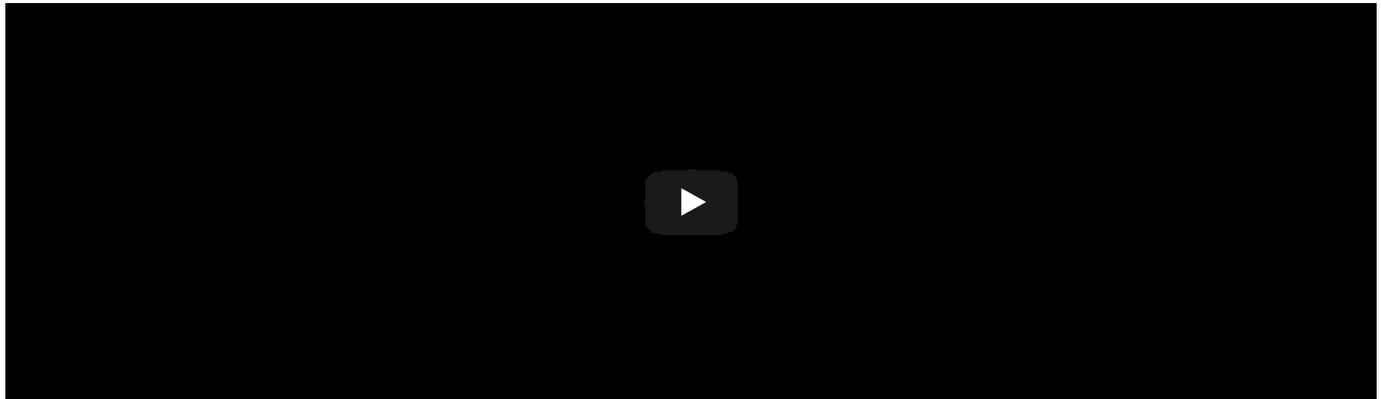


Anatomy of a Price Gouging Case

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Tell us a little about your background and some of the price gouging cases you've been involved with.

I started out in the state attorney's office, then worked as a U.S. Attorney, and then as a special prosecutor for Ken Starr in Washington, D.C. In total, I was a prosecutor for 18 years, and joined Carlton Fields in 2000. Soon after that, the Tampa area was battered by several hurricanes — in 2004, and again in 2005. You may remember Hurricane Charlie. At the time, we thought it was going to devastate Tampa. After intersecting with a cold front, Charlie went up through the corridor in the middle of the state and wreaked havoc.

As a result of all the storms of '04 and '05, the Florida Attorney General's Office launched numerous price gouging investigations under Florida Statute 501.160. I had the opportunity to learn the statute while defending several hotels and suppliers of gasoline and other commodities in price gouging investigations.

What is the definition of price gouging?

In essence, the definition comes from Florida Statute 501.160, which provides that during the 30 days before a state of emergency is declared, it's unlawful to sell, lease, offer to sell, or offer for lease, essential commodities, including but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency; dwelling units; or self-storage facilities, for an amount that grossly exceeds the average price for that item or commodity.

There are only two rarely applied exceptions that allow a vendor to raise its prices after a state of emergency is declared in Florida. A seller can justify the price by showing an increase in its costs, or if national market trends support a price increase.

There is a phrase, "unconscionable price." How does the law define "unconscionable?"

Well that's the problem. The definition I just read, which uses the phrase 'grossly exceeds the average price,' and the word 'unconscionable' are really not very well-defined in Florida law. As a result of that lack of definition, there isn't much guidance for gasoline stations, hotels, and sellers of other commodities like generators, on how much they can raise their prices, if at all, in anticipation of or during a declared state of emergency. Frequently, the people I represent in these matters are frustrated by the lack of a definition for 'grossly exceeds.'

The only comforting news is that, normally, the Florida Attorney General's Office doesn't undertake cases where there may be a 5 or 10 percent increase. It reserves its efforts for gross disparities and, although the terms 'gross disparity' and 'unconscionable price' are not really defined in the statute, we can get a sense of the meanings by reviewing complaints.

These are civil, not criminal, cases. We'll talk about how they start in a bit, but if you look at three cases the Attorney General's Office filed on December 20, 2016 in response to either Hurricane Hermine or Hurricane Matthew, the price increases in these cases were more drastic. The increases, in Hillsborough, Pinellas, and Pope Counties, ranged from 72 to 303 percent in one case, 89 to 238 percent in another, and 43 to 417 percent, in the last. To put this into context, let's consider a hotel room that was advertised at \$100 a night. A 417 percent increase would mean that room went up to \$417. So, those are the types of cases that most interest the Florida AG's office.

These are really just three examples of the more than 2,700 price gouging complaints that the news media reported following hurricanes Matthews and Hermine. Tell us a little about what happens next. What is the anatomy of a price gouging case?

Okay, so the first thing that happens is a storm forms in the gulf or in the eastern Atlantic. Everybody begins to watch the National Hurricane Center, including the office of the Attorney General and more specifically Governor Scott's office. Governor Scott, under Florida's constitution, has the power to enact executive orders. This is also a Presidential power at the federal level, but Governor Scott has his own authority as well. And Governor Scott enacted an executive order dealing with the tropical storm Hermine, which became Hurricane Hermine in August, as well as with Hurricane Matthew.

Normally, the next thing that happens is the storm is followed to see if it develops into a serious threat to Florida. If it does, the governor, in consultation with others, signs an executive order. We'll talk specifics here regarding Hurricane Matthew. Governor Scott signed Executive Order 16-230 on October 3, 2016, putting into effect certain prohibitions of law. On page nine of the executive order, under section nine, it became unlawful and a statutory violation for a person to sell or rent any room at an unconscionable price within the area where the state of emergency was declared. Some of these declarations are by county.

If the storm goes up the east coast, sometimes the declaration does not apply to west coast counties. But because they couldn't tell where Matthew would go, I believe this one was for the entire state.

But it's not just hotel rooms, right? It includes any services that people might need in an emergency?

Yes, any essential commodities — food, ice, gas, hotel rooms, lumber, plywood for windows, water, generators. Under Florida law, 'commodities' is defined quite broadly. Next, the storm comes through and vendors of ice, gas, hotel rooms, food, lumber, water, and the like, have to decide, 'What am I going to do about my price?' Normally when there's a shortage of items, the price goes up because that's how we do it here — it's the power of the market. If I have only three lemons to sell they're worth a lot more than if I have 500.

Without really knowing or understanding what price gouging is, businesses will often raise hotel room rates, or the prices of generators or other commodities. The storm passes. Once the executive order takes effect, the Florida Office of the Attorney General normally also activates the Attorney General's price gouging hotline so people can call in to report that they may have been price gouged.

That launches the media investigations you mentioned, resulting in reports that 2,700 complaints were lodged with the Attorney General's office. The AG has offices throughout the state to respond to hurricanes Matthew and Hermine. Next, the Attorney General's Office scrutinizes the complaint to see if, on its face, it holds water, so to speak. Then, the AG's Office decides whether to issue a subpoena to the entity or person that raised their prices or allegedly price gouged. That subpoena normally calls for documents and the like about the prices and how they were set, etc. Next, the Attorney General's Office gets the documents, evaluates them, and decides whether to bring a complaint as they did in three instances on December 20, 2016, which we talked about.

Once they file the complaint, the vendor then has the chance to respond?

Yes, normally it's quite acceptable and proper to try to avoid having a civil complaint filed against you. Regardless of whether the vendor has a lawyer, it's often good practice to tell your story — if you have one — about why you raised your prices. Doing so might help you avoid a civil complaint that, again, will get reported in the media.

I brought with me today an article that appeared in the *Tampa Bay Times*, December 23, 2016. The headline was 'Area Hotels Accused of Gouging.' These three cases were filed on December 20 at 5:02 pm. Two days later, the article appears. So it doesn't take long. Being accused of price gouging is like being accused of being a racketeer. No one likes even the sound of the words. So, although nothing's been proven, the mere allegation of price gouging during a storm when people were in need is undesirable. Often, it's good to go ahead and make a presentation or a case, if you will, to the Attorney

General's Office to try to avoid a complaint. But, as we saw recently, sometimes that option is unavailable. The price increases are just so substantial that you can't avoid it.

In the majority of cases, how defensible are the increases?

It depends. Sometimes they're very defensible. For example, gasoline price increases are driven by the wholesale market, retail market, and supply and demand. Pricing is very complicated. Normally, a gas station owner doesn't see that a state of emergency has been declared, go out to the pumps, and say, 'Add 50 cents.' It's normally driven by a long market chain. It could be, for example, that a hurricane destroyed the fleet that was carrying the gas or the port where it was coming from, making delivery impossible to the Tampa Bay area. This would cause prices to go up. It's still smart to think 'ready, aim, fire' before raising prices if there's a hurricane or big storm in the Gulf or the Atlantic, because you know you'll attract the attention of the Attorney General's office. And it's just wise to respond to that rather than react, even if there is a shortage of the commodity. We don't want to attract scrutiny, and we don't want to violate Florida's price gouging statute. It's good politics to stay out of the news.

Now you said these weren't criminal cases?

Correct. No one goes to jail. These are civil cases. The burden of proof is preponderance of the evidence. Many people think that whenever the Attorney General's Office gets involved, the case is criminal. While the AG does have some criminal jurisdiction, it's not for price gouging cases.

So, if you're one of these businesses that received a complaint, what do you do?

Well, you'll get served with your complaint. They're served just like a regular civil complaint in Florida, and you have a certain timeframe to respond. Normally it's 20 days once you're served, unless you negotiate an extension of time. And so you have to answer the allegations, whether you admit, deny, or have no information or knowledge. Then the case proceeds like any other civil case. Cases can be mediated. Cases can be set for trial. Most of the time, there's a big effort to try to settle them. But price gouging penalties are very rigorous. So, the people named in the complaints are often concerned about resolving their cases.

The Attorney General sets forth the penalties in the complaints. I'm going to read from one of them: 'Pursuant to Florida law, the defendants are subject to a penalty of up to \$1,000 per violation with an aggregate total not to exceed \$25,000 for any 24-hour period.' So, if I sold four generators at an unconscionable price, my exposure is \$1,000 per violation — in other words, per generator. If it's a hotel room, it's \$1,000 per hotel room up to a \$25,000 maximum. And it goes on and on. There are other penalties too. So there is a financial incentive to get it right and try to avoid scrutiny.

Do you have tips for businesses that might find themselves in this situation? Either proactively before a complaint arises? And then, once they get a complaint?

Yes, I do have some suggestions. Of course, as you might imagine, as a lawyer for over 30 years, I recommend getting a lawyer. Don't wait until you get the complaint.

Be proactive. When you see that a storm in the Gulf of Mexico, Caribbean, or the Eastern Atlantic is coming your way, know that Governor Scott has the power and authority to declare states of emergency or enact executive orders. Start thinking about what, if anything, you can do in consultation with a knowledgeable price gouging lawyer. May you raise your prices? Should you? Involve your lawyer in that decision-making process. Raising prices should be part of a rational 'ready, aim, fire' thought process. Not something you do because you're getting a lot of phone calls for rooms, gas, generators, or what have you and want to see if you can just double your price and hit a grand slam while the storm passes.

The other opportunity to get a lawyer involved comes once you get a complaint. But you'll know in advance that you're going to get a complaint because most complaints are served after you get the subpoena. So as soon as you get the subpoena from the Florida Attorney General's Office seeking business records about evidence concerning the price gouging allegation, you should be speaking with a lawyer to find out what you need to do and how you can defend against the claims. Do you have a defense? What is your response?

What types of evidence do people need to provide when they're filing a complaint against a business?

There's a form you can use on the Attorney General's Office website. It requests your name, address, contact information, and provides a block for you to type in what happened. Typical information may just be four or five sentences that say, 'I went to a gas station and the sign posted said \$2.33 a gallon and when I put my credit card in and started pumping gas, it was

really \$3.33 a gallon.' For a hotel room, maybe there was an advertisement near the hotel that said 'all rooms \$99.' You show up and there are only four rooms left, and they cost \$300. Or power goes out at your house and you need a generator. But people are selling generators at twice Home Depot's price because the Home Depots ran out of them. People will buy up a bunch of generators, double the price, and become, sitting ducks for a price gouging complaint.

Because really, these vendors are playing on the fears of the consumers, right?

Some are, yes. Others are legitimately raising their prices to reflect demand, market conditions, or supply and demand. And, here's the important thing to remember: It's okay to raise your prices. It's *not* okay to raise your prices to an unconscionable level, or to a level that grossly exceeds the price you sold the item at in the 30 days before Governor Scott declared the state of emergency. So it might be okay to raise your prices. Let's say a hurricane's coming to your hotel and you're going to be empty after the storm leaves so you've got to create a little bit of margin or safety net. You might raise your room prices by five or ten dollars. It just can't be unconscionable or a price that grossly exceeds what you offered before.

Do these price gouging statutes apply only for hurricanes or tropical storms?

No. They apply any time a declaration of emergency goes into effect. So you could have an ice storm, a fire, any kind of state of emergency that, as Governor Scott wrote in 16.230, impacts or poses a severe threat to the entire state of Florida — one where timely precautions must be taken to protect communities and the general welfare of the state.

Do you have any final takeaways for businesses?

I do. One of them is, if you want to avoid a price gouging inquiry from the Attorney General's Office, don't raise your prices after a state of emergency is declared. If you must, do so only in consultation with a lawyer and maybe your CFO. Together, determine about how much you can raise your prices to avoid falling under the undefined terms 'unconscionable price,' and 'grossly exceeds.' The easiest way to do this — and no one likes to hear this — is to simply not raise your prices during the 30 days before the state of emergency. That way you avoid scrutiny.

Another suggestion I have is to monitor the Governor's Office for states of emergency. You normally know they are coming when you see a storm on the way, but there's a website you can check. You can just Google 'executive orders.' They are listed for the past five or six years so you can see what one looks like. My other suggestion is to be really nice to your customers when they show up in stressful situations like running from a hurricane.

Especially now, when social media plays such a huge role in a company's branding and reputation, there are so many opportunities for people to share positive and negative experiences, whether through Facebook, Twitter, or review sites like Yelp, so I think that's great advice.

Yes.

Thank you so much for talking to us today about price gouging. I think you've provided terrific advice for businesses, particularly in the state of Florida. And we'll be prepared for the upcoming hurricane season.

These are all timely pointers. The start of the new hurricane season on June 1 isn't that far away.