

# Price Gouging Laws and the Dormant Commerce Clause?

**Minding Your Business Blog** on June 26, 2020

During the pandemic, businesses are asking about their potential price gouging liability in states that they do not sell into directly but where their products might end up. At least one federal circuit court addressed this question in examining a Maryland price gouging law that covered pharmaceuticals (outside the emergency context), ultimately striking down the law as a violation of the dormant Commerce Clause in a split decision.

In [\*Association for Accessible Medicines v. Frosh\*](#), the U.S. Court of Appeals for the Fourth Circuit examined a constitutional challenge to a Maryland price gouging law that prohibited “[a] manufacturer or wholesale distributor” from “engag[ing] in price gouging in the sale of an essential off-patent or generic drug.” Md. Code Ann., Health-General § 2-802(a). Notably, the statute did not apply to retailers that sell directly to a consumer. Unlike the price gouging laws triggered during states of emergency (such as the pandemic), the Maryland pharmaceutical statute operated all the time. The statute defined price gouging as “an unconscionable increase in the price of a prescription drug.” *Id.* § 2-801. The statute further defined “essential” medications as those “made available for sale in [Maryland]” that either “appear[ ] on the Model List of Essential Medicines most recently adopted by the World Health Organization” or are “designated ... as an essential medicine due to [their] efficacy in treating a life threatening health condition or a chronic health condition that substantially impairs an individual’s ability to engage in activities of daily living.” *Id.* § 2-801(b)(1).

The Association for Accessible Medicines (AAM)—a group of prescription drug manufacturers, wholesale distributors, and other pharmaceutical companies—brought suit to challenge the law. Only one of AAM’s member-manufacturers was based in Maryland, and none of the member wholesale distributors were based in Maryland. Typically, AAM’s member-manufacturers sold their products to AAM wholesale distributors. Therefore, the majority of the sales between the manufacturer and wholesaler occurred outside of Maryland. However, the Maryland Attorney General argued that the law nevertheless reached sales that took place outside of Maryland if the drug was eventually sold at retail to a consumer in Maryland.

AAM argued that Maryland’s price gouging law violated the dormant Commerce Clause by “directly regulat[ing] the prices charged for prescription drugs in out-of-state transactions, even though its provisions are triggered only when one of those drugs is available for sale in Maryland.” *Frosh*, 887 F.3d at 670. The Fourth Circuit agreed with AAM, relying on the principle against extraterritoriality, which is “derived from the notion that a State may not regulate commerce occurring wholly outside of its borders.” *Id.* at 667. The Court stated that “[a] state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, or has that ‘practical effect,’ regardless of the legislature’s intent.” *Id.* at 668.

The court held that the Act violated the dormant Commerce Clause because (1) the Act was “not triggered by any conduct that takes place within Maryland,” meaning that it “targets conduct that occurs entirely outside Maryland’s borders, a conclusion supported by the Act’s prohibition of a manufacturer’s use of the defense that it did not directly sell to a consumer in Maryland,” (2) “even if it were, the Act controls the prices of transactions that occur outside the state,” and (3) if other states enacted similar statutes, it would “impose a significant burden on interstate commerce involving prescription drugs.” *Id.* at 670.

The dissent, however, criticized the majority opinion: “the majority opinion [improperly] concludes that the Commerce Clause bars Maryland from protecting its citizens against unconscionable pricing practices by out-of-state generic drug manufacturers who distribute their drugs to Maryland’s citizens through an out-of-state intermediary.” *Id.* at 675. According to the dissent, “Maryland legitimately targeted generic drug pricing practices specifically designed to prey on the special vulnerabilities of a defenseless group of Maryland’s citizens. Simply put, the Maryland statute—which applies equally to in-state and out-of-state manufacturers and distributors—does not implicate the concerns that lie at the heart of the Supreme Court’s dormant Commerce Clause jurisprudence: economic protectionism, discrimination against interstate commerce, and State regulation of streams of transactions that never cross through the State’s borders.” *Id.*

In 2019, the Supreme Court denied Maryland’s petition for certiorari, leaving the Fourth Circuit’s decision intact.

The *Frosh* decision provides some clarity as to how a court, at least in the Fourth Circuit, might construe a price gouging law’s ability to reach conduct that takes place entirely outside of a state. However, it is important to note that Maryland’s law was not triggered by a state of emergency and did not include a specific exception or defense for increased costs, like most state of emergency price gouging laws do. It remains unclear how a court would interpret the application of a price gouging law triggered only during a state of emergency to an out-of-state business. If in-state businesses have a defense that an out-of-state business raised costs, and the dormant Commerce Clause prohibits going down a level in the supply chain to challenge price gouging by the out-of-state business, that state’s price gouging law would be neutralized – at least with respect to the subject transactions (and claims may exist where the sale occurred). It remains to be seen whether a court would enable such a result. Nonetheless, as more lawsuits are filed alleging COVID-19 price gouging allegations, businesses should be aware of the Fourth Circuit’s decision in *Association for Accessible Medicines v. Frosh*, and should be paying close attention to where their sales are taking place and may be deemed to take place.

\* \* \*

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. Visit our [Coronavirus Resource Center](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

[View Original](#)

#### [Related Professionals](#)

---

- **Christopher E. Ondeck**  
Partner
- **John R. Ingrassia**  
Partner
- **Kelly Landers Hawthorne**  
Associate