

Annual Contract Renewals at the Intersection of Price Gouging and Antitrust Laws

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As annual supply contracts come up for renewal, businesses may be wondering whether price increases for annual contracts are permitted under the panoply of price gouging laws currently in effect. Parties may want to negotiate contracts with “normal” price increases, operating under the assumption that, at some point during the contract year, price controls will expire. But if states of emergency remain in effect when the new contract prices become effective, parties can find themselves facing questions about how the agreement can be carried out.

When agreeing to a new contract price, companies should consider how price gouging laws may be interpreted or enforced in ways that overlap or interact with antitrust laws. There is no precedent that definitively reveals the interplay between these laws, given the unprecedented geographic and durational scope of the ongoing emergency. We do, however, strongly suspect that annual contract prices that could be investigated for either price gouging or antitrust reasons will likely be investigated for both.

In terms of antitrust, companies are generally free to set their prices as they see fit, provided, among other things, they make their pricing decisions unilaterally. Since most arrangements between suppliers and distributors benefit consumers, given the distribution and cost reducing efficiencies, annual contracts between suppliers and distributors typically do not run afoul of antitrust laws.

Under price gouging restrictions, however, enforcers will look to evidence that prices increased beyond a permissible level during a state of emergency. Price gouging laws apply broadly to annual agreements between suppliers and downstream distributors and sellers, to the price at which the supplier provides goods, or to the ultimate sale price.

A practice may be permissible under federal antitrust law and unlawful under state law, or vice versa. But, [as we have previously discussed](#), antitrust and price gouging investigations and possible violations are not mutually exclusive. State attorneys general frequently are choosing to investigate pricing moves under both enforcement regimes simultaneously. Given the spotlight on price gouging in response to the ongoing pandemic, contract prices may be scrutinized for antitrust compliance, particularly if there is any whiff of coordinated activity in a market or industry.

Consider this possible scenario: a California-based supplier is preparing to enter into a new annual contract with its California-based distributor. Last year, the supplier agreed to sell its products to the distributor for \$10/unit. This year, the presumptive ceiling for the supplier's sale to the distributor would appear to be \$11/unit based on California's current pricing restrictions. The parties are considering a contract under which the supplier sells its product to the distributor for \$13/unit.

Perhaps the higher price is justified by documented costs, and perhaps the distributor can lawfully pass those costs on as well. Assuming however, that the \$13/unit price cannot be fully justified by cost increases, it may not be permitted within the price gouging exceptions. Also, should the price gouging laws be deactivated mid-contract, it may be that parties could be exposed for any sales that took place during the pendency of the states of emergency.

In light of the [state](#) and [federal](#) enforcement activity against price gouging and the considerations discussed above, companies should ensure that their contract prices are reasonable and justified. Use data to your advantage in contemplating pricing movements. Such records will be especially useful to support any increases should there be an investigation in the future.

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