergency-related increases. If such price increases exceed the threshold set by state law and are not due solely to cost increases, the business will be susceptible to charges of price gouging, with legal consequences and negative impact on goodwill.

The pipeline shutdown reminds us of what companies can do if they believe they are subject to price gouging by their suppliers – for example, resulting from increased transportation costs due to gasoline price hikes. Businesses can file complaints with their state attorney general's office, which can often be done by telephone. They can also send cease-and-desist letters to their suppliers that identify the products and prices in question, explain that price gouging is illegal, and demand that prices revert to reasonable or pre-emergency market levels. If a private right of action is available under the state's unfair trade practices law, businesses can also file lawsuits for injunctive relief and damages, in addition to referring the price gouging to state authorities. For large companies, it may be effective to submit complaints to their state legislators and even their Members of Congress, who are typically eager to publicize, pressure, shame, and investigate price gougers.

Conclusion

The East Coast pipeline shutdown is a stark example of how quickly supply and demand shocks can increase prices and trigger price-gouging laws. Companies should take this opportunity to examine their states' laws to ensure their own compliance and to take action if victimized by price gouging. Given the wide variations among states' treatment of price gouging, businesses that seek to raise prices for goods or services, or believe they are victims of price gouging during the pipeline emergency, would be wise to consult with counsel experienced in this area.

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