Proskauer

Price Gouging Weekly Round Up

February 1, 2021

Price gouging enforcement and litigation is front and center for company counsel and business managers nationwide. Our weekly round up highlights some of the most relevant news and information for our clients and friends.

Federal Indictment for Price Gouging in Violation of Defense Production Act

On January 27, 2021, a businessman in Ocean Springs, Mississippi was charged with defrauding the U.S. and other health care providers in a $1.8 million scheme to hoard personal protective equipment, and price gouge health care providers. The indictment alleges that the businessman "hoarded PPE" and "directed sales representatives to solicit health care providers, including the [Department of Veterans Affairs], to purchase PPE at inflated prices." The businessman allegedly sold masks to the VA and other health care providers for as much as $25 per mask, despite "acquiring such masks at much lower prices." The businessman is alleged to have violated the Defense Production Act ("DPA"), which has recently been used to combat pandemic-related pricing gouging. The DPA provides in relevant part: "to prevent hoarding, no person shall accumulate (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, materials which have been designated by the President as scarce materials or materials the supply of which would be threatened by such accumulation." 50 U.S.C. § 4512. For more information on the DPA, read our blog post.

COVID-19 Price Gouging Prevention Act Re-introduced in Congress

On January 28, 2021, the House Energy and Commerce Subcommittee on Consumer Protection and Commerce Chair Jan Schakowsky (D-IL), Judiciary Subcommittee on Antitrust, Commercial and Administrative Law Chairman David N. Cicilline (D-RI), Energy and Commerce Committee Chairman Frank Pallone, Jr. (D-NJ) and Judiciary Committee Chairman Jerrold Nadler (D-NY) re-introduced the COVID-19 Price Gouging Prevention Act to "prohibit the sale of consumer goods and services at an unconscionably excessive price during the COVID-19 pandemic." The bill defines "good or service" to include, but is not limited to "food, water, personal protective equipment, respirators, medical supplies, cleaning supplies, sanitizers, healthcare services, delivery services or cleaning services." The bill, which provides both the Federal Trade Commission and state attorneys general with enforcement powers, also outlines that an action is considered price gouging if the price grossly exceeds the average price that the same good was sold for the 90-days before January 31, 2020, or during the same 90-day period of the previous year. The bill sponsors offered in connection with the legislation that "[t]his bill will help put an end to price gouging during this national emergency by giving the Federal Trade Commission and state attorneys general the enforcement tools to go after price gougers. We look forward to working with Speaker Pelosi to ensure the House passes this bill as soon as possible."

Colorado Attorney General Settles Price Gouging Case

On January 25, 2021, Colorado Attorney General Phil Weiser's office announced a settlement with a Denver-based medical supply company after the business "made misleading claims about masks and respirators it sold and charged unreasonably excessive prices" during the COVID-19 pandemic. The company's misleading claims included marketing masks as FDA/CE approved, as well as illegally using the FDA logo. In selling masks for a markup that in some cases exceeded 250% of the market price, the company violated Colorado's price gouging law, which prohibits during a declared disaster "price[s] so excessive as to amount to price gouging." The settlement requires the supply company to cease charging excessive prices during the pandemic, as well as pay the State $70,000.

Washington Attorney General Requests Price Gouging Legislation in 2021

Washington is currently among the minority of states without a price gouging law on the books, but this could soon change. Washington Attorney General Bob Ferguson recently requested Senate Bill 5191 in an effort to regulate fair business practices and prohibit predatory price gouging during a state of emergency. The bill states that since Governor Inslee's declared state of emergency due to COVID-19, the AG's office has responded to 1,310 price gouging complaints. The proposed legislation seeks to prohibit "excessive and unjustified price increases implemented during or shortly after a declared state of emergency for essential goods and services that are vital and necessary for the health, safety, and welfare of consumers." "Excessive price" is defined as "a price more than 10% greater than the price at which the person sold, rented, or offered for sale or rent the same product of service immediately prior to the state of emergency." The proposal also addresses a potential loophole in many price gouging laws providing that "[i]f the seller did not sell, rent, or offer for sale or rent the product or service immediately prior to the onset of the state of emergency . . . or if the price charged by the person for the product or service prior to the onset of the state of emergency cannot be determined, an excessive price shall be presumed where the price is more than 10% greater than the price of the same product or service offered for sale or rent by other similarly situated sellers prior to the state of emergency." Similar to other price gouging laws, the law provides a defense where "the price increase is attributable to an additional cost imposed by a supplier of a good or service, or other costs of providing the good or service, including an additional cost for labor or materials used to provide a product or service."

Utah Senate Committee Revisits State Price Gouging Law

On January 27, 2021, the Utah Senate Business and Labor Committee voted to advance Senate Bill 85, which would "drastically revise Utah's price gouging law, including increasing the evidentiary standard required to prove a violation." Sponsored by Senator Lincoln Fillmore, the bill would amend the Price Controls During Emergencies Act from 2005, which Fillmore states "places a few hurdles before a [price gouging] investigation can be launched." Senate Bill 85 has received unanimous support and seeks to "strike the right balance between making sure that consumers are not gouged" and "protect[] the innocent from false claims." Another bill, S.B. 74, also would fully repeal the Price Controls During Emergencies Act, but is not expected to garner significant support.

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