Sheriff, enforcement of price gouging

Number: INFORMAL

Date: September 04, 2007

The Honorable Frank McKeithen
Bay County Sheriff
3421 North Highway 77
Panama City, Florida 32405

Dear Sheriff McKeithen:

You ask what constitutes price gouging and whether the sheriff's office may arrest for such actions.

Section 501.160(2) and (3), Florida Statutes, provides:

"(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 her 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 is effective not to exceed 60 days under the initial declared state of emergency as defined in s. 252.36(2) and shall be renewed by statement in any subsequent renewals of the declared state of emergency by the Governor.

(3) It is unlawful and a violation of s. 501.204 for any person to impose unconscionable prices for the rental or lease of any dwelling unit or self-storage facility during a period of declared state of emergency."[1]

It is therefore 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 exceed the average price for the commodity the thirty days before the declaration of the state of emergency or the seller price for the commodity the thirty days before the declaration of the state of emergency unless the seller can show increases in its prices or market trends justifying the price. Section 501.160(1)(a), Florida Statutes, defines "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."

Pursuant to section 501.160(1)(b), Florida Statutes, 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 or rental or lease of any dwelling unit or self-storage facility that is the subject of the offer or transaction and the average price at which that commodity or dwelling unit or self-storage facility

was rented, leased, sold, or offered for rent or sale in the usual course of business 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; 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 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."

Thus, the law compares the price of the commodity or service to the average price charged over the 30-day period prior to the declared state of emergency to determine whether there is a "gross disparity" between the prior price and the current charge then it is price gouging.[2]

This is a civil crime enforced by the Attorney General, the Department of Agriculture and Consumer Services and the State Attorney.[3] You may, therefore, wish to discuss this matter with your local state attorney. Subsection (9) of section 501.160, Florida Statutes, however, provides:

"Upon a declaration of a state of emergency by the Governor, in order to protect the health, safety, and welfare of residents, any person who offers goods and services for sale to the public during the duration of the emergency and who does not possess a business tax receipt under s. 205.032 or s. 205.042 commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. During a declared emergency, this subsection does not apply to religious, charitable, fraternal, civic, educational, or social organizations. During a declared emergency and when there is an allegation of price gouging against the 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."

Thus, the sheriff's office may arrest those persons who offer goods and services for sale to the public during the duration of the emergency and who do not possess a business tax receipt under section 205.032 or section 205.042, Florida Statutes.[4]

I trust that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] Section 501.204(1), Fla. Stat., provides that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." In construing this subsection, due consideration and great weight is to be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2006. *See* s. 501.204(2), Fla. Stat.

[2] *See* s. 501.160(8), Fla. Stat. ("Any violation of this section may be enforced by the Department of Agriculture and Consumer Services, the office of the state attorney, or the Department of Legal Affairs.").

[3] *But see* ss. 501.160(4) and (5), Fla. Stat., respectively providing that a price increase approved by an appropriate government agency is not be a violation of this section and that the section does not apply to sales by growers, producers, or processors of raw or processed food products, except for retail sales of such products to the ultimate consumer within the area of the declared state of emergency.

[4] *See* s. 205.032, Fla. Stat., authorizing the governing body of a county to levy, by appropriate resolution or ordinance, a business tax for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction. *Cf.* s. 205.042, Fla. Stat., authorizing the governing body of an incorporated municipality to levy a business tax for the privilege of engaging in or managing any business, profession, or occupation within its jurisdiction.