Gasoline Price Increases: Federal and State Authority to Limit "Price Gouging"

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Summary

Fluctuations in gasoline prices in recent years have renewed focus on the role of the government in discouraging "price gouging," a term commonly used to refer to sellers inflating prices to "unfair" levels in order to take advantage of certain circumstances causing a decrease in supply, including emergencies. There have been legislative efforts to create a federal law addressing gasoline price gouging, including bills that would bar certain commercial practices as well as legislation that mandated the study of pricing of gasoline in the wake of Hurricane Katrina.

While the federal government has not enacted legislation aimed specifically at addressing price gouging for gasoline, a majority of states have enacted statutes to curtail price gouging for certain critical goods and services, including fuel, during emergencies. Some of these statutes attempt to address price gouging by barring pricing during emergencies that is considered to be "unconscionable" or "excessive" or otherwise is in violation of a subjective standard. Other statutes place a hard cap on prices during periods of emergency based on percentage increases from prices charged for the good or service in question prior to the emergency. All of these state statutes provide leeway if it can be shown that the price increases are the result of increased costs rather than simply a change in the marketplace.

At least three bills introduced in the 112th Congress would create a federal law that specifically addresses price gouging in response to emergencies. H.R. 964, H.R. 1748, and H.R. 1899 all contain language similar to the language found in the state statutes that attempt to curtail price gouging through limits or controls on pricing during declared periods of emergency. As of the date of this report, all three bills had been referred to House subcommittees, but no further action on them had been taken.

Although there is no federal law aimed specifically at price gouging, federal antitrust laws do forbid various types of anticompetitive business practices. For example, Section 1 of the Sherman Act prohibits unreasonable restraints of trade. It is possible that if a group of gasoline retailers or other retailers collaborated to set prices unreasonably high during an emergency, this "price gouging" could be a violation of Section 1 of the Sherman Act. In addition, while not necessarily tied to retail price gouging, federal statutes addressing monopolies and vertical integration may play a role in evaluating retail gasoline price changes.

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Introduction

"Price gouging" is a term commonly used to refer to sellers inflating prices to "unfair" levels in order to take advantage of certain circumstances causing a decrease in supply, including emergencies. Currently, no federal law specifically addresses price gouging. However, bills have been introduced in the 112th Congress that would prohibit price gouging of gasoline and other fuels.[1] In addition, price-gouging laws already exist in many states and are generally applicable in situations arising from a declared emergency.[2] An increase in prices alone does not constitute price gouging under most of these state statutes. Generally, protections and prohibitions in these statutes are triggered only when prices increase following a statutorily designated event. Federal antitrust and consumer protection laws also afford consumers some protection from unfair pricing schemes.

This report begins with a discussion of state price-gouging laws, including their triggers and applications, and then moves to a discussion of proposed federal legislation aimed at prohibiting price gouging. Finally, the report analyzes existing federal law regarding anticompetitive behavior and how it might apply to the market for gasoline or other petroleum products.

State Price-Gouging Laws

Many states have enacted some type of prohibition or limitation on price increases during declared emergencies. Generally, these state laws take one of two basic forms. Some states prohibit the sale of goods and services in the designated emergency area at what are deemed to be "unconscionable" or "excessive" prices during a designated emergency period. Other states have enacted legislation that caps the amount by which the prices for retail goods can be increased during a designated emergency period. Many statutes of both kinds include an exemption if price increases are the result of increased costs incurred for procuring the goods or services in question.

A Sampling of State Statutes

Prohibitions on "Excessive" or "Unconscionable" Pricing

One common format found in state statutes that attempt to address price gouging is a ban on prices that are considered to be "excessive" or "unconscionable" or another term, as defined in the statute or left to the discretion of the courts. These statutes generally bar such increases during

[1] H.R. 964 was introduced on March 9, 2011. H.R. 1748 was introduced on May 5, 2011. H.R. 1899 was introduced on May 13, 2011. The substance of these bills is discussed later in this report.

[2] At least 30 states—Alabama, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin, as well as the District of Columbia, Guam, and the Northern Mariana Islands have laws that prohibit price gouging, excessive price increases, or unconscionable pricing. Most states have laws that are triggered in the event of a declared emergency, with a few having laws that may be applicable at other times as well. Other states may also exercise authority under general deceptive trade practice laws depending on the nature of the state law and the specific circumstances in which price increases occur.

designated emergency periods; the process for emergency designation is also usually defined in the statute. Frequently the state's governor is granted authority to designate an emergency during which the price limitations are in place.

For example, the New York statute provides that,

> During any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.[3]

The statute defines an "abnormal disruption of the market" as a real or threatened change to the market "resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency ... which results in the declaration of a state of emergency by the governor."[4] The statute leaves the ultimate decision as to whether a price is "unconscionably excessive" to the courts, but it does note that if there is a "gross disparity" between the price during the disruption and the price prior to the disruption, or if the price "grossly exceeds" the price at which the same or similar goods are available in the area, such disparity will be consider prima facie evidence that a price is unconscionable.[5]

Similarly, Florida's statute bars "unconscionable" pricing during states of emergency.[6] The Florida law establishes a prima facie case of unconscionable pricing if the amount being charged represents a "gross disparity" from the average price at which the product or service was sold in the usual course of business, or available in the "trade area," during the 30 days immediately prior to a declaration of a state of emergency.[7] However, unconscionable pricing does not exist if the increase is attributable to additional costs incurred by the seller or is the result of national or international market trends.[8] As with the New York statute, the statute offers guidance but the question of whether certain prices during an emergency are deemed "unconscionable" is ultimately left to the courts.

Many state price-gouging laws are triggered only by a declaration of emergency in response to localized conditions. Thus, in areas not directly affected by a particular emergency or natural disaster, state price-gouging laws are not likely to apply to any price increases subsequent to an emergency or disaster occurring elsewhere. However, at least two states have laws prohibiting excessive pricing that do not require the declaration of any type of emergency as a trigger to the prohibition. Maine law prohibits "unjust or unreasonable" profits in the sale, exchange, or handling of necessities, defined to include fuel.[9] Michigan's consumer protection act simply

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[3] N.Y. Business Law §396-r(2).

[4] *Id.*

[5] *Id*. at §396-r(3).

[6] Fla. Stat. §501.160(1)(b)(3).

[7] Fla. Stat. §501.160(1)(b)(1)-(2).

[8] *Id*.

[9] Me. Rev. Stat. tit. 10, §1105.

prohibits "charging the consumer a price that is grossly in excess of the price at which similar property or services are sold."[10]

Prohibitions of Price Increases Beyond a Certain Percentage

While some state statutes attempt to address price gouging by banning "excessive" or "unconscionable" pricing during emergencies and leaving it to the courts to determine whether such pricing has occurred in accordance with the statute's guidance, other state statutes leave less to the courts' discretion and instead place hard caps on pricing of certain goods during emergencies.

For example, California's anti-price-gouging statute states that for a period of 30 days following the proclamation of a state of emergency by the President of the United States or the governor of California or the declaration of a local emergency by the relevant executive officer, it is unlawful to sell or offer certain goods and services (including emergency and medical supplies, building and transportation materials, fuel, etc.) at a price that represents an increase of more than 10% over the price of the good prior to the proclamation of emergency.[11] The statute does provide that a price above this threshold would not be unlawful if the seller can prove that the price increase was directly attributable to additional costs imposed on it by the supplier of the goods or additional costs for the labor and material used to provide the services.[12] The prohibition on price increases lasts for 30 days from the date of the emergency proclamation.[13]

West Virginia has also adopted an anti-price-gouging measure based on caps to percentage increases in price during times of emergency. The West Virginia statute provides that upon a declaration of a state of emergency by the President of the United States, the governor, or the state legislature, it is unlawful to sell or offer to sell certain critical goods and services "for a price greater than five percent above the price charged by that person for those goods and services on the tenth day immediately preceding the declaration of emergency."[14] As with the California statute and the other percentage-based price gouging statutes, there is an exception under the West Virginia statute if the price increase is attributable to increased costs on the seller imposed by the supplier or to added costs of providing the goods or services during the emergency.[15]

Some states use language barring "unconscionable" or "excessive" pricing in a manner similar to the state statutes described in the previous section, but define these terms with hard caps instead of leaving their exact definition to the discretion of the courts. For example, the Alabama statute makes it unlawful for anyone to "impose unconscionable prices for the sale or rental of any commodity or rental facility during the period of a declared state of emergency."[16] However, it provides that *prima facie* evidence of unconscionable pricing exists "if any person, during a state of emergency declared pursuant to the powers granted to the Governor, charges a price that

[10] MCL 445.903(1)(z).

[11] Cal. Penal Code §396.

[12] *Id*.

[13] *Id.* The statute also forbids contractors from price increases for services related to emergency cleanups for a period of 180 days following the emergency declaration.

[14] W. Va. Code R. §46A-6J-3.

[15] *Id.*

[16] Ala. Code §8-31-3.

exceeds, by an amount equal to or in excess of 25%, the average price at which the same or similar commodity or rental facility was obtainable in the affected area during the last 30 days immediately prior to the declared state of emergency."[17] However, as with most other state price-gouging statutes, there is no unconscionable pricing if the price increase is attributable to reasonable costs incurred by the seller in connection with the rental or sale of the commodity.[18]

A few other states have imposed a cap on price increases during emergencies even tighter than the one imposed by the aforementioned statutes. Some state statutes ban *any* price increase during periods of emergency. For example, in Georgia, it is considered an "unlawful, unfair and deceptive trade practice" for anyone doing business in an areas where a state of emergency has been declared to

> sell or offer for sale at retail any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property 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.[19]

However, as with other state gouging statutes, the Georgia statute provides an exception for price increases which reflect "an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area."[20]

State Price-Gouging Regulations

In some states anti-price-gouging measures have been implemented by the state's executive branch pursuant to a more generic authority to protect consumers granted by the legislature. For example, in Massachusetts there is no statute that specifically addresses "price gouging." However, the state's regulatory code includes a price-gouging provision similar to those found in state statutes as described above. The Massachusetts regulation provides that "[i]t shall be an unfair or deceptive act or practice, during any market emergency, for any petroleum-related business to sell or offer to sell any petroleum product for an amount that represents an unconscionably high price."[21] The regulation defines an "unconscionable high price" as a price that

> represents a gross disparity between the price of the petroleum product and 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business immediately prior to the onset of the market emergency, or 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
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> the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.[22]

[17] Ala. Code §8-31-4.

[18] *Id*.

[19] Ga. Code Ann. §10-1-393.4

[20] *Id*.

[21] 940 Mass. Code Regs §3.18(1).

[22] *Id*. at §3.18(2).

These regulations were promulgated by the Massachusetts attorney general pursuant to a provision in the Massachusetts code that authorizes the attorney general to make such rules and regulations as are necessary to make unlawful "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." This statutory language is similar to the language found in the Federal Trade Commission Act, which makes unlawful "unfair or deceptive acts or practices in or affecting commerce"[23] and authorizes the Federal Trade Commission to take action to prevent the use of "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[24]

Iowa has also chosen to address price gouging through regulations authorized by a generic statutory grant of authority to regulate unfair commercial practices. Iowa's Consumer Fraud Act prohibits unfair and deceptive trade practices in the sale of a product or service and authorizes the state attorney general to adopt rules and to file lawsuits for injunctive relief or civil penalties for parties in violation of the act.[25] Pursuant to this authority, the Iowa attorney general adopted a regulation declaring that "the charge of excessive prices for merchandise needed by victims of disasters" constitutes an unfair practice under the Iowa Consumer Fraud Act.[26] The regulation defines an excessive price as "one that is not justified by the seller's actual costs of acquiring, producing, selling, transporting, and delivering the actual product sold, plus a reasonable profit."[27]

Federal Price-Gouging Legislation Introduced in the 112th Congress

As mentioned above, currently there is no federal law that deals specifically with price gouging. However, federal antitrust laws may apply to behavior generally regarded as price gouging.[28] The Federal Trade Commission (FTC) monitors gas prices and investigates possible antitrust violations in the petroleum industry.[29] In addition, the Energy Policy Act of 2005 required the FTC to investigate whether the price of gasoline is being "artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices."[30] In May 2006, the FTC released its report, finding generally that sellers behaved competitively following Hurricane Katrina and that the price increases were the result of increased costs, although there were limited instances of price gouging.[31]

At least three bills introduced in the 112th Congress would create a federal law that specifically addresses price gouging in response to emergencies. H.R. 964, introduced on March 9, 2011,

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23 15 U.S.C. §45(a)(1).

24 *Id*. at §45(a)(2).

25 Iowa Code §714.16.

26 Iowa Admin. Code §61-31.1.

27 *Id*.

28 The applicability of the federal antitrust laws to the petroleum industry generally and retail gasoline prices specifically are discussed later in this report.

29 For more information on the Federal Trade Commission's activities with respect to gas pricing, see http://www.ftc.gov/ftc/oilgas/index.html.

30 P.L. 109-58 at §1809 (August 8, 2005).

31 The FTC's report can be viewed at http://www.ftc.gov/opa/2006/05/katrinagasprices.htm.

addresses the sale of wholesale or retail gasoline (or any other petroleum distillate) at a price that is "unconscionably excessive" and that "indicates that the seller is taking unfair advantage of the circumstances related to an international crisis to increase prices unreasonably."[32] The bill would make it unlawful to engage in this behavior during an "international crisis affecting the oil markets" as declared by the President, within the affected area as designated by the President.[33] The bill creates both civil and criminal penalties for violations.[34] The Federal Trade Commission would be tasked with enforcement,[35] although the bill would also authorize state attorneys general to bring civil actions on behalf of the state residents to enforce the provisions of the bill and to recover civil penalties.[36]

Title III of H.R. 1899, introduced on May 13, 2011, contains language identical to the language in H.R. 964 discussed above. The bill's two other titles also attempt to address gasoline prices. Title I would amend the Sherman Act (discussed below) to make it illegal for foreign states to act collectively to limit the production or distribution of petroleum products, to set or maintain the price of such products, or to take any other action that would restrain trade for petroleum products.[37] Title II would expand the Clayton Act to create a new prohibition on refusal to sell, export or divert supplies of petroleum products for purposes of increasing prices or creating a shortage in a particular market.[38] Title II also sets forth the factors to be considered in determining whether a party has engaged in this sort of activity.[39]

Like H.R. 1899, H.R. 1748 is comprehensive legislation intended to address gasoline pricing through a few different avenues, one of which is a prohibition on price gouging. Title III of H.R. 1748 is identical to both Title III of H.R. 1899 and H.R. 964. All three would create the same ban on "unconscionable pricing" during a time of crisis as declared by Presidential proclamation. In addition to this, H.R. 1748 also contains language focused on the tax treatment of "major integrated oil companies,"[40] as well as language that would bar certain lessees who hold leases that grant exemption from royalties from bidding on new offshore leases until those lessees renegotiate their royalty-exempt leases[41] and language that would direct the sale of petroleum from the Strategic Petroleum Reserve.[42]

[32] H.R. 964 at §2(a)(1). The bill includes factors to be considered in evaluating whether such a sale has occurred, including whether the price charged grossly exceeded the average price at which the applicable petroleum distillate was offered for sale by that person during the 30 days prior to the Presidential proclamation declaring the emergency, whether the price charged grossly exceeded the price at which the same or similar petroleum distillates were readily obtainable from competing sellers during the same time period, whether the price charged reasonably reflected additional costs not within the control of the seller or reflected additional risks taken by the seller, and whether the price charged was substantially attributable to local, regional, national or international market conditions. Id. at §3.

[33] *Id.*

[34] *Id.* at §3(b)-(c).

[35] *Id.*at §3(a).

[36] *Id*. at §5.

[37] H.R. 1899 at Title I. The title is referred to as the No Oil Producing and Exporting Cartels Act of 2011, or "NOPEC." The viability and enforceability of such legislation is beyond the scope of this report.

[38] *Id.* at §202.

[39] *Id.*

[40] H.R. 1748, at Title I.

[41] *Id* at Title II.

[42] *Id*. at Title IV.

The Relationship Between Federal Antitrust Laws and the Petroleum Industry

Antitrust laws aim to foster free and unfettered competition on the assumption that such competition will produce the best result for consumers—the lowest and most reasonable prices. In some ways, the antitrust laws could be looked upon as the opposite of price gouging laws, because the antitrust laws seek to remove unreasonable restraints upon trade, allowing market forces to govern, while price gouging laws operate by placing restrictions on prices in certain circumstances effectively placing legal limits or restraints upon trade. However, "price gouging," as noted above, has no singular definition. The term generally refers to the inflation of prices to "unfair" levels in certain circumstances, particularly following natural disasters. It could be argued that activities such as "price gouging" in the oil industry might constitute a restraint on free and fair competition, because prices may be raised to "unreasonable" levels. It is possible that in some circumstances the antitrust laws would prohibit such activity.

Agreements among competitors to accomplish what is commonly referred to as "price gouging" would most likely violate Section 1 of the Sherman Act (15 U.S.C. §1).[43] Section 1 prohibits contracts or conspiracies in restraint of trade.[44] That is, section 1 forbids two or more persons or entities from, for example, agreeing to limit output or set prices. While the literal phrasing of Section 1 forbids all agreements in restraint of trade, the Supreme Court has long acknowledged that the statute forbids only *unreasonable* restraints of trade.[45] As a result, most antitrust cases are examined by courts in light of a variety of factors. In the oil and gas price gouging context, this section might apply, for example, to a group of competitors who agreed to fix prices in the market for gasoline. Such a case may be difficult to prove, however. Recently, the First Circuit Court of Appeals affirmed a grant of summary judgment for the defendants in a case in which a group of gasoline station owners on Martha's Vineyard were accused of violating Section 1 of the Sherman Act in the aftermath of Hurricane Katrina.[46] It was alleged that the gas station owners conspired to raise prices to a level far above prices at the gas stations nearest to the island. However, the appellate panel concluded, in that case, that the plaintiffs had failed to sufficiently prove the existence of an agreement to raise prices in such a fashion.[47] As a result, the antitrust claims failed.

If an agreement were proven, however, and a Section 1 violation was found, a number of penalties might be imposed upon the convicted persons. The most commonly cited penalty for violation of the antitrust laws is the civil penalty requiring treble damages. In other words, if

[43] Illegal single firm conduct, including monopolization, attempted monopolization, conspiracies to monopolize, are covered by Section 2 of the Sherman Act. (15 U.S.C. §2). Price gouging might be part of a Section 2 claim if, for example, it can be shown that an entity with sufficient market power reduced prices below cost for a period of time in an attempt to drive competitors from the market, then raised prices once the competition had exited the market. *See* Rebel Oil Company, Inc. v. Atlantic Richfield Company, 51 F.3d 1421, 1429-30 (9th Cir. 1995)(finding insufficient market power to assert a claim of monopolization for a factually similar scenario). However, the primary antitrust law that would apply remains likely to be Section 1.

[44] Section 3 of the Sherman Act (15 U.S.C. §3) is virtually identical to section 1 except that it specifically makes the prohibitions contained in section 1 applicable to the District of Columbia.

[45] State Oil v. Khan, 522 U.S. 3, 10 (1997).

[46] White v. R.M. Packer Co., Inc., 635 F.3d 571 (1st Cir. 2011).

[47] *Id*. at 585.

found to have violated Section 1 of the Sherman Act, a person may be required to pay to the person injured or to the United States (when injured in its business or property) three times the damages caused by the violation of the antitrust laws, as well as court costs, and, for private plaintiffs, attorneys' fees.[48] The antitrust laws may also be enforced criminally by the Department of Justice. Every natural person found guilty of violating Section 1 of the Sherman Act has committed a felony and may be fined up to $1 million or imprisoned for up to 10 years, or both.[49] Every corporation that violates Section 1 may be fined up to $1 million.[50]

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[48] 15 U.S.C. §§15(a), 15a.

[49] 15 U.S.C. §1.

[50] *Id*.