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Spotlight on Past Price Hikes: Anticipating and Establishing Defenses to Price Gouging Class Actions

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Six months into the states of emergency triggered by the COVID-19 pandemic, there is a sizeable amount of data on how prices have actually moved, potentially leading to more private actions as plaintiffs now have the opportunity to review prices retroactively and establish claims based on hard data.

Reports have noted the impact of the pandemic on food and drug prices, for example. In a recent post, we flagged a report from a consumer watchdog group, noting how it leveraged some of that data to shine light on a handful of notable price increases for products sold by and through Amazon during the pandemic. The group analyzed pricing on a handful of products from May through August, and found that prices had been marked up well in excess of many price gouging limitations, including, for example, price increases of up to 425% on flour sold by Amazon and up to 941% increases on flour sold by third-party sellers through Amazon.

A class action proceeding pending against Amazon based on allegations of price gouging was filed in April. Private actions have also been filed against other retailers and online platforms related to purchases of goods such as N-95 masks, disinfectants, eggs, and even wine storage. This is likely only the tip of the iceberg.

While most states of emergency remain in effect, companies have likely acclimated to many of the present economic and social challenges. Companies and industries that have not yet been targeted by state attorneys general or private plaintiffs are not necessarily out of the woods with respect to allegations of price gouging. Indeed, it is extremely unlikely that Amazon will be the only company facing this sort of backward-looking attention from advocacy groups, let alone from plaintiffsgiven the time and opportunity to review months of data.

Pricing data alone may not tell the whole story. Price gouging laws – which have received limited analysis in the past – are subject to limitations, based on potential ambiguities, exceptions and defenses. The raw data does not control for factors affecting prices paid by consumers, nor will it isolate the impact of industry-specific facts, cost or supply factors, and the nature of demand. The prudent course is to document any justifications for pricing movements so that defenses are at the ready in the event claims are made or investigations are initiated against your company.

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