

Enforcing Profiteering Restrictions in the Kansas Consumer Protection Act



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The past year has thrown many Kansans into times of turmoil, whether dealing with the COVID-19 pandemic or handling the fallout of uncontrolled natural-gas prices in February 2021. The Kansas Consumer Protection Act may provide some relief for consumers who are the subjects of price-gouging during times of disaster but is not a cure-all. This article will discuss the anti-profiteering restrictions in the Kansas Consumer Protection Act and how they can be applied to recent situations affecting Kansas consumers.

The Problem(?): Price-Gouging during Disasters

At the outset, it should be acknowledged that price-gouging is not a universally reviled practice, at least among some adherents of free-market economic principles. Some critics consider restrictions on price gouging akin to laws prohibiting racial marriage: they “prevent people from entering into agreements or transactions that lawmakers find objectionable.”¹ In this view, price-gouging restrictions discourage the free movement of goods and therefore “harm” the very people whom lawmakers intend to help.²

That view has not prevailed. Thirty-seven of the 50 states have enacted price-gouging laws, with most of them applying during times of emergency or disaster.³ Kansas passed its version of price-gouging regulations following the events of Sept. 11, 2001.⁴ On March 13, 2020, Attorney General Derek Schmidt invoked this statute specifically for items customers found necessary because of the COVID-19 virus outbreak.⁵ On April 1, 2021, Gov. Laura Kelly requested AG Schmidt open an investigation into natural-gas prices in February 2021.⁶

The Solution(?) for Kansas: Price-Gouging Restrictions during Disasters

The events of the past year have brought renewed interest to price-gouging protections. Although those protections are robust and generally available to consumers, they likely are ill-equipped to handle most public instances.

When Kansas enacted its version of price-gouging restrictions, it incorporated them into the Kansas Consumer Protection Act (the KCPA).⁷ As a result, those who otherwise have a valid claim for relief under the KCPA are also afforded those rights if prohibited price-gouging has occurred. Unfortunately, the applicability of Kansas’ price-gouging restrictions is quite limited, so practitioners evaluating potential cases can use the following checklist as a guide.

1. Was there a Consumer Transaction?

In price-gouging cases, the KCPA's general restrictions apply. The purchaser must have been "an individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes."⁸ The seller must have been "a manufacturer, distributor, dealer, seller, lessor, assignor, or other person who, in the ordinary course of business, solicits, engages in or enforces consumer transactions, whether or not dealing directly with the consumer."⁹ And the transaction between the purchaser and the seller must have been "a sale, lease, assignment or other disposition for value of property or services within this state . . . to a consumer."¹⁰ Because of these restrictions, many businesses are excluded from these protections.

If the elements of the KCPA are otherwise met, to constitute price-gouging, an actual sale at the increased price is not required.¹¹ It is enough that the supplier merely offered the product or service.

2. Did the Transaction Occur during a Time of Disaster?

The KCPA's restrictions on price-gouging apply only during a "time of disaster."¹² The statute defines this as the longer of:

- the period of time when a declaration of a state of emergency by the president of the United States or the governor is in effect; or
- 30 days after the occurrence of the event that constitutes the disaster.¹³

In this context, a "disaster" is "natural or man-made events including, but not limited to, tornado or other severe storm, earthquake, flood, fire, riot, act of war, terrorism, civil disorder or other extraordinary adverse circumstance."¹⁴ It is not necessary that a state of emergency be declared for a disaster to have occurred.¹⁵

3. Did the Transaction Involve a Necessary Property or Service?

The KCPA's restrictions on price-gouging also apply only to "necessary property or service[s]."¹⁶ This is an open-ended phrase and is meant to encompass property or services "for which consumer demand does, or is likely to, increase as a consequence of the disaster."¹⁷ Examples include "consumer food items or property, property or services for emergency cleanup, emergency supplies, communication supplies and services, medical supplies and services, home heating fuel, building materials and services, freight, storage services, housing, lodging, transportation and motor fuels."¹⁸ If the

product or service does not fall within this definition, then aggrieved consumers may still be able to obtain relief from other areas of the KCPA.¹⁹

4. Did the Supplier Increase its Price too Much?

Assuming all other requirements of KCPA's price-gouging restrictions are met, the last question is whether the price increase was too great, *i.e.*, whether profiteering occurred. Here, the Kansas legislature again left this term open-ended, but it provided some defined baselines for what increase is too much. It also provided a defense for suppliers who themselves may have been the victims of price-gouging.

The questions for profiteering involve price comparisons. First, if "the price charged by the supplier during the time of disaster grossly exceeded the price charged by the supplier for similar property or services on the business day before the disaster," then profiteering has occurred.²⁰ This is a simple analysis: what did the business charge the day before the disaster, and what did it charge during the disaster.

Similarly, if "the amount charged by the supplier during the time of disaster grossly exceeded the price at which the same or similar property or services were readily obtainable by other consumers in the trade area," then profiteering has occurred.²¹ This is a slightly more complicated analysis: what were other suppliers charging for the same product or service during the disaster. If there is wholesale profiteering among suppliers, then this analysis will provide no evidence of profiteering.

In either case, if the difference is more than 25 percent, then there is a *prima facie* case of profiteering.²²

The pricing comparisons are not the end of the inquiry. Suppliers are not required to choose between absorbing massive price increases from their own suppliers and violating the KCPA. Instead, the statute gives them a defense, allowing them to pass on their additional costs, even if it would otherwise result in an increase of more than 25 percent. As a result, if the supplier can show the additional amount it charged was "attributable to additional costs incurred by the supplier in connection with the sale of the product or service," and if the supplier also can show it actually incurred those additional costs during the time it was charging the increased price, then it will have a *prima facie* defense that its price was justified.²³ Therefore, in evaluating potential price-gouging cases, it is not sufficient to know just whether the retail prices changed, it is also necessary to know how the supplier's costs may have changed.

Practical Difficulties in Enforcing Price-Gouging Restrictions

In addition to the multiple hurdles present in establishing a case of price-gouging in violation of the KCPA, the supplier's passed-along-costs defense can present difficult questions of timing and overall applicability of the statute. These questions cannot only work to the detriment of retailers who are just trying to stay in business, but also potentially prevent consumers from holding accountable those responsible for the price increases.

First, because passed-along-costs defense requires the supplier to show it incurred the additional costs in connection with that sale, and that it incurred those costs during the time when it was charging the increased cost, suppliers such as gas stations can be put in difficult situations of timing. Consider the following example: a gas station fills its underground tanks the day before a disaster strikes at \$1.50 per gallon. The disaster strikes, and the wholesale price of gasoline goes up to \$2.50 per gallon. Can the gas station increase its retail gas price after the wholesale gas price goes up, but before it has exhausted its supply of \$1.50-per-gallon gas? Probably not: the KCPA will provide no defense to the gas station if it preemptively increases its retail price just because the wholesale price goes up. Depending on how the station times the pricing of its gas, it can be put in a difficult position. The same would be true for any supplier who sells a product whose price can fluctuate dramatically and who keeps a supply of inventory on hand.

In addition, if the potentially price-gouging party is not the retailer, and the retailer has a valid passed-along-costs defense, there are potentially difficult questions of whether the KCPA applies at all, and whether the price-gouging restrictions protect to consumers from such practices. A painful example of this is the case of natural-gas price spikes in February 2021. Many affected consumers were end-users who purchase their natural gas from municipal utilities. Many of those utilities in turn purchase natural gas on the open market from suppliers at "spot" prices, or whatever the market price is that day. For the residents of Mulberry, KS, this resulted in an 11,000 percent increase in natural-gas prices for four days in February 2011.²⁴ The City of Mulberry bought its gas at the spot rate from BP on those days, and presumably it will have to pass on that cost to its customers.

This may seem like a clear case of profiteering, but the KCPA may provide no basis for recovery by the customers, who will end up paying the bill, against BP, who charged the increased price. For the KCPA to apply, there must be a "supplier," a "consumer," and a "consumer transaction."²⁵ If the residents of Mulberry were to sue BP under the KCPA, BP could argue the KCPA does not apply because there was no "consumer transaction." It could contend it is not a "supplier" under the KCPA because it sells its natural gas to municipalities and utilities, not to individuals, husbands and wives, sole

proprietors, or family partnerships.²⁶ It could further contend that its customer, the City of Mulberry, is not a "consumer" under the KCPA. And it could contend that it did not enter any transaction at with the end users. The end users may contend they are intended third-party beneficiaries of the transaction between the City and BP and therefore have a right of recovery, but existing authority is not clear on this point.²⁷

When there is a potentially innocent non-consumer intermediary (in this case, the City of Mulberry) standing between an aggrieved consumer and a supplier alleged to be taking financial advantage of a disaster, there are difficult questions as to whether a "consumer transaction" is involved and whether the KCPA provides any basis for relief. There are no Kansas court cases interpreting the price-gouging restrictions of the KCPA, so the events of February 2021 may provide an opportunity for Kansas courts to address this issue.

Other Considerations

The price-gouging restrictions in the KCPA state that profiteering is considered an "unconscionable" act in violation of the statute.²⁸ As a result, these cases will be decided by the court, not by a jury.²⁹ In jurisdictions in which many of the other potential jurors may have been on the receiving end of the alleged profiteering, not having the right to a jury trial could make close cases more difficult to win.

Conclusion

The price-gouging restrictions of the Kansas Consumer Protection Act offer robust protections to consumers who are the victims of price gouging during disasters. However, the structure of the KCPA does not lend itself to customers holding accountable suppliers of retailers who have a valid defense of passing along their own increased cost.

- 1 Michael Giberson, The Problem with Price Gouging Laws: Is optimal pricing during an emergency unethical?, Regulation, at 48 (Spring 2011).
- 2 Id.
- 3 See <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx> (summarizing the jurisdictions). The states with no such restrictions are Alaska, Arizona, Colorado, Delaware, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Dakota, Washington, and Wyoming.
- 4 L. 2002, ch. 179, § 3; July 1.
- 5 <https://www.ag.ks.gov/media-center/news-releases/2020/03/13/ag-derek-schmidt-state-price-gouging-law-now-in-effect-for-virus-response-supplies>.
- 6 Katie Bernard, KS Gov. Kelly asks AG to launch price gouging investigation on huge natural gas bills, The Kansas City Star, April 1, 2021 (available at <https://www.kansascity.com/news/politics-government/article250342866.html#storylink=cpy>).
- 7 K.S.A. 50-6,106(c).
- 8 50-624(b).
- 9 50-624(l).
- 10 50-624(c).
- 11 K.S.A. 50-6,106(b)(1).
- 12 K.S.A. 50-6,106(b)(1).
- 13 K.S.A. 50-6,106(b)(2).
- 14 K.S.A. 50-6,106(b)(3).
- 15 K.S.A. 50-6,106(b)(3).
- 16 K.S.A. 50-6,106(b)(1).
- 17 K.S.A. 50-6,106(b)(4).
- 18 K.S.A. 50-6,106(b)(4).
- 19 See, e.g., K.S.A. 50-627(b) (discussing other factors for general unconscionability).
- 20 K.S.A. 50-6,106(b)(1)(A).
- 21 K.S.A. 50-6,106(b)(1)(B).
- 22 K.S.A. 50-6,106(b)(1)(A), (B).
- 23 K.S.A. 50-6,106(b)(1)(C).
- 24 Dion Leffler, Standing up to an energy giant: Kansas town claims BP gouged on gas in Feb. Freeze, The Wichita Eagle, April 4, 2021 (available at <https://www.kansas.com/news/business/article250393286.html>).
- 25 K.S.A. 50-624.
- 26 K.S.A. 50-624(b).
- 27 Ellibee v. Aramark Corr. Servs., Inc., 37 Kan. App. 2d 430, 432 (2007) (holding under the facts of that case that prisoner did not have standing under the KCPA to assert claim against prison's food supplier).
- 28 K.S.A. 50-6,106(a).
- 29 K.S.A. 50-627(b) ("The unconscionability of an act or practice is a question for the court").

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