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Prices and Profits Dominating the News

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While states continue to lift their COVID related states of emergency, new price gouging claims are being made and ongoing price gouging litigation continues to wind through the courts. The federal government also now appears more poised than ever to intervene in price gouging issues.

As described in previous posts, the Texas Attorney General has been aggressive in bringing price gouging cases against businesses. Testing the Texas Deceptive Trade Practices Act ("DTPA")—which prohibits "exorbitant and excessive prices" during a declared disaster—the Attorney General sought an injunction against two egg producers. After the egg companies prevailed on a motion to dismiss the complaint, the Court of Appeals reversed the ruling, sending the case back to the trial court for further proceedings – and to develop a factual record in connection with the egg producers claims that the DTPA is unconstitutional.

On October 31, 2022, the egg producers filed a petition for review with the Texas Supreme Court. The egg producers seek a ruling from the Texas Supreme Court that DTPA is unconstitutional "because it: (1) is void for vagueness; (2) violates the dormant Commerce Clause; and (3) constitutes a regulatory taking." Among the flaws in the statute claimed by the egg producers, the DTPA prohibits "exorbitant and excessive prices" but, according to the producers, fails to identify any benchmark against which to measure prices, and fails to adequately define the prohibited conduct. The producers further argue that without these benchmarks companies are unable to adequately identify "exorbitant" price increases. Additionally, the egg producers rely on the State's admissions that the egg producer's prices "did not deviate from their customary pricing by using third-party market index prices." The petition for review remains pending.

In addition to state claims, the Biden administration continues monitor pricing and profits by companies. Recently, President Biden made remarks on the announcements by oil companies of "record-setting profits." The President first noted that gasoline prices had dropped since the steep rise at the onset of the war in Ukraine. He then turned to the recent earnings reports from oil companies showing profits well above last year's. The President called on oil companies to "to act in the interest of their consumers, their community, and their country; to invest in America by increasing production and refining capacity." However, the President did not stop there. In the event these companies do not heed that call, the President made clear "they're going to pay a higher tax on their excess profits and face other restrictions." The administration is prepared to "work with Congress" regarding available options. Introduced on March 11, 2022, HR 7061 is currently pending before the House of Representatives. The bill proposes to impose an additional excise tax on windfall profits on crude oil.

Earlier in October, the Biden administration approached these same oil companies with a proposal to boost output and tame prices. However, none of the oil companies agreed to such a plan. The remarks by President Biden are in line with his administration's prior comments about prices and price gouging. Even without a national price gouging statute, the federal government will continue to play a role potential pricing restrictions, especially with respect to oil and gas refiners.

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