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Price Gouging Captive Customers

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Introduction

The typical American is all too familiar with getting ripped off. We pay for $15 beers at stadiums, $20 burgers at airports, $10 Wi-Fi in airplanes, $20 "payment processing" fees to landlords to pay rent, and $10,000 for ambulance rides. We know these prices are inflated. But when we find ourselves at the mercy of one company, we begrudgingly pay extreme prices because we have no choice.

It does not have to be this way. A century ago, Congress prohibited "unfair acts or practices," and 50 years ago most states followed suit by passing their own prohibition on "unfair practices" in recognition of the endless potential for companies to find new ways to take advantage of consumers. These laws are still on the books, and they can be used to stop an all-too-common modern scheme—overcharging captive customers.

This paper describes the problem of price gouging captive customers, sometimes called "island pricing," which is a common scheme seen in a wide variety of contexts across the economy, including in airports, airplanes, stadiums, car dealerships, emergency rooms, payment processing, and government contracting (including literally captive customers in prisons). In these contexts, price gouging is possible because customers are captive to one company and have no choice but to pay excessive prices. The paper then provides a brief history of the legal prohibition against "unfair acts or practices" and describes the prohibitions as they currently stand. It next shows that price gouging captive customers violates these laws and describes how federal, state, and private litigants could be suing companies for this practice now. Finally, the paper ends with model text that regulators or legislatures could use to supplement broad "unfair acts or practices" enforcement with bright line regulations or legislation.

I. The Problem of Price Gouging Captive Customers

Throughout the economy, companies overcharge customers for add-ons, concessions, or other ancillary goods and services tied to customers' main purchases. Companies can charge excessive amounts in these circumstances because, for one reason or another, the consumer is captive to the company. Once a consumer is captive, companies can engage in monopoly pricing because there is no real opportunity to shop. While this practice takes many shapes and the facts can differ slightly, the purpose of this paper is to show that the various ways in which companies engage in monopoly pricing once they've "got you" are all variations of one common scheme of price gouging captive customers. This section lays out several examples.

A. Airports

There is a well-documented history of airport vendors price gouging travelers for concessions, but earlier this year, Groundwork Collaborative produced a first-of-its-kind report documenting widespread price inflation for purchases within airports.[1] From $5 bottles of water[2] to $28 beers,[3] airport vendors take advantage of the limited competition and the limitations on bringing outside food and drink into an airport to charge excessive prices.[4] Some airports have cracked down on egregiously excessive pricing.[5] In fact, most airports now have so-called "street plus pricing" policies in place that cap what vendors can charge to no higher than 10-18% above the corresponding price outside the airport.[6] However, the process by which airlines set baseline street prices is opaque and difficult to enforce, potentially resulting in inflated prices.[7]

B. Purchases on Commercial Flights and Trains

Passengers on commercial flights and trains are similarly vulnerable to price gouging by airlines and train operators who have an effective monopoly on travelers once they board the plane or train. Airlines levy a wide range of fees that take advantage of captive passengers, including seat fees, fees for priority boarding, and surcharges for onboard Wi-Fi access or food. According to a December 2024 Senate committee

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[1] Emily DeVito, Alez Jacquez, and Elizabeth Pancotti, *Shake Down at the Snack Counter: The Case for Street Pricing*, GROUNDWORK COLLABORATIVE (Mar. 27, 2025), https://groundworkcollaborative.org/wp-content/uploads/2025/03/Groundwork-Street-Pricing-Policy-Brief.pdf.
[2] John Komlos, *Column: The economic lesson behind $5 airport water*, PBS NEWS (Jan. 26, 2016), https://www.pbs.org/newshour/economy/column-the-economic-lesson-behind-5-airport-water.
[3] Matthew Cantor, *$28 for a beer? New York airports crack down on 'exorbitant' food and drink*, THE GUARDIAN (May 23, 2022), https://www.theguardian.com/us-news/2022/may/22/new-york-airports-food-drink-prices.
[4] Emily Stewart, *The high price of absolutely everything at the airport*, VOX (Nov. 17, 2022), https://www.vox.com/23460965/airport-restaurant-flight-prices-lounge-bar-expensive.
[5] *$27 for Beer? Port Authority Cracking Down on Prices at NYC-Area Airports*, ABC NEW YORK (May 13, 2022), https://www.nbcnewyork.com/news/local/27-for-beer-port-authority-cracking-down-on-prices-at-nyc-area-airports/3686070/.
[6] Shake Down at the Snack Counter, 10-11, *supra* note 1.
[7] *Id.*

report, American, Delta, United, Frontier, and Spirit collected $12.4 billion in seat fees alone between 2018 and 2023.[8] Statistics from the Department of Transportation show that "airline revenue from baggage fees increased by more than 30 percent between 2018 and 2022, while their operating revenue grew at less than half that pace in the same period." The Department of Transportation promulgated a rule requiring airlines to "clearly disclose passenger-specific or itinerary-specific fees,"[9] but the Fifth Circuit struck the rule down on procedural grounds earlier this year.[10]

The food service on Amtrak has also received a lot of attention from passengers and from Congress. In 2023, Amtrak passengers filed thousands of complaints about the worsening quality, selection, and even safety of train food.[11] Recognizing that Amtrak's food service was wanting, Congress included a provision in the Infrastructure Investment and Jobs Act requiring Amtrak to form the Food and Beverage Working Group (FBWG) to "provide recommendations to improve Amtrak's onboard food and beverage service."[12] The FBWG provided its recommendations to Congress in 2023, and Congressman Steve Cohen recently introduced legislation that would require Amtrak to report on the progress made towards implementing the FBWG's recommendations.[13] While this attention to the poor quality of food service on trains is laudable, the pending legislation does not explicitly address problems related to excessive prices for train food.

C. Event Venues

The cost of attending live events such as concerts and sporting events held in stadiums or theaters has increased in recent years due to both the increasing ticket prices and

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[8] *The Sky's the Limit: The Rise of Junk Fees in American Travel*, U.S. Permanent Subcomm. on Investigations Majority Staff Report (Nov. 26, 2024), https://www.hsgac.senate.gov/wp-content/uploads/2024.11.25-Majority-Staff-Report-The-Skys-the-Limit-The-Rise-of-Junk-Fees-in-American-Travel-1.pdf.
[9] 89 Fed. Reg. 34620 (April 30, 2024).
[10] David Shepardson, *Major Air carriers challenge ruling on Biden airline fee rules*, REUTERS (Mar. 14, 2025), https://www.reuters.com/business/aerospace-defense/major-air-carriers-challenge-ruling-biden-airline-fee-rules-2025-03-14/.
[11] Opheli Garcia Lawler, *Amtrak Passengers Filed Thousands of Food Service Complaints Last Year*, THRILLIST (April 12, 2024), https://www.thrillist.com/news/nation/amtrak-food-complaints-passengers-food-poisoning.
[12] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 24321, 135 Stat. 429, 706 (2021). .
[13] Press Release, Representative Steve Cohen, Congressman Cohen Introduces Amtrak Food Service Improvement Bills (Jan. 9. 2025), https://cohen.house.gov/media-center/press-releases/congressman-cohen-introduces-amtrak-food-service-improvement-bills.

increasing prices for concessions at these events.[14] Similar to travelers in airports, hungry concertgoers and sports fans begrudgingly accept higher prices for food and drinks at stadiums and other event venues due to the lack of alternatives and restrictions on bringing outside food and drink into venues. Meals at some music festivals cost as much as $100 per person.[15] In 1985, the average fan spent $5 on concessions at Major League Baseball All-Star games (a little less than $15 in today's dollars). But now, a singular can of the cheapest domestic beer costs $15 at a Washington Nationals game.[16] While some stadiums maintain reasonable prices (e.g., the Houston Texans stadium charged $2 for a hotdog and $5 for a small beer in 2022) other stadiums take advantage of the "island effect" to charge double or even triple what is charged at other stadiums (e.g., the Tennessee Titans stadium charged $6 for a hotdog and $10.50 for a small beer in 2022).[17] The general trend is upwards, and stadiums are continuing to increase concession pricing every year.[18] One notable exception is Atlanta's Mercedes-Benz Stadium, which realized it could actually increase revenue by 16% (via increased volume) by reducing hot dog prices to $2, beer prices to $5, and by giving free soda refills.[19]

The Federal Trade Commission (FTC) has promulgated a rule banning junk ticket fees,[20] and local authorities have pursued solutions to fight problems such as price gouging by resellers.[21] However, there do not seem to be any actions aimed at cracking down on excessive concession prices.

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[14] Shake Down at the Snack Counter, 8, *supra* note 1.
[15] Nicholas McEntyre, *Coachella festivalgoers fume after spending over $100 per meal: 'These prices are diabolical*, NYPOST (Apr. 13, 2025), https://nypost.com/2025/04/13/entertainment/coachella-2025-food-and-drink-prices-cause-tiktok-users-to-fume-at-california-music-festival/.
[16] Shake Down at the Snack Counter, 2, *supra* note 1.
[17] Diana Beasely, *Every NFL Stadium Ranked by Concession Prices*, ESPN SOUTHWEST FLORIDA (Feb. 6, 2023), https://espnswfl.com/listicle/every-nfl-stadium-ranked-by-concession-prices/.
[18] Jelisa Castrodale, *Here's How Much You Could be Spending on a Hot Dog and a Beer at an NFL Stadium this Season – and It's Not Good*, FOOD&WINE (Sep. 6, 2024), https://www.foodandwine.com/nfl-stadium-food-prices-2024-8706649.
[19] Sportse Media, *The Truth About Stadium Food Prices (and Why You Keep Paying Them)*, SportsEpreneur (May 14, 2025), https://sportsepreneur.com/truth-about-stadium-food-prices/.
[20] 90 Fed. Reg. 2066 (Jan. 10, 2025).
[21] Meagan Flynn, *D.C. concert venues back bill to crack down on ticket scalpers*, WASH. POST (Apr. 9, 2025), https://www.washingtonpost.com/dc-md-va/2025/04/08/ticket-scalpers-dc-bill-anthem-ticketmaster/.

D. Car Dealerships

Overpriced add-ons are a major source of revenue for car dealerships as well. A study by the car-buying platform CoPilot found that bait-and-switch tactics cost buyers $11.8 billion annually, or about $640 on average.[22] Rather than deviating from the sticker price for the main cost of the car, these bait-and-switch tactics typically come in the form of inflated charges for add-ons taking advantage of the fact that customers are not buying the add-on in an open market. Examples of overpriced add-ons include LoJack, VIN etching, exterior/interior protection, service packages, and Guaranteed Asset Protection (GAP) insurance that purports to relieve consumers of the obligation to repay an auto loan if the vehicle is totaled.[23] One study from the National Consumer Law Center (NCLC) in 2017 found that the average wholesale mark-up for these add-on products was 170%, exceeding the average mark-up charged by typical retailers that often does not exceed 50%.[24]

The FTC has taken action against individual dealerships that add on excessive fees,[25] but attempts to codify prohibitions on such tactics have failed. In December 2023, the FTC promulgated a rule that attempted to ban certain auto dealer add-on bait-and-switch practices,[26] but the Fifth Circuit vacated the rule on procedural grounds earlier this year.[27]

E. Healthcare

In many circumstances, consumers are captive to their healthcare provider. For example, a consumer does not choose the ambulance company used in their city. Consumers are often forced to rush to the closest hospital in an emergency and are not in a position to choose a provider. Additonally, hospitals often work with third-party

[22] CoPilot, *The Perfect Storm: How Car Dealerships Have Capitalized on Crisis Through Bait-and-switch Pricing Through the COVID Era and Tariff Uncertainty*, https://www.copilotsearch.com/dealer-report/.
[23] *Id.*; John Van Alst et al., Auto Add-ons Add Up, NAT'L CONSUMER L. CTR. (Oct. 1, 2017), https://www.nclc.org/wp-content/uploads/2022/09/auto_add_on_rpt.pdf.
[24] John Van Alst et al., *supra* note 23, 10.
[25] Complaint, FTC v. ACIA17 Automotive Inc., Case No. 24-cv-13047 (N.D. Ill. Dec. 19, 2024).
[26] 89 FR 590 (Jan. 4, 2024).
[27] Nat'l Automobile Dealers Assn, v. FTC, 127 F.4th 549 (5th Cir. 2025).

contractors, like provider groups, anesthesiologists, labs, and others, which consumers do not select but who bill directly to consumers.[28]

In these circumstances, healthcare companies will sometimes take advantage of the fact that they have a captive patient to over-charge. Several years ago, private-equity firms started purchasing healthcare companies, with particular focus on the subpart of the healthcare industry that involves especially captive patients, including ambulances,[29] air lift services,[30] ER doctor practices,[31] and anesthesiologists.[32] Private equity now owns a sizable share of each of these markets.[33] It did this, presumably, to take advantage of the captive customers to raise prices.[34] In these circumstances, consumers are incapable of shopping for services, and private-equity-owned entities appear to be taking advantage of the leverage that creates by overcharging.

For example, Envision Healthcare is a company that owns ER doctor practice groups and was responsible for 12 million emergency department visits in 2021.[35] Envision does not own hospitals, rather, it owns the practice groups that operate within a

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[28] Of course, consumers are not captive in all contexts, especially in non-emergency circumstances. For example, consumers will often have multiple dentists, dermatologists, general practitioners, and pediatricians to choose from in their city.

[29] Olivia Webb, *Private Equity Chases Ambulances,* AM. PROSPECT, (Oct. 3, 2019), https://prospect.org/health/private-equity-chases-ambulances-emergency-medical-transport/

[30] Loren Adler, Kathleen Hannick, Sobin Lee, *High Air Ambulance Charges Concentrated in Private-Equity Owned Carriers*, BROOKINGS INST. (Oct. 13, 2020), https://www.brookings.edu/articles/high-air-ambulance-charges-concentrated-in-private-equity-owned-carriers/; Chris Stanton, *The Air-Ambulance Vultures*, NEW YORK MAG. (Apr. 20, 2022), https://nymag.com/intelligencer/2022/04/how-private-equity-took-over-air-ambulances.html

[31] Diane Archer, *Private Equity is Destroying ER Care*, JUST CARE (Oct. 8, 2024), https://www.justcareusa.org/private-equity-is-destroying-er-care/.

[32] Ambar La Forgia, Amelia M. Bond, Robert Tyler Braun, et al, *Association of Physician Management Companies and Private Equity Investment with Commercial Health Care Prices Paid to Anesthesia Practitioners*, JAMA Network (Feb. 28, 2022), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2789280.

[33] *Supra* notes 29-32.

[34] *See* Alexander Borsa, Geronimo Bejarano, Moriah Ellen, Joseph Dov Bruch, *Evaluating Trends in Private Equity Ownership and Impacts on Health Outcomes, Costs, and Quality: Systemic Review*, 383 BMJ 10354830 (Jul. 2023); Jane M. Zhu and Zirui Song, *The Growth of Private Equity in U.S. Health Care: Impact & Outlook*, NIHCM Foundation (May 17, 2023), https://nihcm.org/assets/articles/NIHCM-ExpertVoices-052023.pdf; Ambar La Forgia, Amelia M. Bond, Robert Tyler Braun, et al, *182 JAMA Intern. Med. 396 (2022)*.

[35] Mary Bugbee, Envision Healthcare: A Private Equity Case Study, PRIVATE EQUITY STAKEHOLDER PROJECT at 4 (Dec. 14, 2022), https://pestakeholder.org/wp-content/uploads/2022/12/Envision_CaseStudy_Final_Dec2022.pdf.

hospital when hospitals outsource staffing. When a patient is billed, Envision and the hospital each bill separately, and while a patient's insurance might be in-network for the hospital, it might not be for the practice group. Consumers, at least in theory, choose the hospital they go to and sign entrance agreements with the hospital, but not Envision. In 2017, Yale researchers found that after Envision entered hospitals, it would go out-of-network with insurers, double the prices, and bill directly to patients.[36] This kind of price gouging is only possible with a captive customer base.

F. Payment Processing

The ability to make and accept electronic payments is critical to modern commerce. However, companies of all types have begun profiting off of excessive "convenience fees" or transaction fees (sometimes called pay-to-pay fees) that exceed the costs to the company for processing an electronic payment.[37] They are able to charge excessive margins for payment processing because, once a consumer is in a business relationship with a company, they are captive to that company's electronic payment "add-on" service. Sometimes, the fees are charged by landlords well after the consumer signed the lease, or by debt collectors or mortgage companies that the consumer did not choose at all.

One common business model involves a company that contracts with a payment processor vendor who processes payments and charges consumers a fee. In a market where consumers are shopping on their own behalf, at least in theory, they would choose processors with the best combination of low fees, secure payment, and user interface quality. But these vendors often provide low quality user experience and charge high fees because the vendors offer "revenue-sharing" kickbacks to the company. Companies choose the payment processing vendors with the highest revenue-sharing deal, which means they choose vendors who charge the highest fees to the company's captive customers.

One egregious example of this practice was recently found in prison telephone services. Prison phone vendors were charging $1.80 for a 15-minute phone call out of prisons, and the payment processor that the vendors selected were charging a $13.19 "convenience" fee to electronically process the payment of $1.80 to the vendors. In a

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[36] Zack Cooper, Fiona Scott Morton, and Nathan Shekita. *Surprise! Out-of-Network Billing for Emergency Care in the United States*, Nat'l Bureau of Econ. Rsch. Working Paper No. 23623 (July 2017), at 4, https://doi.org/10.3386/w23623.
[37] *See, e.g.*, Debt Collection Practices (Regulation F); Pay-to-Pay Fees, 87 Fed. Reg. 39733 (July 5, 2022).

class action, plaintiffs alleged that 2/3 of the $13.19 "transaction fee" went back to the vendors in the form of "revenue sharing," meaning the "transaction fee" was marked up at least 200% even after accounting for all costs and profit for the payment processor.[38]

Recently, the District of Columbia Attorney General has issued a consumer alert describing the charging of excessive fees (more than the cost of the service) by landlords to be unlawful, likely a violation of the District's prohibition on unfair practices.[39] And a coalition of Attorneys General identified that some mortgage servicers charging $7.50 to make online payments and $17.50 to make payments over the phone, despite the fact that it costs the company only about $0.50 per transaction, was likely illegal.[40]

G. Government Contractors

In a variety of contexts, the government contracts with vendors to provide services to the public, where the vendors charge the public for those services. Because it is a government service, in these circumstances, the vendor who wins the contract almost always has a monopoly to charge for the service. The general fact pattern is often the same and looks quite similar to the arrangement described above regarding payment processing. The government contracts with vendors, who compete largely based on which vendor can generate the most revenue for the government. As a result, to the extent there is any competition, it drives up prices for consumers, who are then captive to the vendor due to the fact that the vendor is not in a competitive market.[41]

For example, while federal court documents are legally required to be available to the public, the fees imposed for accessing those documents impose practical barriers. The

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[38] Complaint Albert v. Global Tel*Link Corp, No. 8:20-cv-01936-PWG (D. Md. June 29, 2020), *dismissal of case reversed in* Albert v. Global Tel*Link Corp., 68 F.4th 906 (4th Cir. 2023).

[39] D.C. Atty. General, Attorney General Schwalb Issues Consumer Alert on Rental Fees & Protections for DC Renters (Jan. 29, 2024), https://oag.dc.gov/release/attorney-general-schwalb-issues-consumer-alert-1.

[40] Joint Attorney General Letter to CFPB, Docket No. CFPB-2022-0003 (Apr. 11, 2022), https://oag.ca.gov/system/files/attachments/press-docs/State%20Attorneys%20General%20Multistate%20Comment%20Letter%20to%20CFPB_convenience%20fees_4.11.22_final.pdf.

[41] *See, e.g.*, Pearson v. Hodgson, 363 F.Supp.3d 197 (D. Mass. 2018) (involving claims that the state of Massachusetts had imposed an unlawful tax by inflating inmate calling prices to pay for commission payments from the phone vendor to the state).

federal judiciary, through their Public Access to Court Electronic Records (PACER) system, charges up to $3 per document accessed. The judiciary is permitted by statute to charge for access "only to the extent necessary" to provide "access to information available through automatic data processing equipment," but the $146 million in fees that PACER brings in through its vendor vastly exceeds its $3 million operating cost.[42] The judiciary recently paid $125 million to settle a class action that alleged that the judiciary overcharged users for access to court documents between 2010 and 2018, but the settlement did not force the judiciary to change how it charges for document access.[43] Of course, consumers seeking court records are captive to PACER's prices, which is the only reason it can charge such high rates.

Prison vendors present a similar fact pattern. Vendors compete for exclusive contracts to provide services within prisons that inmates and their families pay for, including phone call services, commissaries, internet, and digital content. Vendors will often compete based on how much revenue-sharing they provide back to the government and then take advantage of the needs of their literally captive audiences to include high markups in the items they sell in commissaries. One recent investigation uncovered 600% markups at prison commissaries for goods like ramen, reading glasses, and even religious reading materials.[44] Excessive charges for items like fans are especially shocking given that many prisons do not have air conditioning, and that inmates sometimes earn only as little as 30 cents an hour.[45] While some states have acted to cap the prices charged by prison commissaries, the caps still allow for inflated prices and do nothing to address the problem of low prison wages.[46]

Inmates also often pay marked-up prices for phone calls and email access.[47] The average 15-minute phone call from a prison cost $5.74 in 2018, and various add-on

[42] Matt Ford, *The Courts Are Making a Killing on Public Records*, THE NEW REPUBLIC (Jan. 31, 2019), https://newrepublic.com/article/153003/courts-making-killing-public-records-pacer-fees.
[43] Nate Raymond, *Judge approves $125 million PACER fees settlement with US judiciary*, REUTERS (Mar. 21, 2024), https://www.reuters.com/legal/government/judge-approves-125-million-pacer-fees-settlement-with-us-judiciary-2024-03-20/.
[44] Elizabeth Weill-Greenberg, Ethan Corey, *Locked In, Priced Out: How Prison Commissary Price-Gouging Preys on the Incarcerated*, THE APPEAL (Apr. 17, 2024), https://theappeal.org/locked-in-priced-out-how-much-prison-commissary-prices/.
[45] *Id.*
[46] *Id.*
[47] Cons. Fin. Prot. Bureau, *Justice-Involved Individuals and the Consumer Financial Marketplace*, at 16 (Jan. 2022), https://files.consumerfinance.gov/f/documents/cfpb_jic_report_2022-01.pdf.

fees, such as fees to create an account with the phone provider, add to the costs.[48] In 2024, the FCC capped the amount the providers can charge for inmate calling in order to protect "the captive customers of the provider."[49]

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These stories, and many others like them, have one thing in common: Companies are taking advantage of the fact that consumers are captive to a single vendor to charge prices that far exceed costs and, to the extent there is a comparable market, exceeds the market rate outside the captive environment.

II. History of the laws prohibiting "unfair acts or practices"

Most states and multiple federal laws prohibit "unfair acts or practices." As a result of the complicated and meandering history of these standards, the definitions vary statute-by-statute. But they share commonalities. Here is a simplified version of the story.[50]

Congress first created the "unfair methods of competition" standard in the Federal Trade Commission (FTC) Act in 1914. Before passage, Congress debated whether to prescribe specific violations of law, or instead, set forth a broad standard to be applied to a wider variety of conduct through case-by-case adjudication over time. Recognizing that the potential for innovative trickery was infinite, Congress decided to broadly prohibit unfair methods of competition instead of proscribing discrete conduct.[51]

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[48] *Id.*

[49] Fed. Commc'ns Comm'n, *Report and Order on Reconsideration, Clarification and Waiver, and Further Notice of Proposed Rulemaking*, at 148 n. 970 (July 18, 2024), https://docs.fcc.gov/public/attachments/FCC-24-75A1.pdf.

[50] For a much more in-depth, and very well-researched, historical account of the creation and evolution of the unfairness standard, see Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431 (2021).

[51] S. REP. NO. 63-597, at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one representative of the Illinois Manufacturer's Association, that there were too many unfair practices to define, and after writing 20 of

Though Congress had originally intended "unfair methods of competition" to reach a broad swath of corporate misconduct, in 1931 the Supreme Court constrained the FTC's enforcement by ruling that the law only reached anticompetitive practices that harm competing businesses.[52] Congress responded 5 years later by creating a new "unfair acts or practices" standard in the Wheeler-Lea Act of 1938.[53] This standard took a similarly broad approach to addressing business misconduct, but explicitly focused on consumer-facing abuses. At this point, the legal history of the "unfair methods of competition" standard and the "unfair acts or practices" standard diverged, with "unfair acts or practices" forming part of the bedrock of consumer protection law, and "unfair methods of competition" forming part of the bedrock of antitrust law.

In the 1960s and 1970s, states began passing their own prohibitions on unfair practices, mostly copying the then existing FTC Act at the state level, but importantly, adding a private right of action not available under the FTC Act.[54] In addition to these broad prohibitions, many state laws have over time added a laundry list of specific practices that are prohibited as "unfair acts or practices."[55] When the broad standards were first introduced, the FTC and courts interpreted the unfairness prohibition to be a broad standard that the FTC could use to stop business conduct that was neither a violation of antitrust law, nor deceptive, but which nonetheless was unfair because it (1) "offends public policy [by being] within at least the penumbra of some common law, statutory, or other established concept of unfairness," (2) "is immoral, unethical, oppressive, or unscrupulous, [or] (3) causes substantial injury to consumers (or competitors or other businessmen)."[56] This is sometimes referred to as the *Sperry* test, named after a 1972 legal case, *FTC v. Sperry & Hutchinson Co*.[57]

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them into law it would be quite possible to invent others."); 7 H.R. REP. NO. 1142, at 19 (1914) (Conf. Rep.) ("It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task.").

[52] FTC v. Raladam, 283 U.S. 643 (1931).

[53] Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938)

[54] *See* Cons. Fin. Prot. Bureau, *Strengthening State-Level Consumer Protections: Promoting Federalism* (Jan. 14, 2025) (describing how the FTC promoted state prohibitions against "unfair and deceptive acts or practices" using model legislation), https://www.consumerfinance.gov/about-us/blog/strengthening-state-level-consumer-protections/.

[55] *See, e.g.,* Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-105 providing a list of dozens of specific practices that would meet the broader standard in Colorado.

[56] FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245, n. 5 (1972).

[57] *Id.*

But in the 1980s and early 1990s,[58] the FTC and then Congress more specifically limited the prohibition to practices where the FTC could prove the following:

1. That the practice caused or was likely to cause substantial injury to consumers;
2. That the injury couldn't be reasonably avoided by consumers; and
3. That the injury was not outweighed by countervailing benefits to consumers or competition

Other federal agencies now enforce similar prohibitions against "unfair acts or practices." For example, when Congress created the federal Consumer Financial Protection Bureau (CFPB) in 2010, Congress tasked the CFPB with, among other things, the responsibility to enforce a prohibition on "unfair practices" against financial companies. That standard is identical to the prohibition in the FTC Act.[59] Additionally, the Department of Transportation has similar authority to enforce a prohibition on unfair practices against airlines, and it recently defined the standard as mostly synonymous with the FTC Act.[60] Various federal agencies can enforce the statutory prohibition on unfair practices, and also have authority to issue generally applicable rules that identify unfair practices and create remedial provisions to prevent them.[61]

State prohibitions on unfair practices are generally enforceable in private rights of action, by the state Attorney General, and in some cases by state regulators. State definitions, however, sometimes vary from the federal standard because most of the state prohibitions were created before the federal deregulatory constraints were

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[58] The Reagan Administration's FTC first proposed this refinement in the 1980s as a matter of prosecutorial discretion. FTC Policy Statement on Unfairness, International Harvester Co., 104 F.T.C. 949, app. at 1070 (1984). These elements were then added to the FTC Act after control of Congress shifted in 1994. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691. *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y. L. REV. 431, 514-522 (2021) (describing this historical era and the transformation of the unfairness standard during this time in more detail).

[59] 12 U.S.C. § 5531(c).

[60] 49 U.S.C. § 41712; 14 CFR 399.79(b)(1).

[61] *E.g.*, 15 U.S.C. § 57a (granting the FTC authority to define with specificity acts or practices that are unfair acts or practices, and to prescribe requirements to prevent such acts or practices); 15 U.S.C. § 45 (granting the FTC authority to enforce the prohibition against unfair acts or practices); FTC v. Wyndham Worldwide Corp., 10 F.Supp.3d 602, 617-18 (describing how the FTC has discretion to proceed by rulemaking or individual adjudication to prohibit unfair or deceptive acts or practices).

invented in the 1980s.[62] But even in states where the broader *Sperry* test is still in effect, state law generally recognizes that, *at a minimum*, practices that meet the FTC-prongs are illegal under state law.[63]

III. Price gouging captive customers as an "unfair act or practice"

As noted above, most states and multiple federal laws now prohibit business practices that (1) are likely to cause substantial injury, (2) that aren't reasonably avoidable by consumers, and (3) that are not outweighed by countervailing benefits to consumers or competition.[64] Before proceeding to analyzing price gouging for unfairness under that FTC test, it is important to note that there are other legal prohibitions that could be used to combat price gouging. For example, the CFPB's abusive standard could

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[62] Most states have a broad unfairness prohibition, with the exceptions being Nevada, South Dakota, Minnesota, Wisconsin, Virginia, Delaware, Virginia, and New York. Carolyn Carter, *Consumer Protection in the States: A 50-state evaluation of unfair and deceptive practices laws*, NAT'L CONSUMER L. CTR. At 15, Map 2 (March 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf.

[63] According to plaintiffs in In re Insulin Pricing Litigation, 2024 WL 416500, at *12, n. 17 (D. N.J. Feb. 5, 2024) the FTC Act can be applied in the following state statutes: Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-101 *et seq.*; Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42–110a *et seq.*; Delaware Consumer Fraud Act, Del. Code Tit. 6, § 2511 *et seq.*; Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.*; Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5-1 *et seq.*; Iowa Private Right of Action for Consumer Frauds Act, Iowa Code §§ 714H.1 *et seq.*; Louisiana Unfair Trade Practices and Consumer Protection Law, La. Rev. Stat. § 51:1401 *et seq.*; Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. Tit. 5, § 205-A *et seq.*; Maryland Consumer Protection Act, Md. Code Ann., Com. Law § 13-301 *et seq.*; Massachusetts Consumer Protection Act, Mass. Gen. Laws Ch. 93A, § 1 *et seq.*; North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.*; (13) North Dakota Consumer Fraud Act, N.D. Cent. Code § 51-15-01 *et seq.*; Oklahoma Consumer Protection Act, Okla. Stat. Tit. 15, § 751 *et seq.*; South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; and Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-104, 47-18-101 *et seq.* But other major states like California and Washington recognize the test as a method for establishing liability, even if it is not the only test available. Lin v. JPMorgan Chase Bank, NA, 2024 WL 5182199, at *10-11 (Aug. 15, 2024) (finding that California courts apply the FTC test, in addition to other tests, when interpreting its Unfair Competition Law); RCW 19.86.020 (prohibiting unfair acts or practices); RCW 19.86.920 ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters."). Courts have used FTC guidance and case law to inform what is an unfair practice under Washington law. *See, e.g.*, In re Capital One Data Security Breach Litigation, 488 F.Supp.3d 374, 429 (E.D. Va. 2020).

[64] 15 U.S.C. § 45(n) (2006).

address these practices.[65] Antitrust law including prohibitions on unfair methods of competition or the Sherman Act[66] could as well. And there is the *Sperry* test, as noted above. This paper analyzes price gouging under the FTC-test for unfairness not because it is the best tool for the job, but because it is the most widely available tool across state and federal enforcers and private litigants, second only to "deceptive acts or practices" which would also sometimes be applicable, but not in all cases.[67]

As a general matter, unfair practice laws under the FTC test prohibit business practices that are net harmful to consumers, when consumers cannot avoid the harm. More detail on each element is provided below, but at a conceptual level, the practice of overcharging captive customers is a proto-typical unfair practice. Companies are using the fact that customers are captive—the fact that consumers cannot avoid their prices—to charge more.

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[65] In particular, the Consumer Financial Protection Act prohibits taking unreasonable advantage of the inability of consumers to protect their interests via product selection or in the use of the product. 12 U.S.C. § 5531(d). Advantage taking can include taking excess profit, and consumers are not able to protect their interests when they cannot "choos[e] an alternative provider upfront or during the course of the customer relationship." Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883 (April 12, 2023).

[66] For example, the practice of artificially creating an "island" by prohibiting consumers from bringing outside food into a venue could be considered an "attempt to monopolize" under the Sherman Act. 15 U.S.C. § 2 (2004). Taking advantage of the captive nature of a customer segment to over-price products sold to them could also be considered "conduct [that] goes beyond competition on the merits" such that it would be considered an unfair method of competition. Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202 (Nov. 10 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf. The exact scope and applicability of antitrust law is beyond this article.

[67] This paper seeks to explain how price gouging, even when consumers know about it, is illegal, a practice that would generally not be deceptive.

Substantial Injury

Most unfairness cases involve monetary injury,[68] but other forms of injury like health or safety concerns,[69] emotional harm,[70] significant invasions of privacy,[71] or even intangible harms can also suffice.[72]

It is a common misreading that the "substantial" injury element involves an inquiry into the size of harm. Whether injury is substantial is actually an inquiry into the concreteness of harm, similar to the standard for showing "injury in fact" for purposes of establishing Article III standing to sue in federal court.[73] According to the FTC's policy statement on unfair practices "an injury may be sufficiently substantial if . . . it <u>raises a significant risk of concrete harm</u>."[74] The word "substantial" is intended to weed out injury that is "trivial or merely speculative."[75] Very few cases have found that monetary harm was too inconsequential to constitute "substantial injury."[76]

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[68] *FTC v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008) ("In most cases 'substantial injury' involves monetary harm."), *aff'd*, 624 F.3d 1 (1st Cir. 2010); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) ("In elaborating the term 'substantial injury' in its Policy Statement, the Commission stated that in most cases substantial injury would involve monetary harm ….").

[69] Fed. Trade Comm'n., FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to Intn'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness. [Hereinafter "FTC Policy Statement on Unfairness"].

[70] *See, e.g., In re Social Media Addition/Personal Injury Products Liability Litigation,* 753 F.Supp.3d 849, 895-96 (N.D. Cal., Oct. 15, 2024) ("[K]nowingly developing tools that encourage youth addiction 'cannot fairly be classified as either trivial or speculative,' even if the Court accepted Meta's implicit premise that addiction is a nontangible, emotional harm.").

[71] FTC v. Kochava Inc., 671 F.Supp.3d 1161, 1173-74 (D. Idaho, May 4, 2023).

[72] FTC v. Roca Labs, Inc., 345 F.Supp.3d 1375, 1395 (M.D. Fl., Sept 14, 2018) ("Defendants offer no factual or legal basis to support their argument that the FTC is required to provide evidence of tangible harm.").

[73] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (requiring plaintiffs to prove an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."); *see also* Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (explaining that injury-in-fact must be both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical").

[74] FTC Policy Statement on Unfairness, n. 12.

[75] FTC Policy Statement on Unfairness.

[76] In fact, one recent court ruled that the question of whether harm is "trivial or speculative" is limited to non-monetary harms. *In re Social Media*, 753 F.Supp.3d at 895. Having said that, at least one case involving the *Sperry* standard did conclude that injury was not "substantial" because "damages to the passenger plaintiff . . . have been minimal." Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority, 566 F.Supp.2d 81, 105 (D. Conn. 2008).

A claim that a company is taking advantage of captive customers to inflate prices would constitute "substantial injury" because inflated pricing is a monetary harm.[77] Having said that, in a price gouging case, plaintiffs will need to prove that the prices are in fact inflated. Enforcers could do this in one of several ways.

First, every state has existing case law on determining a "reasonable price" for purposes of assessing damages for an "unjust enrichment," "quantum meruit," or "implied contract" cause of action, or to fill in a price point for a contract that did not include an express price. These circumstances generally require the court to calculate a "reasonable price," which courts determine using a variety of methods that differ state-by-state.[78] Enforcers could use that case law to establish what a reasonable price should have been absent the abuse of a captive customer base.

Second, especially if there is no competitive market outside the "island" to compare to, enforcers could use experts to model the competitive price. For example, absent a competitive market to observe directly, experts often testify to what the prices would have been but-for the anti-competitive practices at issue in a Sherman Act case. Economists use a variety of tactics to make these calculations, but to give just one example, an expert in the Nexium Antitrust Litigation used a "yardstick" approach to approximate the "but-for world" using data from similar markets.[79]

Third, there are circumstances where the amount of a price that constitutes extraneous profit will be obvious. For example, where a defendant is contracting with a third party to provide a service to its customers and charges a consumer more than the costs of the third party, that extra margin (at least) would be substantial injury. Similarly, where a third-party charges consumers directly but pays the defendant a cut of the proceeds to gain access to the defendant's captive customer, the amount of the price that went to paying the kickback would be substantial injury. In these circumstances, the defendant is being paid in exchange for nothing at all—the third party is performing the work and incurring the costs, and so the full cut going to the defendant is surplusage. For example, in cases where a landlord adds a payment processing fee to pay rent and contracts with a payment processor to process electronic payments, if the payment processing fee exceeds what the landlord pays the payment processor, or if the payment processor shares revenue from the fee with the

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[77] *See, e.g.,* Edwards v. N. Am. Power & Gas, LLC, 120 F.Supp.3d 132, 144 (D. Conn. 2015) (finding inflated pricing to constitute substantial injury).
[78] *See* Restatement 2d Contracts § 204, Comment D; Uniform Commercial Code § 2-305.
[79] *In re* Nexium Antitrust Litigation, 777 F.3d 9, 26 (1st Cir. 2015).

landlord, the amount that the landlord keeps would constitute monetary harm sufficient to prove substantial injury.[80]

Not Reasonably Avoidable

Injury is not reasonably avoidable if consumers do not have a free and informed choice.[81] Generally, enforcers can prove consumers did not have the ability to reasonably avoid harm if they did not have both "[1] reason to anticipate the impending harm and [2] the means to avoid it."[82] Harm is not reasonably avoidable when either "seller conduct or market imperfections . . . unjustifiably hinder consumers' free market decisions and prevent the forces of supply and demand from maximizing benefits and minimizing costs."[83] If a consumer has the literal means to avoid a harm, it may not be "reasonably avoidable" if those means are hard to use, onerous, or otherwise not reasonable.[84] For example, in *AFSA v. FTC*, a case involving an FTC regulation about loan default remedies in consumer contracts, the D.C. Circuit accepted the FTC's allegations that consumers could not practically shop over the contract terms in question, and the fact that default was ordinarily outside consumers' control, as evidence that this element was met.[85]

When a consumer becomes a captive customer to a single company for any reason, they would not be able to reasonably avoid excessive prices. Consumers can be captive for a variety of reasons, including that some other party (e.g., a government agency, another company) chose the company for the consumer, or because the consumer purchased a "main" product and then is captive for purposes of ancillary products like add-ons. In many cases consumers are well aware they are being bilked and simply have no reasonable *means to avoid* the harm by purchasing alternative products at a competitive price. These cases are likely to involve arguments and fact-

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[80] Of course, enforcers could sue the payment processor as well. *See, e.g.*, FTC v. First Data Merchant Services, LLC, Case No. 1:20-cv-3867 (settled May 19, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/05/worldwide-payment-processor-payments-industry-executive-pay-402-million-settle-ftc-charges-assisting.
[81] FTC v. Neovi, 604 F.3d 1150, 1158 (9th Cir. 2010).
[82] Orkin Exterminating Co., Inc. v. FTC, 849 F.2d 1354, 1365 (11th Cir. 1988) (quoting FTC v. Orkin Exterminating Co., 108 F.T.C. 263, 1986 WL 722153, at *8 (1986)); *see Neovi*, 604 F.3d at 1158; FTC v. IFC Credit Corp, 543 F.Supp.2d 925, 945 (N.D. Ill. 2008).
[83] *AFSA*, 767 F.2d at 976–78; *Neovi*, 604 F.3d at 1158; *IFC Credit Corp.*, 543 F.Supp.2d at 945.
[84] *See, e.g.*, FTC v. Walmart Inc., 664 F.Supp.3d 808, 837 (Mar. 27, 2023) ("And because it was hard to recover funds sent through money transfers and difficult to trace fraudsters, consumers didn't have the means to avoid the injury."); *see also Neovi*, 604 F.3d at 1158 (dismissing defendants arguments on reasonable avoidability as not "reasonable steps to avoid loss").
[85] *AFSA*, 767 F.2d at 976.

finding about how captive the environment really is. For example, a stadium that lets you bring in outside food would be less captive than a stadium that does not. An add-on that can be purchased later in the open market is different from an add-on that can only be offered by the provider.

Defendants will no doubt argue that consumers signed a contract or agreed to the service, and thus, had a free choice whether to pay the inflated price. In some cases, it will be true that a consumer could forgo the discretionary charge altogether. For example, consumers can choose not to call an ambulance and find another way to get to the hospital instead. Or they can choose not to drink beer or buy a hot dog at a baseball game. Just like when dealing with a monopoly, consumers would have a choice between paying inflated prices and not participating in the market at all.

However, as the 5th Circuit recently noted, "the suggestion that a consumer can simply decide not to participate in the market is not . . . a valid means of reasonably avoiding the injury."[86] It is not "reasonable" to expect consumers to forgo participation in the market *entirely* to avoid harm (i.e. to decide not to take an ambulance, not to pay electronically, not to buy food at the airport, etc.). In addition to the direct quote on this point in the 5th Circuit *CFSA v. CFPB* opinion,[87] this principle can be drawn from the general purpose of this element, which is to ensure the unfairness prohibition can remedy instances where consumers do not have a free and informed choice, or where there is a market failure. The decisions available to customers in a monopoly environment are far from a free choice, and in fact, monopoly is the prototypical form of market failure.[88] Put another way, the point of the reasonable avoidability element is not to judge whether it is the consumer's fault, or whether the consumer should assume the harm, but rather, to distinguish between charges that should be considered a harm (illegal) and charges that should be considered part of a freely bargained-for deal in a well-functioning competitive market (not illegal).[89]

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[86] Comm. Fin. Svcs. Of Am., Ltd. v. Cons. Fin. Prot. Bureau, 51 F.4th 616, 628 (5th Cir. 2022) (quoting 82 Fed. Reg. 54737).
[87] *Id.*
[88] Global Tel*Link v. Federal Communications Commission, 866 F.3d 397, 404 (D.C. Cir. 2017) (describing a circumstance involving captive customers to be a "market failure" because if the consumers wished to purchase the thing at issue in the case (phone calls), "they have no choice but to pay the resulting rates.").
[89] *AFSA,* 767 F.2d at 976 (The unfair prohibition is "not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.")

There are numerous instances in which a practice was deemed unfair even though the monetary cost was agreed to in a contract.[90] This case law tends to focus on instances where the harm is not reasonably avoidable because consumers could not "anticipate the impending harm."[91] But the logic of these cases would also apply to injuries that are not reasonably avoidable due to consumers lacking a "means to avoid."[92] In fact, in the only two circuit courts to consider this specific point (the DC and 5th Circuits), rules identifying certain contract terms as unfair were upheld, in part, due to consumers not having the "means to avoid" the harm by shopping in a competitive market that included products without the identified unfair practice.[93] For example, in *Community Financial Services Association v. CFPB*, the 5th Circuit upheld a finding that the injury was not reasonably avoidable because consumers "lack[ed] other viable options for financing" and "d[id] not have the ability to shop for loans" without the terms at issue in the rule.[94]

In the context of a consumer who becomes captive for purposes of ancillary products after purchasing a "main" product, defendants are likely to argue that consumers are aware of the ancillary product's pricing (at least generally) before they decided to purchase the primary product, and that therefore consumers can incorporate the price of the ancillary product into the decision of whether to purchase the primary product. This argument should generally fail for a few reasons. First, it would not be reasonable to expect consumers to forgo obtaining the primary product to avoid being overcharged for an ancillary product. The price of the primary product is typically going to be much higher than the price of the ancillary product (despite the ancillary product's inflated price). For example, consider a consumer purchasing a $50,000 car who is presented with add-on services that are only $500, but still very inflated. A consumer might generally understand that the price of add-ons is going to be inflated, but it would not be reasonable for a consumer to let the price of a few hundred-dollar add-on dictate which dealership to use for a $50,000 purchase. Rather, a reasonable

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[90] *See, e.g.*, FTC v. Fleetcor Tech., Inc., 620 F.Supp.3d 1268, 1336 (N.D. Ga. 2022) (finding that certain fees were unfair and not reasonably avoidable even though they appeared in the contract); *IFC Credit Corp*, 543 F.Supp.2d at 947-48 (finding that a fraudulent scheme was unfair and not reasonably avoidable even though the truth of the scheme appeared in the contract).
[91] *Orkin*, 849 F.2d 1354, 1365.
[92] *Id.*
[93] Credit Practices Rule, 49 FR 7740 (Mar. 1, 1984), upheld in *Am Fin. Svcs. Ass'n v. FTC,* 767 F.2d 957 (D.C. Cir. 1985); Payday, Vehicle Title, and Certain High-Cost Installment Loans,82 Fed. Reg. 54472-01 (Nov. 17, 2017) upheld in *CFSA*, 51 F.4th at 629.
[94] *CFSA*, 51 F.4th at 628.

consumer would choose the dealership with the cheapest cars and then become captive to the dealer for the add-ons.

Second, in most cases, this kind of price gouging is a uniform market practice. In *AFSA v. FTC* and *CFSA v. CFPB*, the DC Circuit and 5th Circuit ruled that consumers could not avoid the harm in part because most market participants engaged in the same practices—even if in theory the consumer had a choice, in practice, there were no reasonably available alternatives.[95] Consumers simply do not have a choice to pick a car dealership or stadium or airport that does not price gouge for add-ons or concessions. Everybody does it.

And third, consumers often do not have a free choice of provider in the primary market. A consumer who wants to fly to a specific city at a specific date and time usually only has one airport they can choose from. A consumer who wants to watch a professional baseball game usually only has one option in their city. Sometimes, like in the context of government contractors, consumers have no choice at all.

Countervailing Benefits

Enforcers must also prove that the harm is not outweighed by countervailing benefits to consumers or competition, or put another way, that a practice is harmful in its "net effects."[96] This is not a high hurdle. Enforcers are not required to perform a detailed or quantitatively precise cost-benefit analysis.[97] In fact, this author is unaware of any case where a court dismissed an unfair practice claim where the plaintiff proved the first two elements but failed to prove this one. A court has never overturned a rule on this element either.[98] This is because the only relevant countervailing benefits are those specifically created by the practice in question, as opposed to the benefits of the defendant's overall products or services.[99] Importantly, the existence of *some*

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[95] *AFSA*, 767 F.2d at 977; *CFSA*, 51 F.4th at 628.

[96] FTC Unfair Policy Statement (describing the countervailing benefits element as an assessment of whether "a practice unfairly injures consumers . . . in its net effects.").

[97] *Roca Labs*, 345 F.Supp.3d at 1396.

[98] *E.g. AFSA*, 767 F.2d at 975-76; *CFSA,* 51 F.4th at 630-31.

[99] *In re Social Media*, 753 F.Supp.3d at 898, n. 49 ("It is telling that Meta in its reply only gestures in conclusory fashion at the "meaningful societal benefits of Facebook and Instagram" as the countervailing benefits that outweigh these alleged harms. At the very least, this response is not appropriately tailored. The States' allegations target specific design choices that foster compulsive use, and those choices cannot be explained away by general reference to any beneficial functions Meta's platforms may serve to promote social connectivity and engagement."); *Roca Labs*, 345 F.Supp.3d at 1396 ("First, Defendants'

countervailing benefits is not enough to scuttle an unfairness case or rule. Rather, the countervailing benefits would need to outweigh the harm.

In a price-gouging case, plaintiffs would argue that consumers do not benefit, on net, from overpriced concessions, overpriced products in airports, or other overpriced services. While the standard merely requires showing that the practice did not produce countervailing benefits to competition, plaintiffs can argue that the practice actively harms competition. Companies that price gouge their captive customers are leveraging a monopoly position over individual consumers' choices to get a competitive advantage in another market—the product for which they charge excess prices. In some jurisdictions, it is a violation of the Sherman Act to use a monopoly position in one market to gain a competitive advantage in another.[100] In others, it is only a violation of the Sherman Act if the firm uses the monopoly in one market to seek a monopoly in another.[101] The exact scope of antitrust liability is beyond the ambitions of this article, but regardless, it is not *good* for competition, and in many cases, the practices at issue in this paper involve using an existing monopoly to lock customers into a monopoly choice in an ancillary market (and charging monopoly prices in that ancillary market). This is the opposite of creating "benefits to competition."

Defendants will no doubt argue that they are able to reduce the price of other items based on the extra revenue generated from the overpriced products. For example, a stadium defendant might argue that it can keep stadium tickets low by up-charging concessions. Or an airport might argue it is able to charge less to airlines, which in turn can charge less to consumers in the form of plane tickets, due to the extra revenue from overpriced airport food.

These are over-simplified economic arguments. The other prices are set based on (imperfect) competitive dynamics where there is comparison shopping and multiple competitors, which are already set to maximize profit. If the market permits airlines or stadiums to charge more for tickets now without losing volume (i.e. if they could increase prices to generate more profit) they presumably would have already done so.

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recitation of the benefits they claim consumers received from using the products ignores the issue presented in this claim, which is whether Defendants' gag clause *practices*, not their products and services, presented a countervailing benefit.").

[100] Berkey Photo, Inc. v. Eastman Kodak Company, 603 F.2d 263 (2d Cir. 1979).

[101] Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

Furthermore, there is copious research on the concept of "pass-through" rates, which suggests pass-through of lost revenue from a back-end fee or add-on to the sticker price will only be 100% if either the fee/add-on was perfectly salient or the market is perfectly competitive.[102] If markets are perfectly competitive, aggregate prices (e.g., ticket prices plus the price of concessions) will have already been pushed down to marginal costs such that the company will be forced to increase prices to make up for the lost fee revenue to stay viable. And if the fee is perfectly salient, then demand is only responsive to the total price and will not respond to an equal-sized reduction in the fee and increase in the sticker price. But overpriced products charged in a captive setting are far from perfectly salient (if there is such a thing). And there are essentially no markets in the country that achieve the platonic ideal of "perfect competition." For example, consumers who want to watch a professional baseball game rarely have more than one option in the city they live in. Similarly, most consumers only have one airport option servicing a particular route, which is far from perfect competition.

This kind of 100% pass-through is even more unrealistic where there are multiple pass-through layers. For example, where an airport argues that consumers would experience higher plane tickets due to lower airport concessions prices, the pass-through of the costs first goes from the airport to the airline in the form of higher fees to operate in the airport, and then from the airline to consumers. At each step, pass-through is likely to be less than 100%, reducing countervailing benefits to consumers at each level.

Lastly, note that even if 100% of the lost revenue would pass-through to other prices, that is still not countervailing benefits that "outweigh" the injury. Pass-through rates would have to be at least 101%, which is simply unrealistic.[103]

Class Actions to Attack Price Gouging of Captive Customers

To be effective in small dollar claims like the one contemplated here, private enforcers must use the class action tool. Every plaintiff's firm in the country is aware of the two

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[102] Sumit Agarwal et al., *A Simple Framework for Estimating Consumer Benefits from Regulating Hidden Fees*, 43 J. LEGAL STUD. 239 (2024).

[103] While pass-through rates of over 100% do occur, that would not be *caused* by the practice, but rather, an independent business decision to take advantage of the circumstances to generate more profit. For example, during the COVID pandemic, inflation was caused in part due to companies passing through more than 100% of the increase of input prices. This form of "seller's inflation" was a result of business decisions to take advantage and earn extra profit. Isabella Weber, Sellers Inflation, Institute of New Economic Thinking (Oct. 18, 2023), https://www.ineteconomics.org/perspectives/videos/sellers-inflation.

main obstacles to class actions: arbitration and class certification. Neither should be obstacles for a price gouging case against a stadium, airline, or other company leveraging a captive audience.

First, there will often not be an arbitration clause because there will often not be a formal written contract with the defendant. For example, consumers purchase plane tickets from an airline (or booking service), not an airport. Consumers purchase event tickets from a booking service (or even a scalper), not directly from the stadium.[104] Because consumers will often not have a contract with the defendant in question, these cases are uniquely suitable to avoid a motion to compel arbitration.

Second, certifying a class action has become increasingly difficult in recent years, and it is notoriously difficult to get a judge to certify a class for unfairness cases.[105] That is because courts will often rule that the elements described above entail too much individualized analysis. However, a case involving price gouging captive customers is uniquely suitable to class certification treatment and would not involve any individual or consumer-by-consumer evidence collection or legal claims. This is the case for a few reasons. First, the inflated prices will tend to be identical across all captive customers. For example, baseball game attendees will be charged the same inflated price for hotdogs, and consumers will be charged the same price for coffee in the airport. The analysis of whether the prices are inflated will involve assessing comparison prices at other establishments or market-based economic analysis—something that does not involve evidence pertaining to individual plaintiffs.[106] Second, whether the injury is reasonably avoidable will be based on an objective analysis of whether customers in general have access to reasonably available alternative options. Specific facts that might be relevant to this analysis would include facts like, for example, whether customers can bring food from outside into the stadium. These facts will be a class-wide assessment involving whether the stadium has policies prohibiting outside food and whether there are other establishments near the stadium. And third, whether there are countervailing benefits to consumers would involve a business-model-wide

[104] *See, e.g.*, Ticketmaster Terms of Use, Mandatory Arbitration Agreement and Class Action Wavier, https://help.ticketmaster.com/hc/en-us/articles/10468830739345-Terms-of-Use (applying to claims between Ticketmaster and customers, not between customers and venues).

[105] *See, e.g.*, *In re Insulin Pricing Litigation*, 2024 WL 416500 (D. N.J. Feb. 5, 2024).

[106] Note that class certification could become more complicated in cases involving many different products or services where prices have to be calculated for each. *See, e.g.*, Anderson v. Laboratory Corporation of America Holdings, 2023 WL 1970953, *10 (M.D. N.C. Feb. 13, 2023) (denying motion for class certification in a medical billing case asserting the company charged more than "reasonable price" in an implied-contract case, in part due to the many different services provided).

assessment of pass-through rates, which is more appropriate for a class-wide analysis than an individual analysis because firms will not be adjusting business models and pricing for individual customers.

Conclusion

Academics often conceive of price gouging as the practice of taking advantage of an emergency or natural disaster to extract extra profits.[107] This is condemnable behavior and illegal in many states.[108] But the popular conception of price gouging is broader, reaching any context in which companies are taking advantage of the absence of a fair market to extract extra profits. As policymakers and enforcers continue to look for ways to address the broader cost-of-living crisis in the United States, they should also focus on the much more common and mundane problem of price gouging customers in captive environments.

To do so, policymakers and enforcers can pursue three strategies *simultaneously*. First, state Attorneys General, federal enforcers, and the plaintiff's bar should enforce the unfair practices prohibitions already on the books to stop overpricing in common captive spaces, including those listed in this paper like airports, stadiums, and hospitals.

Second, state and federal regulators can promulgate regulations using this same unfair practices authority to either ban price gouging captive customers broadly, or to ban it in specific settings. Federal and state regulators often have authority to issue regulations to identify unfair acts or practices, and prescribe remedial obligations, even though they could also enforce the general standard without need for a regulation.[109] In particular, regulation (instead of just enforcement) is useful for achieving broader compliance or prescribing specific remedial provisions. Regulators can use the language in the Appendix as a starting point.

Third, legislatures can add a prescriptive ban on price gouging captive customers to their "unfair and deceptive acts or practices" laws or existing price gouging laws focused on emergency-based gouging. States have a long history of supplementing the

[107] Litigation of Prohibitions Against Price Gouging, 161 Am. Jur. Trials 551 (April 2025 Update)
[108] *Id.* at § 5, n. 1.
[109] *Supra* note 61.

general unfairness standard with a laundry list of more specific prohibitions.[110] These specific prohibitions are often duplicative of the general standard and merely reiterate that conduct is already illegal, to make it easier to enforce or add more prescribed remedial provisions.[111] Legislators can also use the Appendix as a starting point.[112]

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[110] *Supra* note 55.
[111] *Id*.
[112] State legislatures should take care to make sure that when they prohibit price gouging, they do so by focusing on the point-of-sale involving a resident in their state. The reason for that is courts might overturn legislation that seeks to regulate out-of-state commerce as a violation of the Commerce Clause of the US Constitution. For example, in 2005 the District of Columbia attempted to prohibit price gouging on prescription drugs, which was overturned because it sought to regulate out-of-state manufacturers' transactions with out-of-state wholesalers, rather than point-of-sale pharmacies situated in the District. Pharmaceutical Research and Mfrs. Of Am. v. District of Columbia, 406 F.Supp.2d 56, 67-71 (D. DC 2005).

Appendix

Sec. 1. Price Gouging Captive Customers Prohibited

(a) Inflated prices charged to captive customers

(1) Standard. It is an unfair act or practice to charge more for any product or service than a reasonable price when the consumer is captive to that provider for any reason.

(2) Definition of Reasonable Price.

(A) When a competitive market exists. When the same product or service is sold in non-captive contexts by the provider or other providers, a reasonable price is the average price charged outside the captive context.

(B) When no competitive market exists. When the product or service is not sold outside the captive context, a reasonable price is a reasonable approximation of the cost to provide the service, plus no more than a 5% mark-up.[113] Cost approximations can be performed in aggregate or using reasonable estimates of averages, including both fixed and variable costs.

(3) Definition of captive customer. A consumer is captive when there is only one seller of a product or service available to the consumer at the time and place of purchase of that product or service. This can include when a consumer purchased a different product or service from the provider in the open market and became captive to that provider or its subcontractors for the purchase of additional products or services. It also includes when the provider was selected by an unaffiliated third-party and not the consumer.

(4) Example. A consumer purchases a ticket to see a concert or sporting event. The stadium prohibits consumers from bringing food or drinks into the stadium. The provider sells food and drinks in the stadium at

[113] The average corporate profit margin in the United States in 2024 was 5.1%. Bureau of Economic Analysis, Corporate Profits, https://www.bea.gov/data/income-saving/corporate-profits.

an excessive mark-up. This practice would be unlawful. However, the venue could charge the average price of a beer charged by bars in the surrounding area.

(b) Vendor Kickbacks

(1) Standard. It is an unfair act or practice for a provider to (A) contract with a third-party to provide products or services to the provider's customers, or give the third-party access to sell to the provider's customers, and (B) receive a kickback from that third-party, enter into a revenue-sharing arrangement with that third-party, or receive any payment for granting that third-party access to the provider's customers.

(2) Exception for rent. Providers may charge rent to vendors operating a business on the provider's real estate property. The rent charged may not exceed the average price charged for similarly sized commercial or retail space in close proximity but outside the captive context.

(3) Example. An airport contracts with a retailer to sell food, drinks, and other goods within the airport. By contract, the airport receives a share of the retailer's proceeds. As a consequence, goods and services sold within the airport are more expensive than similar products sold outside the airport. This practice would be unlawful. However, the airport could charge rent for a restaurant to occupy a space, if rent is priced at the average cost for commercial square footage in the surrounding area.