MAY 13, 2020
Senate Judiciary Committee
Ohio Attorney General Dave Yost – Proponent Testimony – SB 301

Chairman Eklund, Vice Chair Manning and Ranking Member Thomas—thank you for allowing me the opportunity to provide proponent testimony today on SB 301.

At the beginning of this emergency, my office began to receive complaints of product shortages and price gouging brought on by consumers panic buying items like toilet paper, disinfectant wipes, and hand sanitizer. During those early days, I spoke with a good number of major retailers, and was impressed to learn of the proactive steps retailers all over Ohio were taking to hold the line on prices and to protect the supply chain. While the vast majority of retailers continue to do the right thing, the bad actors have not—in no small part due to the lack of clear authority to curb their predatory behavior.

SB 301 has two main provisions:

1) It gives the office of the Attorney General explicit authority to go after the most egregious price gougers—those who sell items at prices "grossly in excess" of the regular price of an item before the declaration of an emergency, and

2) It gives the office of the Attorney General permissive authority to establish statewide and uniform per-consumer per-transaction quantity limitations on items related to the emergency or necessary to protect the health and safety of Ohioans.

Price Gouging

Ohio is one of only fourteen other states that do not have some form of price gouging protection codified in law. With the passage of SB 301, my office will have explicit authority to go after the worst offenders to stop their behavior, and in appropriate circumstances, to levy civil penalties against them for profiteering on fear.

Unlike other states where the attorney general may use this authority at any time, the sponsors of SB 301 have sought a more measured approach. The authority is limited to activity taking place during a declared emergency.

The bill also includes this innovation: a robust set of affirmative defenses to defend price increases related to supply chain costs, as well as actions taken by the seller that increase the value of the product.

For example, the price for eggs increased significantly in mid to late March. Our office began to receive complaints filed against retailers across the state for price gouging. After investigating, we learned that increased production costs were driving up the retail price of eggs statewide. Under SB 301, it is clear that this scenario would not constitute price gouging.

Contrast this with the case of a man who went by the handle of Donkey476 on eBay. Donkey476 sold N-95 masks at an 1800% mark up *from the existing market*. Manufacturers such as 3M continued to make and sell their masks while in high demand for a little more than $2 during the COVID-19 crisis. The sales of millions of masks at this price establishes the market, not the handful of fear-driven transactions at an 1800% markup.

Let us turn for a moment to the virtues of a free market. Simply shouting “Free markets forever!” is not a magic incantation. Free markets are the most efficient way to allocate resources and establish prices. They are indispensable to prosperity.

But they are not inherently infallible, and can result in outcomes we deem poor on grounds other than efficiency. That is why our market system has rules: for example, you cannot lie on your financial statements, or purposely deceive people about the dangers of your product. It’s why the New York Stock Exchange temporarily pauses trading when the market loses a certain amount, to prevent panics. They call it a “circuit breaker,” but it’s really more of an emergency brake.

So the question becomes: how does a market work during a public emergency—a pandemic or a weather catastrophe?

If plywood is in short supply in Biloxi, MS, after a hurricane, a higher price will incentivize the owners of existing stockpiles in Minnesota to move the plywood from a place of low demand (and low prices) to a place of high demand (and higher prices). This effect will come into play in the second provision of this bill—let's drop a pin here for the moment.

But what about when existing goods have been moved to the higher-demand market? If demand remains higher for a long time, then higher prices will give others the incentive to move into that market themselves—to potentially build mask or plywood factories, if you will.

Yet most emergencies do not last for a long time. What business person would try to start manufacturing these not-so-easy to produce masks for an emergency whose demand will ebb as quickly as it arose, once our society reaches herd immunity? What do you do with all those masks when they are no longer needed?

My point here is that markets are less beneficial in short-term demand spikes, where the demand is enough to exhaust existing supplies and manufacturing capacity but will not endure long enough to expand the number of players in the market. I believe that is precisely what we are seeing with the current COVID-19 pandemic.

To return to our 1800% markup man, what Donkey476 was doing was *not* market-based selling. The old phrase about pricing—"everything the market will bear"—means there is a breaking point at which the market will not bear it and other people will enter with lower priced goods, or an alternative good will develop in time because of the price incentives.

What Donkey476 did had nothing to do with markets or what they would bear, and had everything to do with the individual breaking point of individual people. A starving man will give everything he has for a loaf of bread. That transaction — don't call it a sale! – does not establish a market.

Panic Buying

While Ohio would be a relatively late adopter on the price gouging piece of SB 301, the panic buying piece is a more innovative tool. Again, only during a declared emergency, the Attorney General would have permissive authority to establish quantity limits on per-consumer per-transaction retail purchases. Our office would be required to provide notice of these limits and post them to our website, and they would remain in place for 90 days or the end of the emergency, whichever is sooner.

Americans are not going to the bathroom more because of COVID-19. We do not need more toilet paper than we did before, and we certainly don't need more toilet paper factories.

So why was this humble, yet-so-necessary commodity in short supply, and briefly sold for outrageous prices in certain places? The run on toilet paper wasn't fueled by a fear that the total global supply would run out. It was fueled by seeing empty shelves. Those empty shelves prompted us to fear that our own family would go without if we didn't buy then and buy far more than we'd ever use.

This massive bulk purchasing fueled *artificial* shortages. Some businesses and individuals saw that panic as an opportunity to make tremendous profits by exploiting people's fears and uncertainties. The authority provided in this legislation isn't a brake on the free market – it's a throttle limiter to make sure the machinery of commerce doesn't blow itself apart, hurting innocent and vulnerable consumers in the process.

The engines of supply and demand always come into balance in the long run. What we're doing here is protecting the public from exploitative sellers and artificial price inflation and supply contraction long enough for that to happen.

In the current crisis, some retailers voluntarily placed limits on the amount of toilet paper (or other goods) that could be sold in a single transaction—and others may have adopted them later after our conversations—but all those actions occurred *after* the panic buying produced the artificial shortages. And some never did limit purchase quantities. This bill will allow the Attorney General—only in the event of a declared emergency—to place temporary limits on retail sale quantities.

The result will be to diminish such price-gouging, not by government price controls, but by constraining demand.

This bill uses the law of supply and demand to achieve a flexible price result. By limiting quantity per transaction, supply and actual demand will remain in rough equilibrium. The price would reflect that balance, rather than a price set by government edit.

This levels the playing field for suppliers and consumers, provides timely assurances to a nervous public, and helps protect the nation's supply chain.

A final caution: panic buying and price gouging go hand-in-hand, and it would be a mistake to tackle one piece of this problem without acknowledging the other. Like the so-called "circuit breaker" on the New York Stock Exchange, this bill provides for a temporary, limited emergency brake that will prevent many market distortions and the pain they generate.

In closing, I am grateful Senators Manning and Wilson for their leadership on these topics and to the many stakeholders who have provided feedback on this bill. Thank you, and I'm happy to answer any questions you may have at this time.