

One to Watch: Constitutional Challenges to NYC's Price Gouging Rule

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On March 18, 2021, retailer Union Square Supply, Inc. [filed](#) a civil rights class action lawsuit in the Southern District of New York challenging New York City's price gouging enforcement practices. The complaint alleges that defendants are responsible for "the creation and maintenance of an illegal and unconstitutional penalty enforcement scheme, abuse of emergency powers, and other misconduct that improperly assesses penalties and fines on businesses without any notice or due process."

Rather than challenging the validity of the price gouging law itself, plaintiff's arguments largely focus on the whether the process violates constitutionally protected rights. Still, the relief sought functionally asks for the price gouging law to be abandoned. The complaint is seeking more than \$150 million in damages on behalf of class members, a declaratory judgment that defendants willfully violated their rights, and certain temporary, preliminary, and permanent injunctions. Part of the injunctive relief sought includes an injunction against "all enforcement, hearings, and determinations of price gouging entirely.

On March 15, 2020, New York City issued an [emergency price gouging rule](#) (6 RCNY § 5-42). That emergency rule was later made [permanent](#), and applies during a declared state of emergency in the city. The "covered goods and services" under the law include those "goods or services that are essential to health, safety or welfare, or are marketed or advertised as such," with a non-exhaustive list of examples including: "staple consumer food items," "goods or services used for emergency cleanup," "gasoline or other motor fuels," "emergency supplies," which includes "candles, blankets, soaps, diapers, [and] toiletries," as well as "medical supplies."

The pandemic-related state of emergency order [remains in effect](#) through at least April 20, 2021. For more than a year, the rule has therefore allowed the city to fine retailers who charged excessive prices on covered goods and services.

Lead plaintiff Union Square Supply Inc. and other retailers now allege that the fines that New York City has imposed on business for price gouging during this ongoing state of emergency have been assessed unfairly. The complaint alleges that the city's enforcement has intensified over the course of the pandemic, leaving business without fair warning of what constitutes "price gouging." Plaintiff accuses the Office of Administrative Trials and Hearings of basing decisions upon "voluminous 'packets' where computer printouts of online products are taken as evidence, even if all of the products shown are clearly shown to be 'unavailable' or 'out of stock'," or comparing local prices to those offered by "out of state or national vendors." The complaint also alleges that it "impossible" for businesses to comply with the administrative appeals process.

As a result, plaintiff alleges that the City has violated, among other things, its 14th Amendment Due Process rights and its Eighth Amendment right to be free from excessive fines.

Given the pushback on pandemic restrictions and emergency orders in other areas, it is perhaps not surprising to see a suit challenging New York City's price gouging enforcement practices. It remains to be seen how defendants will respond to the argument that the law is "being applied in an arbitrary manner." On March 23, Judge Denise Cote denied plaintiff's motion for a temporary restraining order, which sought to enjoin the enforcement of a penalty imposed on Union Square Supply Inc. and to enjoin future enforcement under the statute. At least for now, the law remains in full effect. We will be watching to see how the court responds to the legal theories raised in the case, and what impact it could have on business and other enforcement actions.

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