Petroleum Price Gouging and Market Manipulation 101:  
A Guide to Understanding the Current Regulations, 
Enforcement and Investigations
Speakers

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Agenda

• Federal Pursuit of Market Manipulation
  ▪ FTC
  ▪ CFTC
  ▪ Oil & Gas Fraud Working Group

• Interplay between State and Federal

• Typical Approaches to State Regulation
  ▪ State of Emergency
  ▪ Market Emergency

• Steps to Take to Protect Yourself
Federal Pursuit of Market Manipulation

• Historically, the Government has Investigated Price Spikes
  ▪ FTC
  ▪ CFTC

• New Statutory Authority Expanded the Investigations
  ▪ Antifraud Statute: FTC
  ▪ Dodd-Frank: CFTC

• President Obama Initiates the Oil & Gas Fraud Working Group
  ▪ U.S. Attorney General, in conjunction with: CFTC, FTC, DOE, DOA, Treasury, SEC, Fed Reserve, FBI, and States Attorneys General

• No Preemption
  ▪ States are encouraged to conduct investigations
Approaches to State Regulation

State of Emergency vs. Market Emergency vs. Blend of Both
Gasoline-Oil Price Gouging Laws
in the 50 U.S. States and the District of Columbia

Wholesale Price Gouging Laws
Retail-Only Price Gouging Laws
States Without Specific Laws

* As of May 2011.
Wholesale Gasoline-Oil Price Gouging Laws in the 50 U.S. States and the District of Columbia

* As of May 2011.
Typical Statutory Language

• The language found in many of these statutes is often broad and undefined, or not defined with specificity:

   - Unconscionable Price
   - Excessive Increase
   - Gross Disparity
   - Increased Costs
   - Violation
Typical Statutory Language

- **Connecticut; Regs. Conn. State Agencies § 42-110b-29(b):**
  
  “(b) It shall be an unfair act or practice in violation of Connecticut General Statutes, Section 42-110b (a) for a seller during any period of abnormal market disruption to sell or offer to sell a petroleum product for an amount which represents an unconscionably excessive price.

(c) Evidence that (1) (i) the amount charged represents a gross disparity between the price of the petroleum product which was the subject of the transaction and the price at which such petroleum product was sold or offered for sale by the seller in the usual course of business immediately prior to the onset of the abnormal market disruption or (ii) the amount charged grossly exceeded the price at which the same or similar petroleum product was readily obtainable by other consumers in the trade area; and (2) the amount charged by the seller was not attributable to additional costs incurred by the seller in connection with the sale of such product, shall constitute prima facie evidence that a price is unconscionably excessive.”
Typical Statutory Language

• Alabama:

Ala. Code §8-31-3: “It is prima facie evidence that a price is unconscionable if any person, during a state of emergency . . ., charges a price that exceeds, by an amount equal to or in excess of twenty-five percent 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 and the increase in the price charged is not attributable to reasonable costs incurred in connection with the rental or sale of the commodity.”
State of Emergency

- **Trigger:** Declaration of a State of Emergency by the State’s Governor or President of the U.S.
- **Geographic Coverage:** Varies from local to regional to national depending on scope of declaration
- **Statutes generally prohibit substantial price increases when compared to prices before the State of Emergency**
- **Some states criminalize noncompliance**
- **Examples of State of Emergency Jurisdictions:**
  - California
  - Florida
  - Kentucky
  - Louisiana
  - New Jersey
  - Texas
State of Emergency: Florida

F.S.A. § 501.160

(1)(b) It is prima facie evidence that a price is **unconscionable** if: . . . 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 declaration of a state of emergency, and **the increase in the amount charged 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.

(2) Upon a declaration of a state of emergency by the Governor, it is unlawful and a violation of s. 501.204 for a person or his agent or employee to rent or sell or offer to rent or sell at an **unconscionable price** within the area for which the state of emergency is declared, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency. This prohibition remains in effect until the declaration expires or is terminated.
Florida

- **Trigger**: Declaration of a State of Emergency by the Governor
- **Geographic Coverage**: Within the area for which the State of Emergency is declared
- **Prohibits** “unconscionable” prices for any essential commodity during a stated declared emergency.
- **Penalties**: Civil penalties up to $1,000 per violation, not to exceed $25,000 in 24 hours
Florida

- Recent Activity
  - In the wake of Hurricane Ike in 2009, the Attorney General and Agriculture and Consumer Services Commissioner began investigating multiple cases of potential price gouging.
  - Ultimately, led to two high-profile settlements
    - Customer reimbursement, plus $40,000 donation, for a retail gasoline company
    - $2.275M with a large fuel supplier
  - Industry saw need for change
Florida: Updated Statute

F.S.A. § 501.160

(1)(b) It is prima facie evidence that a price is unconscionable if: . . . 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 declaration of a state of emergency, and the increase in the amount charged 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 regional, national or international market trends.

(2) Upon a declaration of a state of emergency by the Governor, it is unlawful and a violation of s. 501.204 for a person or his agent or employee to rent or sell or offer to rent or sell at an unconscionable price within the area for which the state of emergency is declared, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency. This prohibition remains in effect until the declaration expires or is terminated.
KRS 367.374: Sale or rental of goods and services during declared state of emergency -- Thirty-day prohibition against grossly excessive prices

(1)(a) When a Condition Red has been declared by the United States Department of Homeland Security under the Homeland Security Advisory System or the Governor has declared a state of emergency... the Governor may implement this section by executive order for a period of thirty (30) days.

(b) No person shall sell, rent, or offer to sell or rent, regardless of whether an actual sale or rental occurs, a good or service... or any repair or reconstruction service for a price which is grossly in excess of the price prior to the declaration and unrelated to any increased cost to the seller.
Kentucky

- **Trigger:** State of Emergency as declared by the Governor or a ‘Condition Red’ declared by the U.S. Department of Homeland Security
- **Geographic Coverage:** Unspecified
- **Prohibits any price which is grossly in excess to the price prior to the declaration and is unrelated to any increased cost to the seller.**
- **Penalties:** Up to $5,000 for the first violation, and up to $10,000 for each subsequent violation
Kentucky: History of Enforcement

• 2005: AG files suit for alleged price-gouging violations following Hurricanes Rita and Katrina
• 2008: AG investigates wholesale gasoline prices in the Louisville market
• 2011: AG attempts to limit a large refiner’s price increase in the wake of a declared state of emergency
Market Emergency

• **Trigger:** Abnormal market disruption caused by an extraordinary adverse circumstance that causes stress to the petroleum products market
  - May be a natural disaster; could be supply interruptions etc.
  - Any declaration made?
• **Geographic Coverage:** Either unspecified or within the area where the disruption or disaster is declared
• **Statutes generally prohibit selling goods at “unconscionably high” prices.**
• **Examples:**
  - Connecticut
  - Illinois
  - Massachusetts
  - New York
  - Oregon
Market Emergency: Massachusetts

94 CMR 3.18: Price Gouging

(1) It 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**.

(2) A price is unconscionably high if:

(a) the amount charged 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

(b) 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.
Massachusetts

- **Trigger**: Any market emergency, defined as any abnormal disruption of any market for petroleum products
- **Geographic Coverage**: Unspecified
- **Prohibits**: Sellers of petroleum products from charging “unconscionably high” prices.
- **Penalties**: Up to $5,000 per violation
NY Gen. Bus. § 396-r. Price Gouging

1. Legislative findings and declaration. The legislature hereby finds that during periods of abnormal disruption of the market caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances, some parties within the chain of distribution of consumer goods have taken unfair advantage of consumers by charging grossly excessive prices for essential consumer goods and services. In order to prevent any party within the chain of distribution of any consumer goods from taking unfair advantage of consumers during abnormal disruptions of the market, the legislature declares that the public interest requires that such conduct be prohibited and made subject to civil penalties.

2. 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. For purposes of this section, the phrase "abnormal disruption of the market" shall mean any change in the market, whether actual or imminently threatened, 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, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor.
New York

- **Trigger:** Any abnormal disruption of the market that is caused by strikes, power failures, severe shortages or other extraordinary adverse circumstances.
- **Geographic Coverage:** Unspecified
- **Prohibits the sale or offer of goods or services during the market disruption “unconscionably excessive prices”**
- **Penalties:** Up to $25,000 fine, and where appropriate, restitution to aggrieved consumers
Steps to Protect Yourself

• Know Your Jurisdiction
  - What is the state activity level?
  - What are your triggers?

• Double-Check Your Compliance Systems
  - Antitrust
  - Futures and Physical Trading of Petroleum Products

• Encourage Communication Between Traders, Compliance and Lawyers

• Consider Becoming Involved in the Reformation Processes
Questions?

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