

Online Marketplaces Could Expose Third-Party Sellers to Price Gouging Liability

Minding Your Business Blog on **September 30, 2021**

On July 2, 2021, a group of consumers filed a putative class action in Washington District Court alleging Amazon engaged in unlawful price gouging during the COVID-19 pandemic on a variety of products. The case is noteworthy because Washington does not have a specific price gouging statute. Instead, plaintiffs argue that the alleged price gouging is an “unfair or deceptive act[] or practice[] in the conduct of any trade or commerce” in violation of Washington Consumer Protection Act (“WCPA”). Commentators have speculated that one of the purposes for filing in Washington is to pursue, in a state court, nationwide damages from Amazon.

The lawsuit seeks to hold Amazon accountable for alleged price gouging that occurred on its platform not only for Amazon-branded products, but also for price increases on products sold by third-party sellers. Plaintiffs argue Amazon’s pricing policies—which allows the platform to set prices and apply price ceilings on third-party seller’s products—make the e-commerce giant liable for sales on their site that might violate the WCPA regardless of the seller is. This theory of liability raises many questions for companies who host online marketplaces and third-party sellers who utilize these platforms.

The complaint points to three of Amazon's pricing policies. First, Amazon sells some third-party products under its "Sold by Amazon" program. In this program, Amazon retains complete control of pricing and sellers receive revenue based on a minimum gross proceeds price. It is unclear to what extent this pricing authority would make Amazon the "seller" for the purposes of state price gouging laws. Most states with a specific price gouging statute prohibits "selling" or "offering to sell" at prices above the statutory limits. Since the program is styled "Sold by Amazon," courts could construe Amazon to have made the sale. However, it also raises the question of the extent to which the third-party seller could similarly be held liable if the prices charged by Amazon are above the statutory limit.

Next, Amazon commonly negotiates most-favored-nation ("MFN") protections with larger third-party suppliers to ensure suppliers do not undercut Amazon prices when selling on other platforms. Most courts have not found MFNs inherently anticompetitive, and in fact, MFNs often serve procompetitive purposes. However, some courts have permitted plaintiffs to use MFNs as evidence of collusion, on the basis that such agreements can sometimes facilitate price fixing or discourage sellers from competing with lower prices. The antitrust implications of MFN protections are somewhat contrary to claims under price gouging laws. MFNs limit downward pressure on prices since suppliers are unable to offer goods at lower prices to competitive retailers. Price gouging laws, instead, restrict price increases, creating a price ceiling for sellers. Plaintiffs' claims are somewhat novel in that they are alleging unfair price increases but pointing to MFN protections, which create price floors. In states with broad unfair pricing laws, such as Washington, MFN provisions will come under greater scrutiny as enforcement turns beyond consumer facing prices and to supply chains.

Finally, Amazon offers third-party sellers automated pricing, where prices are set algorithmically based on rules communicated to sellers. In general, prices under this model are based on competitive benchmarks. The complaint alleges that if one of these competitive benchmark prices increased through price gouging, Amazon's pricing algorithm would automatically raise prices accordingly across its platform.

The complaint illustrates how automated pricing algorithms could result in improperly raising prices in violation of state price gouging statutes. The algorithms use a variety of inputs to determine pricing trends and allow sellers to set prices based on numerous market factors. In some scenarios, the input that caused the price increases plaintiffs complain of could be outside of Amazon's control, such as a price change at a small local retailer. The changed input could inflate the price of a third-party's product, without either the seller or Amazon actively setting the price. Under the plaintiffs' theory, however, Amazon should be held liable for such increases. As we discussed in [a previous article](#), plaintiffs cannot point to clear statutory price limitation in Washington. Instead, the WCPA merely prohibits unfair trade practices, forcing plaintiffs to argue that the WCPA effectively includes a 15% cap on price increases during an emergency. While plaintiffs have only brought suit against Amazon at this stage, third-party seller who, albeit, through an algorithm, responded to price gouging in the market by raising the price of their own product, could potentially be exposed to litigation risk as well.

The complaint raises significant concerns for third-party sellers who utilize Amazon or other marketplace websites to sell products. If a seller is bound by pricing policies like those used by Amazon, the seller could risk similar liability under price gouging or other statutes. While some state laws permit price increases in the face of increased costs, sellers must substantiate the cost increase. Merely pointing to an Amazon-like pricing algorithm may not be sufficient to relieve such sellers of liability. When engaging in sales on platforms like Amazon sellers should carefully examine the types of protection the algorithm or pricing policy offers to ensure compliance with price gouging statutes and other pricing controls.

While still in its early stages, this lawsuit raises new concerns for those who run marketplaces, which could face liability when selling products on their platform and for third-party sellers, which potentially risk litigation by relying on automated pricing strategies or pricing agreements. Diligent companies will continue to monitor these developments closely to understand their individual exposure under increased enforcement and fluid price gouging laws, many of which remain in effect.

* * *

Visit [Proskauer on Price Gouging](#) for antitrust insights on COVID-19.

* * *

[View Original](#)

Related Professionals

- **Christopher E. Ondeck**
Partner
- **John R. Ingrassia**
Partner
- **Shannon D. McGowan**
Associate
- **Timothy E. Burroughs**
Associate