

PRICE GOUGING AMIDST THE COVID-19 PANDEMIC



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I. INTRODUCTION

As the world struggles to contain the COVID-19 pandemic, the resulting states of emergency, need for medical supplies, and panic buying have caused unprecedented changes in supply and demand on an unparalleled global scale. Federal and state antitrust authorities are paying close attention, as there have been numerous reports nationwide of unscrupulous sellers taking advantage of the increased demand of goods and services by engaging in price gouging. Certain medical supplies associated with the pandemic — many now deemed essential or in high demand — are being offered at excessive prices: a single dust mask that sells for \$25;³ a small bottle of hand sanitizer selling for \$49.95; a package of disinfecting wipes priced at \$220.⁴ Recent headlines report that, Amazon has suspended more than 3,900 selling accounts in the U.S. alone for violating the company's fair pricing policies as well as removed 530,000 "high-priced offers" from its marketplace.⁵

As the pandemic continues to unfold, Federal and state law enforcement agencies have been closely monitoring companies' pricing of essential medical supplies and taken action to prosecute price gougers and companies that facilitate sales of goods with inflated prices. Similarly, concerns about price gouging have led to rapid legislative action, both at the federal and state level.

II. FEDERAL RESPONSE

On March 23, 2020, President Trump issued Executive Order 13910 which prohibits the hoarding of vital medical equipment and supplies, noting that "it will be a crime to stockpile these items in excessive quantities."⁶ Further, the presidential directive delegated the Secretary of Health and Human Services ("HHS") the authority to designate essential health and medical supplies as scarce. Accordingly, the HHS published a list of 15 categories of "scarce or threatened materials," which currently includes the following:

- N-95 facepiece respirators and other specifically designated face masks and respirators;
- Medical gowns and other apparel;
- Disinfecting devices;

³ Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. Times (Mar. 27, 2020).

⁴ Kate Gibson, *A \$220 Bottle of Lysol? Coronavirus Leads to Price-gouging on Amazon*, CBS News (Mar. 12, 2020).

⁵ Annie Palmer, *Amazon Removes Hundreds of Thousands of 'High Priced Offers' Amid Coronavirus Price Gouging*, CNBC News (Mar. 6, 2020).

⁶ U.S. Exec. Order No. 13910; The White House, *Executive Order on Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19* (Mar. 23, 2020).

- Sterilization devices and related services;
- Drug products containing the active ingredient chloroquine phosphate or hydroxychloroquine HCl;
- Ventilators; and
- Personal protective equipment.⁷

Following the President's Executive Order on price gouging, Attorney General William Barr declared that the Department of Justice would crack down on price gouging and hoarding of medical supplies included on the HHS list. The goal is to ensure the availability of critical health and medical resources so that hospitals, first responders, and doctors can have necessary equipment. Additionally, Attorney General Barr announced the development of a Hoarding and Price Gouging Task Force in the wake of COVID-19, and identified law enforcement strategies for prosecuting unscrupulous actors who treat the crisis as an opportunity to get rich quick.⁸ According to Attorney General Barr, the task force includes over one hundred federal prosecutors around the country and has already initiated hundreds of hoarding and price-gouging investigations into companies and individuals selling goods designated as "scarce" by the HHS and activities that are disrupting the supply chain.⁹

However, there is no comprehensive federal legislation on price gouging. As it currently stands, the federal law that addresses price gouging is a prohibition against the hoarding of scarce goods under the Defense Production Act ("DPA"). While originally enacted during wartime, the DPA's authority extends to the Executive Branch to act in response to national emergencies, such as the COVID-19 pandemic.

In particular, Section 102 of the DPA prohibits the accumulation of scarce materials (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices.¹⁰ Though it carries both criminal and civil penalties, actors convicted of violating the Act are guilty of a misdemeanor, face only a maximum of one year in prison and must pay a fine of up to \$10,000.¹¹

Notably, the DPA focuses on accumulation of materials. Hence, a seller that ordinarily purchases personal protective equipment could try to argue that reselling its current inventory at a markup to someone else wouldn't be violating the federal statute. This is in contrast to many state price gouging statutes which focus on whether the price being charged is in excess of a determined baseline level. Similarly, while many state price gouging laws have either a specific standard or use specific language to target extreme price increases, the DPA prohibits "resale at prices in excess of prevailing market prices." Because "excess" is not defined in the statute and has not yet been defined by the courts, the DPA imposes a potential burden of proving a given price mark-up constitutes as illegal price gouging. Though, in addressing the Senate Judiciary Committee, the Department of Justice ("DOJ") indicated that traditional costs may play a role in determining whether price gouging has occurred.¹²

Accordingly, the DOJ's first publicized prosecution for price gouging did not actually charge either hoarding or price gouging under the DPA. On March 30, 2020, the FBI arrested a defendant who massively stockpiled surgical masks and other medical supplies, but, despite evidence that he was selling those goods at a markup, the U.S. Attorney's Office for the District of New Jersey charged him with assaulting and lying to FBI agents.¹³

⁷ U.S. Dep't of Health & Human Servs., *Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950* (Mar. 25, 2020).

⁸ White House Press Briefings, Transcript of Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force (Mar. 23, 2020).

⁹ Memorandum from Jeffrey Rosen, Deputy Att'y Gen., *US Dep't of Justice, Department of Justice Enforcement Actions Related to Covid-19* (Mar. 24, 2020); Office of the Attorney General, *Memorandum for All Heads Of Department Components And Law Enforcement Agencies... Department of Justice COVID-19 Hoarding and Price Gouging Task Force* (Mar. 24, 2020).

¹⁰ 50 U.S.C §§ 4512, 4513.

¹¹ *Id.*

¹² C. Ryan Barber, *You Will Be Hearing a Knock on Your Door': William Barr Warns Coronavirus Profiteers*, Law.Com (Mar. 23, 2020).

¹³ United States Attorneys' Office, District of New Jersey, "Brooklyn Man Arrested for Assaulting FBI Agents and Making False Statements About His Possession and Sale of Scarce Medical Equipment" (Mar. 30, 2020).

Nevertheless, more recent enforcement efforts offer guidance as to what might qualify as price gouging under the DPA. In a case brought by the federal government for COVID-19 related price-gouging, criminal charges were brought against a defendant for allegedly using his retail sneaker and sports apparel store to amass and sell large quantities of PPE at a more than 1,000 percent markup. Federal prosecutors have also brought criminal charges against individuals and companies, contending either attempts to overcharge the government for PPE or merely defrauding the government with offers to sell equipment that never existed in the first place.

While current federal enforcement seeks to target unscrupulous selling and hoarding of medical equipment, the broad language of the DPA, combined with the growing reports of active DOJ investigations, makes it all the more necessary to closely monitor and consider federal action when putting a price gouging compliance program in place. Though there is no federal price gouging law, members of Congress have proposed price gouging legislation in recent weeks.¹⁴

Particularly, following Attorney General Barr's statements on hoarding of essential materials, Missouri Representative Jason Smith (Republican) and New Jersey Representative Josh Gottheimer (Democrat) proposed a federal bill that would "prohibit companies and individuals from selling goods and services at an 'unconscionably excessive price' during national emergencies."¹⁵ Price gougers could serve up to five years in prison or incur a fine of up to \$1,000.

III. STATE RESPONSE

Given the limitations on federal enforcement, state laws are a potentially more effective means of pursuing price gouging and could provide an example for future federal law to follow.

Since the outbreak of the pandemic, there has been a high degree of enforcement scrutiny from state attorneys general ("AGs") and many have initiated publicized crackdowns on price gougers. For example, Florida AG Ashley Moody recently announced that her office has already contacted more than 4,500 merchants and recovered more than \$500,000 in consumer refunds for aggrieved customers. New York has received nearly 2,000 complaints and issued hundreds of thousands of dollars in fines after finding hundreds of violations; New Jersey has sent almost 1,600 cease-and-desist letters to retailers; the Florida Attorney General's Office has contacted thousands of merchants about price gouging, recovering approximately \$500,000 in refunds for aggrieved customers; the Pennsylvania attorney general sent more than 30 cease-and-desist letters and subpoenas regarding price-gouging behavior.¹⁶ As their offices continue to receive thousands of consumer complaints, AGs will increasingly launch investigations and enforcement actions.

Currently, more than 30 states have some form of price-gouging laws, most of which are typically triggered by the declaration of a state-wide or national public emergency. Certain states have specific price gouging law while others, such as Texas, prosecute unlawful price gouging under their general prohibitions against unfair or deceptive trade practices. Most state price gouging laws cover a broad range of products and services used by consumers during a public emergency. Other states have expanded their existing price gouging statutes to include scarce supplies associated with the pandemic. For example, New York supplemented its price-gouging statute to include "essential medical supplies and services," along with "any other essential goods and services used to promote the health or welfare of the public."¹⁷ Similarly, Massachusetts' AG issued an emergency regulation expanding the state's price regulation that applies to gasoline and petroleum products to cover "any goods or services necessary for the health, safety or welfare of the public."¹⁸

¹⁴ H.R. 6472 (prohibits "unconscionably excessive" pricing "indicating the seller is using the circumstances related to" the emergency to increase prices); H.R. 6264 (creates a new criminal offense for price gouging during a state of emergency); H.R. 6450 (based on California law, limits raising price of consumer goods to no more than 10% after an emergency declaration).

¹⁵ Office of Josh Gottheimer, *Gottheimer Announces Bipartisan Nationwide Protections Against Price-Gouging During Coronavirus State of Emergency* (Mar. 13, 2020).

¹⁶ Fla. Office of the Att'y Gen., News Release, *VIDEO: Attorney General Moody's Rapid Response Team Acts Quickly to Deter Price Gouging* (Apr. 7, 2020); State of N.J., Office of Att'y Gen. Bob Ferguson, *TRANSCRIPT: March 23rd, 2020 Coronavirus Briefing Media* (Mar. 23, 2020); Office of the Pennsylvania Attorney General, *UPDATE: AG Price Gouging Complaints Surpasses 1,000 Tips* (Mar. 17, 2020).

¹⁷ Ryan Tarinelli, *Cuomo Signs Anti-Price Gouging Bill to Cover All Essential Goods During Pandemic*, Law.Com (Jun. 8, 2020).

¹⁸ Office of Attorney General Maura Healey, *AG Healey Issues Emergency Regulation Prohibiting Price Gouging of Critical Goods and Services During COVID-19 Emergency* (Mar. 30, 2020).

Generally, businesses that enlarge their offerings in response to a crisis are not necessarily engaged in price gouging, but some jurisdictions do place restrictions on sellers that newly enter a market after an emergency has been declared. In fact, some states have expanded their existing price gouging statutes to account for new sellers. For example, California issued an Executive Order adding restrictions on sellers who enter the market after an emergency has been declared, prohibiting newcomers from selling protected goods at a price that is greater than fifty percent more than what the seller originally paid for the good, or greater than fifty percent more than the cost of producing and selling the good.¹⁹ Sellers thus face two potential obstacles in times of declared emergencies: overpricing commodities they previously sold, and, in some cases, selling new products.

Moreover, most state price gouging laws are not limited to consumer sales and state AGs have been actively pursuing price gouging cases across the supply chain. For example, New York's and Pennsylvania's laws explicitly apply to "any party within the chain of distribution." Therefore manufacturers, distributors and retailers face potential enforcement risk. California's law, on the other hand, prohibits price gouging only on consumer sales. Similarly, sellers that offer products via the online marketplace face enforcement in multiple states.

The states with no price gouging statutes of any kind have taken different approaches to combat potential price gouging. Some states have introduced price gouging legislation or enacted temporary regulations to address the problem. For example, Maryland recently passed price gouging legislation, New York introduced legislation to target medical supply price gouging and Ohio's AG indicated that it is working on introducing price gouging legislation.

Other states have relied on executive orders from their governors. Michigan Governor Gretchen Whitmer signed an executive order targeting big markups on supplies and consumer food items through mid-April, while Arizona Governor Doug Ducey issued an executive order cracking down on price gouging related to COVID-19 diagnosis and treatment services. Despite different state coping mechanisms, one thing is clear: state AGs are at the forefront of investigating and prosecuting instances of price gouging.

IV. STATE PRICE GOUGING STATUTES: OVERVIEW

Among the states with specific prohibitions, the statutory frameworks vary significantly. Aside from differences in the types of goods or services they protect, the statutes have different definitions of and metrics for identifying excessive pricing. Complicating matters further, a number of state price-gouging statutes incorporate exceptions for "justifiable price increases," which allow a seller to show that its otherwise substantial price surge was the result of increased costs in the supply chain or other reasonable factors.²⁰ Finally, the penalties for price gouging differ, ranging from fines per violation to prison time.²¹

Though the baseline periods measured can vary by state, state price gouging laws typically use two distinct baselines for measuring an illegal price increase: (1) the seller's price for the product prior to the emergency declaration or (2) the price at which the product was readily obtainable in the marketplace prior to the emergency declaration. California and New York both use the price "immediately prior" to the emergency declaration for these measures. Florida looks at the product's average price in the 30 days prior to the emergency declaration, and Pennsylvania uses the average price in the last seven days prior to the emergency declaration.

"Bright Line" price gouging statutes identify a specific percentage increase in price that is considered gouging in the context of a disaster or other emergency- generally ranging from ten to twenty-five percent.²² For instance, New Jersey and California consider it unlawfully excessive for retailers to increase the price of goods by more than ten percent of their ordinary cost during a state of emergency.²³

¹⁹ C.A. Exec. Order N-44-20 (Apr. 3, 2020).

²⁰ Ark. Code § 4-88-301; Cal. Penal Code § 396(b); Fla. Stat. §501.160.

²¹ Cal. Penal Code § 396(h); N.Y. Gen. Bus. Law §396-r(4).

²² Ala. Code §8-31-4; Kan. Stat. Ann. §50-6, 106 (drawing bright lines at twenty-five percent); Utah Code §13-41-201; Ky. Rev. Stat. Ann. § 367.374; Ark. Code. 4-88-303 (drawing bright lines at ten percent); Me. Stat. tit. 11 § 1105 (drawing bright lines at fifteen percent); Okla. Stat. tit. 15 § 777.4.

²³ N.J. Stat. §56:8-107; Cal. Penal Code §396(b).

However, even in states with a bright-line rule, price increases beyond a certain percentage can be lawful if attributable to increased costs from suppliers or merely from operating during a declared emergency. On the other hand, such exemptions for “justifiable price increases” have limits. In California, for instance, a “justifiable price increase” cannot be “more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business.”²⁴ Thus, even where state laws delineate price gouging by specific percentages, nuances will often require a vastly fact-specific examination. And a lack of uniformity among the various statutes make it all the more complicated for businesses operating in multiple states.

States with opaque price-gouging statutes are even more complicated. These statutes generally prohibit “unconscionable” or “excessive” price increases during a declared emergency, but do not explicitly define these terms. For example, Florida prohibits “unconscionable prices” during times of emergency.²⁵ Likewise, New York’s excessive pricing statute prohibits, among other things, selling goods for an “unconscionably exorbitant price.”²⁶

With certain exceptions, a complainant can raise a presumption that a price is prima facie unconscionable if (1) there is a gross disparity between the pre- and post-emergency prices (i.e. the price offered during the usual course of business as compared to emergency price) or (2) the amount charged grossly exceeded the prices charged by competitors prior to the emergency.²⁷

Other, more opaque, state statutes require the application of multiple factors to identify illegal price gouging, yet define the relevant factors for consideration differently. For example, Idaho’s statute instructs courts to consider three factors: (1) a comparison of the price paid for the good immediately prior to the emergency, (2) additional costs of doing business during the emergency, and (3) the duration of the emergency.²⁸ Similarly, North Carolina’s statute lays out three factors to determine whether price gouging exists, including whether the “price charged by the seller is attributable to additional costs imposed by the seller’s supplier or other costs of providing the good or service during the triggering event.”²⁹

Like many of the bright-line price-gouging statutes, *the goal is* not to punish sellers that increase prices because of a strained supply chain. Rather, these statutes target sellers that seek to exploit the pandemic for excessive profit. As such, the statutes might enable businesses to avoid allegations of price gouging if they can point to additional or increased costs that have been imposed on them outside of the seller’s control. In this way, the application of price-gouging statutes using multifactor tests will ultimately require the same fact-specific analysis of the underlying costs and market forces as the bright-line statutes that have “justifiable price increase” exceptions.

V. CONCLUSION

In this rapidly changing environment, compliance with the state and federal price-gouging laws will require a complex and nuanced examination. Businesses must weigh their right to remain profitable against various legal restrictions. Regulatory agencies and law enforcers are likely analyzing the extent to which the pandemic has increased other costs of doing business, like more expensive delivery services, payment of overtime employment, or raised prices by manufacturers or distributors.

Likewise, sellers of certain essential products should expect outreach from enforcement agencies for insight into a seller’s business costs and profit margins. Quick response to inquiries and demands from government investigators with adequate documentation related to costs may facilitate the investigatory process and perhaps ease investigatory actions. In fact, business might want to consider contacting regulators in advance. In certain circumstances, state and local task forces have expressed a willingness to work collaboratively with businesses to find a reasonable balance between consumer protection and real-world market forces.

²⁴ *Id.*; N.J. Stat §56:8-108.

²⁵ Fla. Stat. §501.160.

²⁶ N.Y. Gen. Bus. Law §396-r(3).

²⁷ *Id.* §396-r(3)(b).

²⁸ Idaho Code §48-603 (19).

²⁹ N.C. Gen. Stat. § 75-38.

Further, a business's pricing considerations should also account for public perception. If consumers feel that a business did not treat the public fairly during the pandemic, the reputational consequences can be severe and long-term.

Lastly, businesses will be under increasing scrutiny to refrain from doing business with price gougers. This particularly applies to e-commerce platforms that host large numbers of independent third-party sellers across multiple states with varying price-gouging laws. As more consumers turn to the internet in order to avoid crowded stores and shopping centers, internet-based retailers have a particular responsibility to guard against price gouging. Online platforms may be asked to assist enforcement agencies to regulate bad actors on their platforms. As such, online platforms may find it prudent to take an active role in identifying third-party sellers who may be price gouging.

Many state AGs have already sent letters to online marketplace operators- including Amazon, eBay, Craigslist, Facebook, and Walmart- asking them to be more vigilant against price gouging on their platforms and to enact measures to prevent price gouging including to: (1) set policies and enforce restrictions on unconscionable price gouging during emergencies, (2) trigger price gouging protections independent of, or prior to an emergency declaration, and (3) create and maintain a "Fair Pricing" portal where consumers can report price gouging incidents to you directly.³⁰

While public enforcers have historically had a challenging time making cases against e-commerce entities for the actions of the third parties which list on them, substantial reputational risk is also likely in play for these online sellers. Additionally, online marketplace operators that use algorithms for dynamic pricing must rigorously observe their software in order to ensure compliance with price-gouging laws and regulations.

The COVID-19 health crisis has made price gouging a subject of interest and outrage. Under normal circumstances, businesses should take great care when determining what to charge the public. Now more than ever, it is essential that those selling goods or charging for services that are in limited supply, or are deemed or even perceived to be essential, should be particularly vigilant.

³⁰ Spencer Parts, *State AGs Target Coronavirus Price Gouging*, USA News (Mar. 23, 2020).



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