

“Unconscionable” Standard Need Not be Clean Cut: NY Appellate Court Reverses Lysol Price Gouging Case

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One of the bellwether price gouging cases from the early days of the COVID-19 pandemic was recently reversed and remanded by [New York’s First Judicial Department of the Appellate Division.](#)

New York Attorney General Letitia James [announced in May 2020](#) that her office had filed a lawsuit against a wholesale grocery distributor – Quality King Distributors – and its CEO for price gouging. The lawsuit [alleged](#) that between January 2020 and April 2020, Quality King raised the price of Lysol when its costs had not increased, “dramatically boost[ing] its gross profit margins for Lysol Spray, almost quintupling them over its pre-crisis margins.” Quality King sold 46,104 cans of Lysol during the time in question, and “each time one of these [] cans of Lysol was sold at retail for an inflated price – and each time a person bought any other Lysol product whose price Quality King had inflated – Quality King’s price-gouging caused injury to a consumer,” the lawsuit stated. The Attorney General seeks, among other relief, disgorgement of all profits from the illegal practice and a civil penalty of \$25,000.

[New York's General Business Law § 396-r](#), which has been amended since AG James brought this case, provides that “[d]uring any abnormal disruption of the market for consumer goods . . . vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods . . . shall sell or offer to sell any such goods . . . for an amount which represents an unconscionably excessive price. . . .” However, Section 396-r includes an exception that a “defendant may rebut a prima facie case with evidence that (1) the increase in the amount charged preserves the margin of profit that the defendant received for the same goods or services prior to the abnormal disruption of the market or (2) additional costs not within the control of the defendant were imposed on the defendant for the goods or services.”

The case was [dismissed](#) in September 2020 because the pricing was not found to be “unconscionable,” as required by the state price gouging law.

Following an appeal, a four-judge panel in [New York's First Judicial Department of the Appellate Division ruled](#) that the State did in fact make a prima facie case that Quality King engaged in price gouging activities, by establishing the claim's three elements.

In assessing the requirements of the statute, the appellate court found that the AG showed the requisite “abnormal disruption of the market” due to the “public health crisis stemming from a unique virus,” and, crucially, applied an earlier “onset date” for the market disruption. The court also found that Lysol was “vital and necessary for the health, safety and welfare of consumers,” regardless of the “extent to which COVID-19 was transmittable from a surface,” or the extent to which the product was ultimately “effective in eliminating or meaningfully limiting any such potential transmission.” Finally, the court found that AG James had made a prima facie case that Lysol had been sold at “unconscionably excessive prices on at least several occasions,” using the earlier onset date.

The appellate court noted that the state law “proscribes *any* instance of price gouging; the AG need not demonstrate a uniform price-gouging practice for liability to attach.” It considered and rejected constitutional challenges that the statute was unconstitutionally vague, among other arguments. The court explained that the absence of a “quantitative metric for ascertaining whether a given price is unconscionably excessive or unconscionably extreme (or whether a given disparity between two prices is gross) ... does not affect the statute's constitutionality.”

When state price gouging laws were activated in force in the spring of 2020, there was uncertainty, even among enforcers, as to what behaviors would be covered. This reversal should serve as a reminder that the interpretation and application of these laws continues to evolve. Compliance and [risk management](#) should remain in the forefront of business planning.

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