WE'RE ALL IN THIS TOGETHER

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By: Melanie Ann Hines

When the Governor declares a storm-related state of emergency, normalcy is suspended. Everyone rushes to stock up on batteries, food, water, ice, and lumber for "boarding up." Gas stations become parking lots. ATMs run out of cash. Some people flee to hotels; others rent storage facilities for their possessions. For days on end, we are all focused on "the storm." Strangers say to strangers and friends to friends: "be careful out there; stay dry; get out before it's too late;" and the like. It feels like we are all in it together, and we are.

Unfortunately, not everyone feels the same way; some unscrupulous outliers view a state of emergency as an opportunity to cash-in on the demand. Thankfully, Florida law prohibits this practice through its anti-price-gouging statutes. When a person or business entity that knew or should have known of the storm, increases the price of essential commodities and services during a declared state of emergency to an unconscionable level, enforcement authorities can obtain an order shutting them down and can seek to punish willful activity with hefty fines – $10,000.00 per violation, or $15,000.00 per violation if the activity is directed to seniors (over 60), persons with disabilities, military service members or the spouse or dependent child of a military service member, plus a civil penalty of not more than $1,000 per violation, with an aggregate total not to exceed $25,000 for any 24-hour period. Each unconscionable sale can constitute a "violation."

Profiteers don't have to be successful to be punished; the law treats "offers to sell" essential commodities at unconscionable prices just like an actual sale. Essential commodities are defined 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." Section 501.160, Florida Statutes. The law also prohibits price-gouging with respect to a lease or offer to lease any dwelling unit or self-storage unit. The statute prohibits price-gouging as long as the emergency declaration is outstanding (usually 60 days, unless lifted or extended); the prohibitions do not end when the storm passes.

Prices are considered unconscionable if they "grossly exceed" the amount charged "in the usual course of business during the 30 days immediately prior to a declaration of a state of emergency" or the amount at "which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to a declaration of a state of emergency."

It is not "price-gouging" if a seller or service provider can justify the price increase by showing comparable increases in its own costs to obtain, store, or make the commodity or service available, or where regional, national, or international market trends stimulate the increase. The statute only covers activity within the area for which the state of emergency is declared. It does not apply to growers, food producers or processors, except for retail sales of such products to the ultimate consumer within the area of the declared state of emergency. The statute does not apply where an appropriate government agency has authorized the price increase.

The enforcing authority (state attorney or Attorney General) may sue an alleged price-gouger to recover the penalties under Florida's Unfair and Deceptive Trade Practices Act (Chapter 501, Part II). In the alternative, the enforcing authority may terminate an investigation or lawsuit if the seller agrees to pay a stipulated civil

penalty. The penalties may be waived by the enforcing authority or the court if the seller has previously made full restitution or has paid actual damages to the injured. Injured parties can include governmental agencies. If the enforcing authority prevails in litigation, attorneys' fees and costs can be assessed against the seller. However, private causes of action for damages are not authorized by the statute.

When a state of emergency is declared, businesses should make certain that everyone involved in the covered transactions are instructed on the law – that means front and back office employees, C-suite executives, branch managers, sales personnel, and customer care representatives. All are essential to preventing violations and for properly handling consumer questions or complaints about pricing.

If the emergency causes a legitimate increase in prices, businesses need to be prepared to justify the necessity through proper documentation. It is essential to maintain records concerning sales or services rendered in the 30 days prior to and during the emergency declaration; such records are critical to a defense during an investigation or an enforcement action. Remember the authorities will be comparing what was charged during the emergency with what was charged during the 30 days prior to it. The statute of limitations for enforcement actions is four years. It is advisable to keep such records for that length of time.

If you receive an investigative subpoena or a civil investigative demand for business records, you might immediately think of hiring an attorney, and rightly so. The financial and reputational consequences of a civil suit and the attendant negative publicity can be devastating. The same instinct is reasonable if the inquiry comes in a less formal manner, such as a telephone call, letter or email from an enforcing authority. During an emergency, the Attorney General and some local government agencies establish "price-gouging hot-lines" which are usually flooded with calls, and the agencies aspire to investigate all complaints, so they may start right away by just asking a few questions. An informal inquiry can lead to the same serious consequences as a formal investigation if a justification for the price increase cannot be made, and made quickly. The personnel who answer your telephones or open your mail or email should know where to direct such inquires within your organization so that a proper response can be given to the enforcing authorities, which may simply be a referral to your attorney, who should act promptly on your behalf. If a justification cannot be made for the price increase, or the activity is not otherwise exempt, you will want to make the consumer whole as quickly as possible and take diligent action to prevent the activity from occurring again. Such remedial measures may help prevent formal action by the enforcing authority or militate against the imposition of stiff penalties.

Raising prices during an emergency can be an economic necessity for some businesses because supply chains become more competitive and operating costs go up. When this occurs, the best way to defend against unfounded or defensible allegations is to be prepared to justify the increase, which must be a reasonable one. Just as you take precautions to protect your business *ahead of the storm*, be equally prepared for the questions you may be asked *during and after the storm* about your pricing.

Be safe out there. We're all in this together.

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