

Price Gouging 101: A Call to Florida Lawmakers to Perfect Florida's Price Gouging Law

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By Edward Page and Min Cho In 2004, the awesome power of Hurricanes Charley, Frances, Jeanne, and Ivan devastated the lives of thousands of Floridians. In 2005, Hurricanes Katrina, Rita, and Wilma annihilated parts of Louisiana, Mississippi, Texas, and Florida. Indeed, the 2004 and 2005 hurricane seasons brought severe anxiety, frustration, and exhaustion for many Floridians as they attempted to get back on their feet. In the midst of the recovery, price gouging profiteers preyed upon hurricane victims. Fortunately, Florida's price gouging law protected these consumers.

Since the recent increase in catastrophic hurricanes striking Florida, the Florida Attorney General's Office,¹ which enforces Florida's price gouging law, has investigated thousands of businesses and individuals for suspected violations. Florida Attorney General Charlie Crist states that the main objective for investigating and prosecuting price gougers is to prevent businesses and/or individuals from taking advantage of consumers' misfortunes. Crist states:

[W]hen we are in a state of emergency, if there is a gross disparity between what the store was charging before the emergency arose and then afterwards, it's very clear that that is not making a profit. That's profiteering at the expense of people at a time of need. That's why these laws are important. Listen, I'm all for free enterprise and entrepreneurship, but we're not for people taking advantage of Floridians in a time of need. That's why these laws are on the books and that's why we will aggressively enforce them to protect the people of our state.²

Florida's price gouging law protects weary consumers from lurking predators whose primary goal is to take advantage of consumers' misfortunes resulting from the hurricanes. Unfortunately, Florida's price gouging law is not perfect in any sense, and some commentators criticize Florida's law for its subjectivity and have even called upon Florida lawmakers to revise it to establish uniformity and objectivity.³

This article provides a general overview of Florida's price gouging law and summarizes some of the individual attorney general's investigations. Finally, it discusses suggested changes to Florida's price gouging law.

Florida's Price Gouging Law Florida's law prohibits the unconscionable pricing of commodities during a state of emergency.⁴ It is prima facie evidence that a price is unconscionable if:

1. The amount charged represents a gross disparity between the price of the commodity that is the subject of the offer or transaction and the average price at which that commodity was rented, leased, sold, or offered for rent or sale in the usual course of business during the 30-days immediately prior to a declared state of emergency, and the increase in the amount is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of any dwelling unit or self-storage facility, or national or international market trends; or
2. The amount 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 a declared state of emergency, and the increase in the amount is not attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of any dwelling unit or self-storage facility, or national or international market trends.⁵

In other words, it is unlawful during a state of emergency to sell, lease, offer to sell, or offer for lease commodities, dwelling units, or self-storage facilities for an amount that grossly exceeds the average price for the commodity the 30 days before the declaration of the state of emergency or the seller's price for the commodity during the 30 days before the declaration of the state of emergency, unless the seller can show how increases in its prices or market trends justify the price increase.⁶

Additionally, it is a violation of §501.204 of the Florida Unfair and Deceptive Trade Practices Act (FDUTPA) for a person, his or her agent, or employee, during a declared state of emergency, to rent or sell or offer to rent or sell at an unconscionable price within the state of emergency area, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a result of a declared state of emergency.⁷ This prohibition remains in effect until the declaration of emergency expires or is terminated.

Price gougers are subject to hefty civil and criminal penalties. In addition to all other remedies FDUTPA provides, ⁸ a court may impose a civil penalty of not more than \$1,000 per violation, with the aggregate not to exceed \$25,000 for any 24-hour period against the price gouging law violators.⁹ Additionally, it is a second degree misdemeanor for any person to offer goods and services for sale to the public during a state of emergency without an occupational license.¹⁰ The

Department of Agriculture and Consumer Services, the office of the state attorney, or the Department of Legal Affairs¹¹ may enforce Florida's price gouging law.

The price gouging law defines a commodity as "any goods, services, materials, merchandise, supplies, equipment, resources, or other article of commerce, and includes, without limitation, food, water, ice, chemicals, petroleum products, and lumber necessary for consumption or use as a direct result of the emergency."¹² Unfortunately, the price gouging law does not define "unconscionable," "gross disparity," or "grossly exceeds." Additionally, there have not been any Florida appellate decisions interpreting or defining these terms.

Although there have not been any Florida price gouging cases defining "gross disparity," there is at least one Florida case where a court found there to be a "gross disparity" in the pricing of real property. For example, in *Oregrund Ltd. Partnership v. Shieve*, 873 So. 2d 451, 458 (Fla. 5th DCA 2004), the district court determined that the \$600,000 proceeds given to appellant and the \$3 million property value interest conveyed to appellees as a result was found to be "grossly disparate," as the value received was worth more than three times the investment. In addition, price gouging laws of other states, such as New York, also lack a clear definition of "gross disparity."¹³

Because there are no Florida appellate decisions interpreting Florida's price gouging laws, many investigations entail a subjective aspect. In other words, a formal charge or complaint filed against a business or individual will primarily depend on whether the individual enforcement official reviewing and investigating the price gouging reports determine whether a "gross disparity" exists. Critics have noted this subjective component of the price gouging law and have urged Florida lawmakers to establish a clear definition of "gross disparity" and establish specific guidelines for enforcement.¹⁴ As of the date of this writing, Florida law makers have not acted upon these suggestions.

Prosecutions and Complaints On August 14, 2004, Attorney General Christ announced the creation of the Attorney General's Hurricane Task Force, which mobilized criminal and civil investigators statewide to investigate price gouging complaints. Based on their investigations, the attorney general filed numerous civil complaints against several individuals and businesses.

Days Inn Airport, West Palm Beach ¹⁵

A billboard in close proximity to the Days Inn Airport advertised rooms for less than \$50 per night. After Hurricane Charley, the hotel charged more than double that amount to three consumers. Two were forced to pay \$109 per night, while the hotel charged \$119 for the third. The hotel told the consumers that it had "only two rooms left," thereby creating a sense of urgency to pay the inflated price. The hotel settled the lawsuit for \$70,000 with \$10,000 of the settlement for consumer restitution and the remainder went to the costs of the investigation and to the Florida Hurricane Relief Fund.

Payless Inn & Suites, Ocala 16

A 77-year old woman, with her husband and disabled daughter, fled their Tampa home because it was in a designated evacuation zone. The family checked into the Payless Inn after seeing a highway billboard advertising a 50 percent discount for senior citizens. The next day, the hotel charged the family \$160.49 for a one-night stay. Later that day, the family found a booklet advertising rates for only \$29.99 a night, with a \$10-per-person charge for additional guests. Two days later, the inn quoted a rate of \$59.99 over the phone.

The hotel told another consumer that only two rooms were available at a rate of \$129.90. The hotel told the consumer that the high price stemmed from the room being a suite. In fact, the room was not a suite, but a regular room. Soon after, the consumer called the hotel to learn that a regular room was \$79 a night.

Baymont Inns & Suites, Naples 17

The Baymont Inns & Suites charged three consumers more at check-out than the price quoted to them when they made their reservations. The first consumer received a quote of \$53.99 per night. During check-out three days later, the hotel charged her 33 percent more, \$71.99 for the first two days, and \$89.10 for the third day, or 65 percent above the quote. After she protested, the hotel reduced the rate for the third day charges to \$71.99, but refused to honor the \$53.00 quote for the first two days. The hotel charged a second consumer \$93.60 after receiving a 10 percent AAA discount. The hotel, however, quoted a rate between \$49 and \$64 per night. A third consumer reserved a room for herself, a friend, and a dog at a quoted rate of \$55 per night. The hotel tried to charge her \$99 per night, but upon her objection, the hotel reduced the rate to \$79 per night, still 44 percent higher than the originally quoted price.

ABC Restoration, Inc. d/b/a Dr. Dry 18

Dr. Dry sent an employee on August 16, 2004, to assess water damage at a consumer's home. Dr. Dry's employee quoted a price of \$6,500 to \$7,500 to repair the couple's porch ceiling and upstairs screens and to remove the carpet from a room adjacent to the porch. The business removed the carpet, left it on the front lawn, moved furniture from an upstairs room to the porch, and then demanded \$12,000 to complete the remaining work.

Dr. Dry also provided a quote of \$5,000 to remove furniture and wet carpeting from another home. The consumer in that home authorized Dr. Dry to charge her credit card \$5,000 upon completion of the work. The workers placed 10 large fans and three dehumidifiers in the woman's home and made large holes in her ceilings to allow for drainage. Dr. Dry then demanded an additional \$6,500 to complete the work. Later, the woman discovered that Dr. Dry had charged her credit card even though Dr. Dry never completed the agreed-upon work. The business then refused to give her a refund.

Also, on August 17, Dr. Dry removed 24 square yards of wet carpet from a Ft. Myers home. The removal took one hour to complete, for which Dr. Dry charged a fee of \$22 per square yard. The standard industry price for the service should have been \$3 to \$8 per square yard.

Sun State Trees & Property Maintenance, Inc. 19

Two Winter Park neighbors obtained an estimate from Sun State, after three trees in one man's yard fell onto another house, damaging the roof. Sun State provided an estimate of \$30,000 for tree removal services and gave invoices for \$15,000 to each of the neighbors. Sun State removed one tree on August 15, 2004, two days after Hurricane Charley hit Florida, and arranged to return the next day to remove the remaining trees. The next day, the neighbors complained about the high cost of the tree removal service, and Sun State offered to complete the job for a total cost of \$11,000. The average price in Central Florida for the removal of three trees during the 30-day period preceding the declaration of a state of emergency was approximately \$3,359.14.

John Charles Mikell and John Tate Mikell 20

A man and his son traveled to Santa Rosa County and sold generators from a pickup truck and horse trailer parked on a roadside. They sold 22 generators for \$650 each. The investigators determined that the manufacturer's suggested retail price for that model generator was \$299.99, meaning the price offered for the generators was more than double the retail price.

Conclusion — Call to Florida Lawmakers Florida's price gouging law is lacking in several areas. First, it does not establish a clear definition of "gross disparity." Thus, it is within the discretion of the investigating assistant attorney general to determine whether a business or individual engaged in price gouging. Often, it is difficult to determine whether an increase in costs is a result of price gouging or a simple function of supply and demand. Therefore, the legislature should establish a clear definition of "gross disparity." Additionally, establishing a clear definition of "gross disparity" would put merchants on notice as to what constitutes lawful or unlawful conduct. For example, under the guidelines, merchants could be allowed to raise prices up to a certain percentage of the pre-storm price to cover increased operating costs in the aftermath of such a storm. In short, people deserve to know what conduct is permissible and what conduct is unlawful before they become the targets of an investigation by a state agency.²¹

In the last two years, the attorney general has been active in investigating price gouging complaints. Although many of these complaints are legitimate, some may be frivolous and unfounded. Many honest businesses and individuals can be burdened with substantial attorneys' fees and costs when responding to and defending against a price gouging investigation and complaint, even one that is frivolous and unfounded.

Thus, a renewed suggestion for the legislature is to create additional methods that result in better enforcement and greater deterrence, without burdening legitimate businesses with expensive legal defense fees. One commentator has suggested, “the Attorney General could issue citations, similar to traffic tickets, to anyone who has been determined to have violated the Act in accordance with the enforcement guidelines — the more serious the offense, the bigger the fine.”²²

Accordingly, rather than spending their money on attorneys’ fees mandated during litigation, businesses and individuals whose actions border on price gouging could opt to pay a fine based on the gravity of the offence. On the other hand, some may argue that this suggestion would not effectively deter price gouging because it may give merchants justifiable reasons to price gouge consumers, as the penalty will only be a prorated citation.

Floridians have endured two devastating hurricane seasons. Unfortunately, there may be many more to come.²³ A common battle cry for hurricane victims is “Relief, Recover, and Rebuild!”²⁴ Floridians look upon Florida lawmakers to protect their consumer interests during this recovery stage.

Although Florida’s price gouging law for the most part protects consumers, it is imperfect. Thus, it is advisable for Florida lawmakers to take note of the discrepancies in Florida’s price gouging law and make appropriate changes to define “gross disparity,” “unconscionable,” and “grossly exceeds.”

1 The Attorney General’s Office received almost 9,000 reports of price gouging during the declared state of emergency covering the 2004 hurricanes. Approximately one-third of the reports were determined to be unfounded. See myfloridalegal.com.

2 Transcript: Getting Gouged? Fox News (Jul. 10, 2005) available at www.foxnews.com/story/0,2933,162071,00.html.

3 Gary E. Lehman, Price Gouging: Application of Florida’s Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew, 17 Nova L. Rev. 1029, 1050-1051 (1993).

4 The governor has the authority to declare a state of emergency pursuant to Fla. Const. art. IV, §1(a) and by the Florida Emergency Management Act.

5 Fla. Stat. §501.160(1)(b)1-2 (2005).

6 See generally Fla. Stat. §501.160 (2005).

7 Fla. Stat. §501.160(2)(2005).

8 FDUPTA’s provides for investigative powers of enforcing authorities, which can lead to civil penalties and equitable remedies. Additionally, the FDUTPA provides a private cause of action for individuals aggrieved by businesses and individuals engaging in unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. The FDUTPA provides: “1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violated this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part. 2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney’s fees and court costs as provided in s. 501.2105. However, damages, fees, or

costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.” Fla. Stat. §501.211. (2005). The rights and remedies of the FDUTPA are beyond the scope of this article. To get a better understanding of the FDUTPA, see David J. Federbush, *Damages Under FDUTPA*, 78 Fla. B.J. 20 (2004); David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 Fla. B.J. 49 (2000); and David J. Federbush, *The Unexplored Territory of Unfairness in Florida’s Deceptive and Unfair Trade Practices Act*, 73 Fla. B.J. 26 (1999).

9 Fla. Stat. §501.164 (2005).

10 Fla. Stat. §501.160(9) (2005). However, this subsection does not apply to religious, charitable, fraternal, civic, educational, or social organizations. *Id.* Additionally, during a declared state of emergency and when there is an allegation of price gouging against a person, failure to possess a license constitutes reasonable cause to detain the person, provided that the detention shall only be made in a reasonable manner and only for a reasonable period of time sufficient for an inquiry into the circumstances surrounding the failure to possess a license. *Id.*

11 Fla. Stat. §501.160(8) (2005).

12 Fla. Stat. §501.160(1)(a) (2005).

13 Although New York’s price gouging law uses the term “gross disparity,” the New York courts do not put much emphasis on the term. Instead, the New York courts view the “gross disparity” language as more procedural rather than definitional. In other words, “it simply establishes a means of providing presumptive evidence that the merchant has engaged in price gouging. A showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness.” *People v. Two Wheel Corp.*, 525 N.E. 2d 692, 694-95 (N.Y. Ct. App. 1988). Nevertheless, a clear definition would give both investigators and consumers guidance.

14 *Lehman*, *supra* note 3 at 1050-1051. *Lehman* suggests “[t]his would add uniformity, as well as objectivity, to an enforcement process that is all too subjective and creates unnecessary legal costs to innocent persons who may find themselves the targets of zealous prosecutors for unknowingly or unwittingly violating the Act. When faced with another natural disaster, such guidelines would also put merchants on notice as to what constitutes lawful or unlawful conduct. For example, under the guidelines, merchants could be allowed to raise prices up to a certain percentage of the pre-storm price to cover increased operating costs in the aftermath of such a storm. In short, people deserve to know what conduct is permissible and what conduct is unlawful before they become the targets of an investigation by a state agency.” *Id.* at 1050.

15 *State of Florida v. Janus Hotels and Resorts, Inc.*, Complaint, available at myfloridalegal.com/daysinncomplaint.pdf; myfloridalegal.com/JanusAVC.pdf; myfloridalegal.com/JanusConsentDecree.pdf.

16 *State of Florida v. Ocala Inn Management, Inc.*, Complaint, available at myfloridalegal.com/paylesscomplaint.pdf.

17 *State of Florida v. Baymont Inns Hospitality, LLC*, Complaint, available at

myfloridalegal.com/baymontcomplaint.pdf.

18 State of Florida v. ABC Restoration, Inc., Complaint, available at myfloridalegal.com/DrDryComplaint.pdf.

19 State of Florida v. Sun State Trees & Property Maintenance, Inc., Complaint, available at myfloridalegal.com/sunstatecomplaint.pdf.

20 State of Florida v. John Charles Mikell et al., Complaint, available at myfloridalegal.com/MikellComplaint.pdf.

21 Lehman, *supra* note 3, at 1050.

22 *Id.* at 1051.

23 Hurricane Expert Predicts Years of More Storms, MSNBC (Feb. 7, 2006) available at www.msnbc.msn.com/id/9417904/. Experts predict more hurricanes, large and small, in the next 10 to 20 years.

24 Michael Flynn, Construction Contracts and Contractors: Hurricane Andrew Reteaches Consumer, 17 Nova L. Rev. 1093, 1093 (1993). Professor Flynn's article thoroughly discusses Florida's unlicensed contractor statute.

This column is submitted on behalf of the Trial Lawyers Section, Mark P. Buell, chair, and D. Matthew Allen, editor.

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