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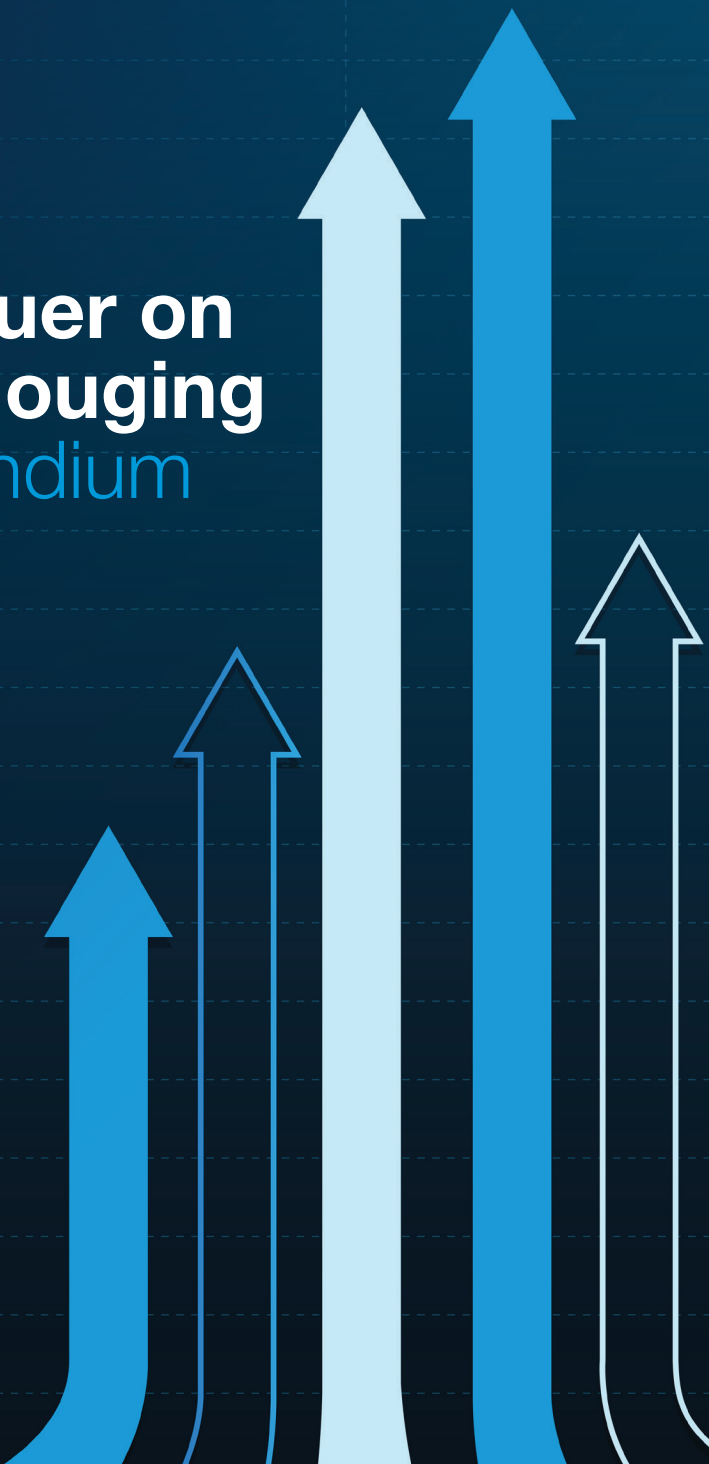
Proskauer on Price Gouging Compendium



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Preface

Welcome to the Proskauer on Price Gouging Compendium. This Compendium is the result of three years of effort by a dedicated price gouging practice group at Proskauer. Starting at the beginning of the pandemic, our team met daily with the goal of tracking every state's activities, every case, and every news item, relating to price gouging controls. In addition, our team represented clients in most of the significant price gouging litigations and government investigations, and counseled dozens of clients on navigating the many price control regimes.

During the course of the pandemic, our team published over 140 items, including long form articles, 50-state-surveys, a series of reference guides, blog posts, and webinar presentations. The compilation contains a curated set of those materials, as well as new content.

The Compendium provides a detailed analysis of what took place over the 2020 to 2023 pandemic period, how price gouging regimes were enforced and how they evolved, how companies complied with them, and the lessons learned.

Our editorial board, whose dedication, work, and expertise made this publication possible, includes:

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Introduction

The Proskauer Price Gouging Compendium is intended to serve as a resource for businesses as they navigate the patchwork of price gouging statutes across the United States. Price gouging statutes primarily are state laws, and they vary greatly – the dozens of different statues contain different price caps, different product coverage, different remedies, and different enforcement mechanisms.

There is no straightforward approach to compliance with these myriad laws. For any business operating on a national basis, this lack of a uniform standard for compliance is a challenge. Merely tracking which states have activated or deactivated their laws is a major and ongoing undertaking. Once a business determines which laws apply to them and their products or services, designing a nationwide strategy requires an understanding of the several different types of price gouging laws, their caps on price increases, and an assessment of the risk of enforcement.

Price gouging laws are well-intended. At their heart, these laws are intended to ensure necessities (food, medical supplies, fuel, etc.) cost the same the day after an emergency or disaster as they did the day before—they act as temporary price freezes or limits to price increases. They therefore appear on their face to protect the public in times of great need from unscrupulous practices of drastically increased prices at exactly the moment the public is most vulnerable. Governments see a role in freezing prices and maintaining the status quo in such emergency situations – until the roads are cleared, shelves can be restocked, and the emergency abates.

Historically, state price gouging laws have been activated only for limited periods of time, typically following regional or localized emergencies. Storms that interrupt electricity and interstate transportation are the most common examples. The price gouging statutes generally are activated by a small number of impacted states, usually for a time period of no more than 30 to 60 days. Businesses have been able to cope with such localized compliance issues, particularly because the time period has been relatively short. Most businesses can operate for short periods without needing to increase prices – whether due to price increases they are experiencing from the emergency in their own supply chain, or internal costs such as labor, or simply due to the annualized process of consideration of incremental price increases.

But the COVID-19 pandemic created a dramatically different situation for the price gouging laws and the ability of businesses to comply. Critically, most states kept their price gouging laws "turned on" for two years. As of the writing of this Compendium, a number of states still have their price gouging statutes activated and in force, almost three years after the activation of most price gouging laws in March of 2020. Such widespread and long-lasting price controls have not occurred in the United States since the Great Depression in the 1930s.

This creates unintended consequences for businesses. While a price freeze or cap that lasts for one or two months is sustainable, such freezes or caps that last for two years are not. The price gouging laws are intended to deter or catch bad actors. But during the last two years, the good actors, which comprise the overwhelming majority of businesses, have been between a rock and a hard place. They faced rising supply chain costs. The saw their competitors "take price" – usually after the first twelve months of the pandemic. They faced retailers who used the price gouging laws as a sword and shield to refuse to take price increases. They faced large compliance costs to attempt to monitor and comply with the dozens of different jurisdictions, across many thousands of product SKUs.

Perhaps worst, they faced arbitrary and uneven enforcement by the different state attorneys general. Some AGs were highly active in enforcement, and pursued conduct in their state that other states appeared to accept or deem as reasonable. Business were forced to evaluate the litigation risk of enforcement from doing business in the various state jurisdictions. Anecdotally, it appears that some producers made the reluctant decision to cease selling into states that appeared too arbitrary or unreasonable in their enforcement prosecutions and decisions. Thus the unintended effect: laws designed to protect the public may have had the result of reducing the supply in a state of the very necessities whose prices they limited.

The bottom line is that law-abiding businesses need an effective means to monitor these laws, determine their status as active or deactivated, and then evaluate the risk for practices that arguably are not covered by the laws – but might be swept in by a prosecutor or private plaintiff – on a pragmatic basis. During the past 25 months, the Proskauer Price Gouging Team has authored over 145 articles, resource materials, interactive maps, and other publications to assist businesses with these needs. This Compendium incorporates and categorizes many of those materials based on our experiences litigating and counseling during the past two years on these issues. In addition, it also contains new materials and guidance, and predictions for the next evolution of these statutes.

Specifically, the compendium first provides a curated list of articles and blog posts authored by the Proskauer Price Gouging Team on a range of topics relating to price gouging. Next, it includes nationwide maps that provide a snapshot of which states have dedicated price gouging laws and which states provide for a private right of action under those laws. The third section answers the question of what to expect from price gouging inquiries and how best to navigate them. Fourth, it highlights the most noteworthy prosecutions and active cases that will have lasting impact on price gouging compliance. Fifth, we set forth our analysis of the constitutional issues surrounding price gouging and the dormant commerce clause, and a discussion about platforms and their role in policing price gouging within their sphere of influence. Finally, we provide analysis of the possible evolution of the price gouging statutes and how businesses can plan strategically for compliance.

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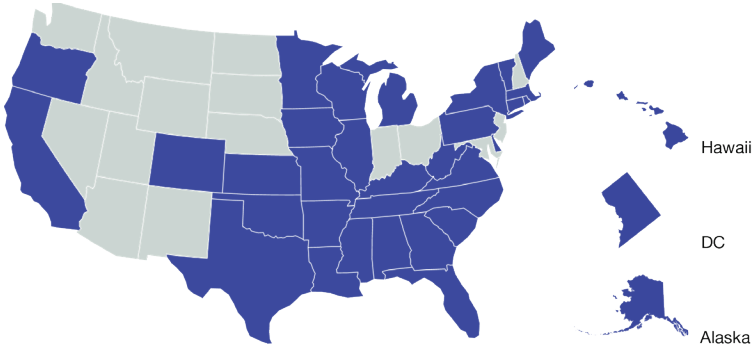
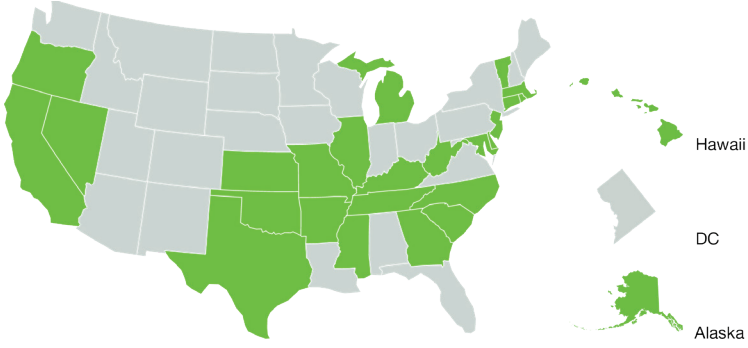
Maps

The maps below provide a quick reference to several of the important features of state price gouging laws.

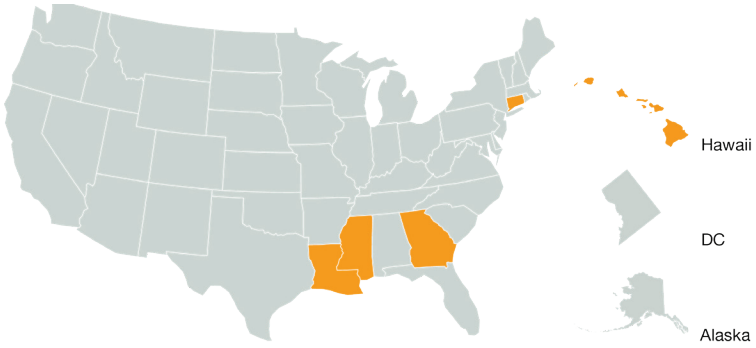
1. The states in **purple** below may apply state price gouging laws to supply chain participants beyond retail consumer facing establishments:



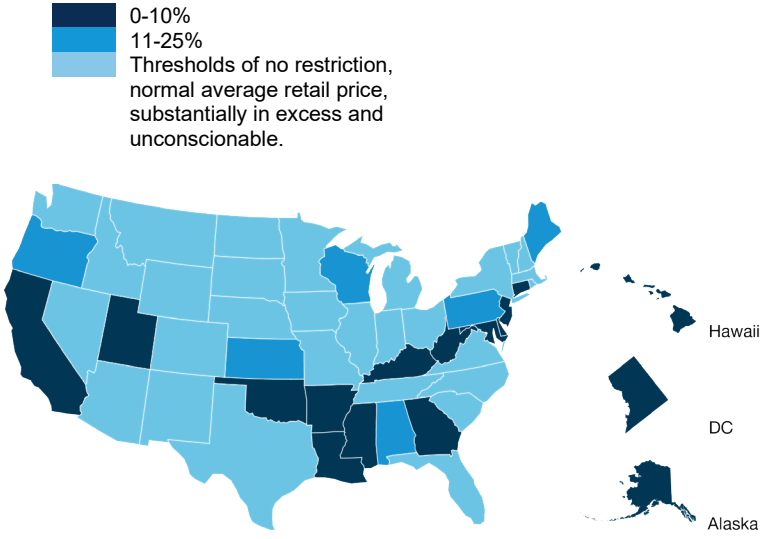
2. The states in **green** below may provide for a private right of action in their states price gouging laws:



3. The states in **orange** below may require pricing freezes for covered products and services when their price gouging laws are activated (subject to defenses sometimes available for cost increases):



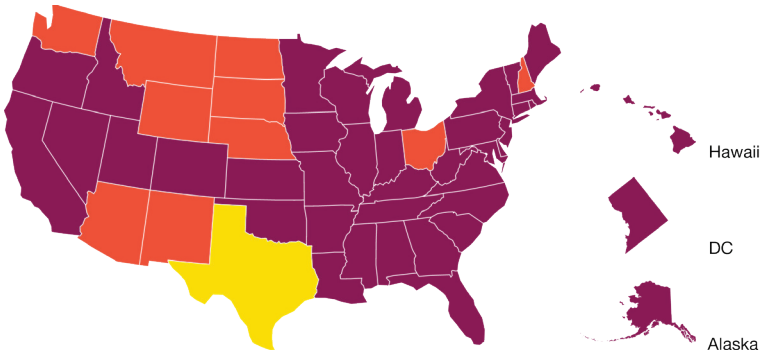
4. The states below reference **state price gouging thresholds**, percentage v. no percent states:



5. The states below reference **states that provide a defense or exception for increased costs**:

Yes
No*
No statute or statute is silent on this issue

* However, the statute prohibits exorbitant or excessive prices. Increased costs may be evidence that the price is not exorbitant or excessive.



Preparing for and Responding to Price Gouging Inquiries

While price gouging laws provide a lens for examining issues like competition or the extent of government regulation of markets, they also serve as the basis and authority for numerous lawsuits and price gouging inquiries by government agencies and private plaintiffs. Responding to a price gouging investigation or private complaint requires careful advance planning and preparation. By properly tracking pricing information, companies can position themselves to quickly and accurately respond to price gouging inquiries by private or public actors.

Preparing for Price Gouging Inquiries

To respond to price gouging inquiries (public or private) a company must have reliable past and present pricing data on hand. For large national and regional businesses that set prices by market, responding to a price gouging lawsuit starts long before a company receives a letter from a potential plaintiff or government investigator.

Initially, identify the states the company sells in or into, and be over-inclusive. Consider not only the states that the company might sell products from, but also the states that products are sold into. State enforcement agencies assert sometimes expansive jurisdiction and are unlikely to be dissuaded from investigating a price gouging complaint based on potential jurisdictional concerns. If, for example, a product is sold free-on-board to a receiving party outside a state, but the impact in downstream pricing occurs within the state, expect regulators and plaintiffs in both states to take notice.

Price tracking should include every state in which the company sells, and should include the relevant pricing restrictions, as well as the products or services that are potentially within scope of the applicable pricing restrictions. The “baseline” price – or the price at the start of the relevant state’s emergency declaration – is key. Price gouging claims will be measured against this price. Monitoring relevant changes to price gouging laws from state governments is also critical, as both Governors and state legislatures implement, and amend, pricing restrictions with some regularity. Finally, note relevant statutes of limitations. State governments and private plaintiffs are likely to investigate potential price gouging claims for as long as possible following the expiration of relevant states of emergency. Statutes of limitations – which generally range from 2 to 6

years depending on the jurisdiction – provide a potentially quick and effective way to cut off any price gouging lawsuit at an early stage, but can also implicate lingering potential liability.

When collecting pricing data, include the bases for pricing movements as these provide the most common defense under most price gouging laws. Note also though that many state price gouging laws do not make exceptions for price increases based for instance on pricing indices, and instead only allow for price increases based on direct and sometimes indirect increased *costs*. Therefore, recording why price changes were made, particularly where they are tied directly to increased costs, will be helpful and powerful evidence to have at the ready. As with statutes of limitations, defenses based on cost increases will allow companies to quickly respond to price gouging inquiries and position the company to avoid extended investigations.

Responding to an Investigation

Price gouging laws have been the basis for hundreds of prosecutions and lawsuits over the last two years. For example, in March 2021 Attorney General Merrick Garland announced, on the one year anniversary of the CARES Act, that the Justice Department had charged nearly 500 defendants with fraud or other crimes, including many for violations of the Defense Production Act's anti-price gouging provisions. This represents just the tip of the iceberg – state governments and private plaintiffs have been the most active in pursuing price gouging claims. State attorneys general have responded to, and opened investigations into, thousands of instances of price gouging across a wide range of products and industries during the last several years.

Therefore, companies can prepare for the possibility of a price gouging inquiry by maintaining good records; having a robust compliance program; and thinking strategically about how best to respond to an inquiry. It has been our experience that state investigators often provide little detail into the scope or ultimate target of their investigations, and instead simply ask for pricing information for certain products in defined time periods. Good questions can help shape, frame and narrow investigations. Narrowing the scope of the investigation is especially important as state investigators remain interested in pricing data for a host of related reasons, including antitrust inquiries. By being very clear that the company arrived and arrives at its prices unilaterally at all times, companies can avoid at the outset letting a price gouging inquiry bleed over into antitrust concerns.

Price Gouging Case Summaries

Constitutional Law

Online Merchants Guild v. Daniel Cameron, Case No. 20-CV-29, (E.D. Ky. May 1, 2020), appeal argued Case No. 20-5723 (6th Cir. Mar. 10, 2021)

A trade association representing online sellers brought suit against the Kentucky Attorney General seeking an injunction. In March 2020, the Attorney General began an investigation into Amazon and the Online Merchants Guild alleging possible price gouging. The Guild challenged the constitutionality of the law, alleging Kentucky could not apply its price gouging statute extraterritorially. In its complaint, the Online Merchants Guild alleged that Kentucky's price gouging laws violated the United States Constitution, specifically the Dormant Commerce Clause, the Due Process Clause, and the First Amendment. Online Merchants Guild members conduct much of their business via Amazon's online platform. According to the merchants, Amazon has the power to oversee sellers on its marketplace, including by removing postings, allowing third party price adjustment applications, or restricting search results. They alleged that the Kentucky Attorney General could not investigate or charge non-Kentucky sellers under the Kentucky price gouging laws given the differences between state price gouging regulations. The district court granted the plaintiffs' motion for a preliminary injunction, which was appealed to the Sixth Circuit.

The Sixth Circuit found that the district court incorrectly granted an injunction preventing the Kentucky Attorney General from applying Kentucky price gouging laws to sellers on Amazon. On October 12, 2021, the Guild moved to voluntarily dismiss its case without prejudice, noting that the Guild and Attorney General were engaged in discussions to address the state's concerns while avoiding further litigation. On May 2, 2022, the district court issued an order to the Guild to show cause to explain why the case should not be dismissed with prejudice. The Guild responded to the show cause order by withdrawing its opposition to the dismissal with prejudice, noting that the Attorney General had reasonably addressed "certain concerns underlying this case."

Bell v. Cal-Maine Foods, Case No. 20-CV-461 (W.D. TX Sept. 24, 2020)

In a class action price gouging case in the Western District of Texas, plaintiffs allege that the Defendant egg producers violated the Texas Deceptive Trade Practices Act ("DTPA"), specifically by selling eggs at an

exorbitant or excessive price during a declared state of emergency. The defendants filed a motion to dismiss the complaint arguing: (1) the plaintiffs lacked standing to bring the case because they did not purchase eggs from the defendants and they did not allege the defendants set the prices for the eggs they did purchase at supposedly high prices, (2) the allegedly wrongful actions did not fall under the Texas DTPA, in part, because the large commercial contracts objected to in the complaint are not covered by the statute, (3) the DTPA is unconstitutionally vague by failing to adequately define "exorbitant" or "excessive," and (4) the statute violated the Dormant Commerce Clause by regulating transactions outside of Texas. The State of Texas intervened in the case to defend the constitutionality of the state's statute.

On September 20, 2021, Judge Robert Pitman dismissed the case after adopting Magistrate Judge Mark Lane's report and recommendation. Magistrate Judge Lane found that the plaintiffs failed to claim the amount in controversy necessary for the court to have subject matter jurisdiction. Plaintiffs argued that their claims against each defendant should be aggregated together but failed to make any factual allegations that the defendants are related or worked together to manipulate and raise egg prices. The district court adopted these findings and dismissed the complaint without prejudice.

Union Square Supply, Inc. v. De Blasio et al, Case No. 1:21-cv-02390-DLC (S.D.N.Y. Mar. 18, 2021)

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." The plaintiffs allege that the City's enforcement is constantly evolving by decisions in cases which change the determination of price gouging and defenses. On March 23, 2021 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.

On November 16, 2021, Judge Denise Cote granted the City's motion to dismiss. Judge Cote found that Union Square Supply failed to state a void-for-vagueness claim, that the price gouging rule provided sufficient due process protections, and that the fines issued under New York's price gouging enforcement did not violate the Excessive Fines Clause. Because Union Square Supply had opportunity to amend its complaint but failed to do so, the federal claims were dismissed with prejudice.

COVID PPE and Consumer Products

New York v. Quality King Distributors, Case No. 052720-n442 (N.Y. Cty. Sup. Ct.)

In May 2020, the New York Attorney General filed a lawsuit against wholesale grocery distributor Quality King for price gouging in violation of New York's price gouging statute. The statute prohibits sellers from offering goods at "an unconscionably excessive price" during "any abnormal disruption of the market for consumer goods." The statute also provides defenses, however, for increased prices to preserve the seller's profit margin and to offset additional costs for the goods or services in question. According to the complaint, while Quality King's costs did not increase, it raised the price of Lysol from approximately $4.25 for a 19-ounce can, up to as high as $9.15. The Attorney General also alleged that Quality King's median unit margin on sales of Lysol was between 47% and 95.5%. As a remedy for the alleged misconduct, the Attorney General sought disgorgement of profits for each of the 46,104 cans of Lysol sold during the time in question, and a civil penalty of $25,000.

Following oral arguments, the Court concluded that while Quality King may have sold Lysol at increased prices, it did not "uniformly" raise the price of the product. The Court also found that Quality King's overall pricing did not "indicate any use of unfair leverage, an abuse of bargaining power or unconscionable means; nor did the pricing represent a gross disparity between the price of the goods and their value measured by the price at which they were sold immediately prior to March 7, 2020." The Judge also concluded that Quality King did incur increased costs for the Lysol and had maintained competitive pricing with its competitors.

Online Platforms

Mercado v. eBay, Inc., Case No. 5:20-cv-03053 (N.D. Cal. May 04, 2020)

Jeanette Mercado, a ride-share driver, filed a proposed class action suit against eBay alleging violations of California's Unfair Competition Law and its Consumers Legal Remedies Act. In the complaint, Mercado alleged she purchased a two-pack of N95 masks on eBay in March 2020 for $23.98. According to Mercado, this constituted a 300% markup from pre-pandemic prices. The complaint also alleged that the proposed class of plaintiffs purchased consumer goods, such as hand sanitizer, toilet paper, paper towels, baby formula, and diapers on eBay's platform. California's price gouging statute prohibits price increases over 10 percent following the declaration of a state of emergency. On February 3, 2020 Santa Clara County declared California's first state of emergency regarding COVID-19 and the Governor declared a state of emergency on March 4, 2020. In the complaint, Mercado alleges that eBay's "ban" on certain sales was insufficient to comply with the price gouging statute. eBay and Mercado entered into a confidential settlement on December 4, 2020.

McQueen v. Amazon, Case No. 20-cv-02782 (N.D. Cal. Apr. 21, 2021)

In a proposed class action case filed in the Northern District of California, consumers alleged that Amazon.com unlawfully increased prices on numerous consumer items. The plaintiffs claimed that they could not safely obtain the products from traditional retailers and that Amazon had "an obligation under California law to ensure that its pricing does not exploit consumers facing emergency conditions." According to the complaint, prices for products such as face masks, pain reliever, and black beans increased between 100% and 670%. In response, Amazon asked the Court to compel the plaintiffs to individually arbitrate their claims. The plaintiffs argued that Amazon's cited arbitration clause was unconscionable and contrary to public policy. On May 7, 2021, the Court granted Amazon's motion to compel arbitration.

Greenberg et al. v. Amazon, Case No. 2:21-cv-00898 (W.D. Wash. Jul. 2, 2021)

On July 2, 2021, a group of consumers filed a putative class action in the Western District of Washington seeking to hold Amazon accountable for allegedly unlawful price gouging during the COVID-19 pandemic on a variety of Amazon-branded products as well as products sold by third-party sellers in the Amazon marketplace. On October 1, 2021, Amazon

filed a motion to dismiss the complaint. Among other things, Amazon pointed to the basic economic principle of supply and demand and argued that the court should not impose a blanket price ceiling of its own accord. Amazon also objected to the plaintiffs' attempt to create a 15% limit on price increases, a standard which is not found in Washington's consumer protection statute or case law. The plaintiffs filed an amended complaint which added an additional named plaintiff and described additional products allegedly sold at inflated prices. The plaintiffs' amended complaint also claims the baseline price for measuring whether price gouging occurred is the "the price prevailing immediately prior to the declaration of a national emergency related to COVID-19." Amazon's motion to dismiss the amended complaint, filed on December 3, 2021, attacked the plaintiffs' attempts to "clarify" the standard for price gouging as unavailing because the statute did not provide for such a standard, and, in any event, such a standard is not clear enough to create a duty to avoid excessive prices.

In their opposition, plaintiffs argue that their claims are viable under Washington's consumer protection law because Amazon's prices, which according to plaintiffs increased up to 826% for named plaintiffs, were "unfair". Plaintiffs cite to Washington precedent to support that no additional price gouging statute is required for the court to find the pricing practices unlawful if they are "unfair". It is up to the factfinder to determine if "an unregulated practice violates the public interest and is thus 'unfair'". Additionally, plaintiffs argue that Amazon's prices could be considered "immoral, unethical, oppressive, or unscrupulous" which Washington courts have established as "unfair acts or practices". Amazon has filed a reply and the parties are awaiting the court's ruling.

Prices Tied to Market Indexing

Texas v. Cal-Maine Foods, Inc., Case No. 2020-25427 (215th Dist. Ct. Harris Cty. Tex. Apr. 23, 2020)

On April 23, 2020, Texas Attorney General Ken Paxton filed suit against a large egg supplier in Texas. The Attorney General alleged that Cal-Maine sold eggs at an "exorbitant or excessive price during a disaster," in violation of the Texas Deceptive Trade Practices Act. The complaint alleged that Cal-Maine raised the price of eggs approximately 300 percent. Cal-Maine moved to dismiss the complaint on constitutional grounds. Cal-Maine also argued that the State had failed to establish the standard for "excessive or exorbitant." Cal-Maine maintained that its eggs are sold on

a national market with independent price quotes. Accordingly, as its prices were tied to such market baselines, the price increase did not violate the Texas statute. The Court granted Cal-Maine's motion to dismiss and State appealed the decision. The appeal has been fully briefed and the parties are awaiting a decision.

Beylerian v. Hillstone Restaurant Group, Case No. 20STCV44916 (Los Angeles Cty. Superior Ct. Nov. 24, 2020)

On November 24, 2020, a class action price gouging claim was filed against a California-based operator of casual fine dining restaurants. The class action lawsuit against Hillstone Restaurant Group alleges price gouging in violation of California Penal Code §396. According to the lawsuit, "Hillstone engaged in unfair and unlawful business practices by increasing its price on food items and also unjustifiably charging a 10% or 15% so-called 'service or packaging fee' for takeout orders." The lawsuit further alleges that "despite increasing the cost of its food items and adding this Fee, there has been no change in the quality or quantity of the food sold or the packaging being offered for pickup by consumers as compared to Hillstone's pre-pandemic offerings." Plaintiffs seek restitution, injunctive relief, attorneys' fees, and punitive damages. Hillstone attempted to remove the case to federal court. In February 2021 the case was remanded to Los Angeles County Superior Court and remains pending.

Profit Margins

Idaho Attorney General and Gasoline Retailers Settlement

On November 18, 2020 the Idaho Attorney General entered into a settlement agreement with three gasoline retailers following an investigation into allegations that the retailers sold gasoline at an "exorbitant or excessive price" in violation of Idaho's price gouging statute. The Attorney General based the theory of liability on the retailers' profit margins. While some jurisdictions use margins as a factor in analysis, the Idaho statute was silent on this point. It only referred to selling at "exorbitant or excessive prices." Despite the fact that gas prices dropped in Idaho following the declaration of state of emergency in March, the investigated companies allegedly saw profit margins steadily rise from the $.10 margins the companies had been collecting in February. Notwithstanding the drop in prices, the Attorney General focused on profit margins that allegedly reached as high as 70 cents/gallon, concluding that such mark-ups are "excessive at any time, but during a declared

emergency it is unconscionable." The settlement agreement discloses that the allegations in the case stemmed from the companies' motor fuel prices following Idaho's declaration of a state of emergency on March 13, 2020.

The Idaho Legislature took issue with the settlement, and amended the state's price gouging statute. The legislation clarifies that only price increases are covered by the price gouging prohibition – not price decreases that are deemed insufficient. Second, the amendments stipulate that for the analysis of whether the price increase is "exorbitant or excessive," courts "shall not consider any increase in the margin earned." However, courts will continue to use other factors in the analysis: i) prices from before the emergency, ii) increased costs, iii) the duration of the emergency, and iv) a newly added provision for loss of sales or volume as a result of the emergency. These amendments appear to respond directly to the concerns raised by the gas retailers – using profit margins as the benchmark and ignoring significant decreased sales. The new law would prohibit investigations like the 2020 retail gas sales investigation that are predicated solely on increased profit margins.

D.C. vs. Capitol Petroleum Group, Case No. 2020 CA 004671 (Superior Ct. Nov. 12, 2020)

On November 12, 2020, D.C. Attorney General Karl Racine filed a lawsuit against Capitol Petroleum Group, LLC ("CPG"), a retailer and distributor of gasoline in the District of Columbia. The complaint alleged that CPG violated D.C.'s Natural Disaster Consumer Protection Act by engaging in price gouging during an emergency, as well as unfairly increasing profits on gas distribution. The Attorney General cited data obtained during his investigation showing the difference between CPG's profit margin before and after the declaration of a state of emergency. During the three months preceding the March 11, 2020, declaration of emergency, the Attorney General alleged that CPG's average profits per gallon on regular gasoline and premium gas were $0.44 and $0.88, respectively. Following the emergency declaration, according to the complaint, the average profit per gallon increased to $0.88 per gallon of regular gas, and $1.23 per gallon of premium gas. On March 31, 2022 defendants moved for summary judgment.

Price Gouging and the Dormant Commerce Clause

The application of price gouging laws during the pandemic has presented numerous challenges for businesses that sell in more than one state, including but certainly not limited to (1) the difficulty of complying with multiple states' varying price gouging regulations at the same time and (2) potential price gouging liability in states into which a business does not sell directly but where its products might end up. These challenges have raised questions about the effect of price gouging laws on interstate commerce and, thus, the dormant Commerce Clause doctrine is relevant.

I. An Overview of the Dormant Commerce Clause

The Commerce Clause of the United States Constitution gives Congress both an affirmative grant of power to regulate interstate commerce and, by negative implication, restricts the states' ability to do the same. *See New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) (stating that the "negative" aspect of the Commerce Clause directly limits the power of the States to discriminate against interstate commerce); *South Carolina State Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938) (noting that the Commerce Clause, by its own force, prohibits discrimination against interstate commerce by state legislatures); *Cooley v. Board of Wardens*, 53 U.S. 299 (1851) (suggesting that, under some circumstances, state regulation of interstate commerce will fail even in the absence of conflicting federal legislation). *See also* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 4 Duke L.J. 569, 570 (1987) (noting that the Commerce Clause in its "dormant" state is thought to invalidate state regulations that discriminate against out-of-state interests or unduly burden the free flow of commerce among the states).

For this second, "dormant" form, state statutes violate the Commerce Clause when they (1) impermissibly discriminate against interstate commerce, (2) are impermissibly extraterritorial, or (3) impose a "burden on interstate commerce" that is "clearly excessive" in relation to the state's interest in the law. *See, e.g.*, *Limbach*, 486 U.S. at 273 (striking down as unconstitutionally discriminatory an Ohio tax credit available only to ethanol producers from Ohio or states which grant reciprocal benefits); *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (striking down as impermissibly extraterritorial a Connecticut law that would effectively prevent Massachusetts-based brewers from undertaking competitive, market-based pricing); *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (striking

down as impermissibly burdensome on interstate commerce an Arizona requirement that would have prevented a company from packaging fruit grown in Arizona at its California facility located approximately 50 miles away).

A. Discriminatory Statutes

Discrimination simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994); *see also, e.g.*, *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 370 (6th Cir. 2013). Such differential treatment "is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other states." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 577–78 (1997).

B. Impermissibly Extraterritorial Statutes

A state law is impermissibly extraterritorial in violation of the Commerce Clause if it either expressly applies to out-of-state commerce or if it has that practical effect, regardless of the intent. Extraterritoriality arguments can be hard to win, however. *Rocky Mountain Farmers Union v. Corey,* 730 F.3d 1070, 1101 (9th Cir. 2013). *See also Energy & Env't Legal Inst. v. Epel*, 43 F. Supp. 3d 1171 (D. Colo. 2014), *aff'd*, 793 F.3d 1169 (10th Cir. 2015). The Supreme Court has struck down only a small handful of state laws as extraterritorial over time. *Rocky Mountain Farmers Union*, 730 F.3d at 1101.

C. Statutes that Impose an Undue Burden on Interstate Commerce

Courts evaluate whether a statute imposes an undue burden on interstate commerce using the balancing test first set forth by the Supreme Court in *Pike v. Bruce Church*, 397 U.S. 137 (1970). In determining whether a statute imposes an undue burden on interstate commerce under the *Pike* balancing test, courts examine whether "the burden on interstate commerce outweighs the local benefits" from the statute. *See Am. Beverage Ass'n*, 735 F.3d at 368. Where a statute provides significant benefits, there is a "strong presumption" that the statute is valid. *See Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444–45 (1978) (noting strong presumption that regulations promoting highway safety are valid). In contrast, where a statute does not provide a "significant local benefit," even "an incidental burden on interstate commerce" imposed by the state

statute would be "clearly excessive" in violation of the dormant Commerce Clause. *See McNeilus Truck & Mfg., Inc. v. Ohio*, 226 F.3d 429, 444 (6th Cir. 2000) (citing *Pike*, 397 U.S. 137). *See also Fla. Transp. Servs., Inc. v. Miami-Date Cty.*, 703 F.3d 1230, 1261 (11th Cir. 2012) (holding that because record showed no local benefit created by the challenged state regulation, its burden on interstate commerce necessarily exceeded its benefits); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573 (4th Cir. 2005) (holding that the lack of a legitimate necessity for the challenged state statute rendered its burdens clearly excessive and therefore unconstitutional).

II. Price Gouging and the Dormant Commerce Clause

Almost by definition, state price gouging laws treat in-state and out-of-state interests the same—they aim to keep prices at a set level based on statute no matter the company or the location of the business. Nor is there any reason to believe that any state price gouging statutes were drafted with the intention of granting in-state businesses an advantage over out-of-state businesses. As such, any challenge to a state price gouging law under the dormant Commerce Clause would likely need to be framed as challenges to extraterritorial regulations or undue burdens on commerce.

In at least one instance, the extraterritoriality doctrine has been the basis for invalidating a price gouging law. In *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), the U.S. Court of Appeals for the Fourth Circuit examined a constitutional challenge to a Maryland price gouging law that prohibited "[a] manufacturer or wholesale distributor" from "engag[ing] in price gouging in the sale of an essential off-patent or generic drug." Md. Code Ann., Health-General § 2-802(a). The statute did not apply to retailers that sell directly to a consumer, and defined price gouging as "an unconscionable increase in the price of a prescription drug." *Id*. § 2-801. The statute further defined "essential" medications as those "made available for sale in [Maryland]" that either "appear[ ] on the Model List of Essential Medicines most recently adopted by the World Health Organization" or are "designated ... as an essential medicine due to [their] efficacy in treating a life threatening health condition or a chronic health condition that substantially impairs an individual's ability to engage in activities of daily living." *Id.* § 2-801(b)(1).

Maryland's law was challenged by the Association for Accessible Medicines (AAM)—a group of prescription drug manufacturers, wholesale distributors, and other pharmaceutical companies—on dormant

Commerce Clause grounds. AAM argued that it "directly regulated the prices charged for prescription drugs in out-of-state transactions, even though its provisions are triggered only when one of those drugs is available for sale in Maryland." *Frosh*, 887 F.3d at 670. The Fourth Circuit agreed with AAM, relying on the principle against extraterritoriality. *See id*. at 667.

While the context and the law at issue are not the same—this case predated the pandemic, and the pharmaceutical-specific price gouging law at issue is different from the state's emergency-triggered price gouging law—this example illustrates how the extraterritorial impact of a price gouging law can compel a court to strike it down as a violation of the Commerce Clause.

However, in the context of price gouging restrictions put in place during the COVID-19 pandemic, the Sixth Circuit rejected the argument that Kentucky's price gouging law is impermissibly extraterritorial. After Kentucky Attorney General Daniel Cameron initiated civil investigations into various Kentucky-based merchants, including one member of the Online Merchants Guild, the Guild sued Cameron seeking a temporary restraining order against application of the state price gouging laws to its member suppliers.

The Guild argued that the application of the statute violated several constitutional provisions, including the dormant Commerce Clause. Its dormant Commerce Clause allegations focused heavily on the extraterritoriality of the law. According to the Guild, because the sales of goods in Amazon's online marketplace were governed by Amazon's own internal requirement that all goods in the Amazon marketplace be priced the same nationwide, by investigating violations of Kentucky's price gouging laws in the Amazon marketplace, in effect, Kentucky was demanding that the vendors charge Kentucky-based pricing in all 50 states. This application, it argued, was impermissibly extraterritorial.

The Guild's preliminary injunction request was granted by the U.S. District Court in the Eastern District of Kentucky, which halted the Kentucky Attorney General's investigations and enjoined the state from enforcing the price gouging statutes against Amazon suppliers. In its dormant Commerce Clause analysis, the district court noted that Guild members merely provide products and recommend prices but have limited control over the final prices set by Amazon, and zero control over where the product is ultimately sold. The court found that the application of

Kentucky's "price gouging statutes to transactions that occur on Amazon have the inevitable effect of regulating the price charged outside of Kentucky. In other words, the Attorney General's actions effectively dictate the price of items for sale on Amazon nationwide." Therefore, the Guild "succeeded in proving a likelihood of success on the merits," and the preliminary injunction motion was granted.

Attorney General Cameron appealed the preliminary injunction, garnering the support of a bipartisan group 31 states and the District of Columbia. Ultimately, on April 29, 2021, the Sixth Circuit remanded, finding that it was Amazon's pricing structure that led to any extraterritorial effect, not the price gouging law itself. *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021). The Court found the extraterritoriality argument unconvincing, given that "in a modern economy just about every state law will have some 'practical effect' on extraterritorial commerce." *Id.* at 559. As a result, it dissolved the preliminary injunction, overturned the lower court's ruling on extraterritoriality grounds, and remanded to the district court for further proceedings.

Another argument available to the Guild—though it was not considered by the district court or addressed on appeal—is whether the application of a state price gouging law unduly burdens interstate commerce. Realistically, sellers do not—and, in many cases, cannot—offer different prices to consumers in different states. The effect of the patchwork of state price gouging laws, with their varied rules and standards, has been that online prices nationwide are functionally governed by the laws of the state or states in which the platform operates. But the scope of the dormant Commerce Clause has waxed and waned over time, and the pandemic may prime the courts to consider its reach again.

While the Sixth Circuit decision to remand in *Online Merchants Guild* may weaken potential defenses based on dormant Commerce Clause principles, it hinges on only one theory and is limited to its particular facts. It is entirely possible than an argument focused on balancing the burdens involved might be more favorable for challengers depending on their particular circumstances.

What About Platforms?

Platforms, or digital/virtual marketplaces, allow buyers and sellers to find and transact with each other. They are not new, and most function much in the way that aggregators have always done and still do in the outside world, much like a local farmers' market. But the rise of the internet has created complex markets and new categories of platforms, which play an increasing role in the economy and in daily life.

Price gouging may be implicated because platforms that facilitate third-party transactions have a unique ability to influence and control third-party pricing. This raises questions about how that may shift responsibility and liability for potential price gouging claims. In principle, the existence of these platforms lowers search costs and fosters competition. In some cases, the success of the most prominent digital marketplaces has led to the question whether they can or should be held liable and accountable for the actions of third-party sellers, including price gouging.

There are risks and benefits inherent in platform marketplaces, and courts have split on their treatment. Conversations about balancing risks and benefits are coming to the fore in the context of price gouging enforcement under various states of emergencies. For now, it remains an open question whether digital marketplaces will or should be treated as more than facilitators for purposes of many kinds of liability, including price gouging.

Early in the pandemic, several online platforms quickly declared their stance on price gouging. For example, on February 28, 2020, before most states had declared a state of emergency, eBay posed an "important reminder" to sellers that price increases over market value, and "attempt[s] to profit from tragedies and disasters," were prohibited. A week later, eBay went on to block all new listings of facemasks, hand sanitizer, and disinfecting wipes, and announced that it would remove existing listings in those categories, citing "regulatory restrictions" across the United States.

On March 23, 2020, Amazon posted an explanation that it "has zero tolerance for price gouging." Noting that, "[m]ore than half of the products on Amazon are offered by third-party sellers who set their own prices," the platform reminded sellers that they are "strictly prohibit[ed] … from exploiting an emergency by charging excessively high prices on products and shipping," and promised aggressive enforcement of that policy.

Despite these messages and platforms' internal enforcement policies, many do not think the platforms are doing enough to protect consumers. Given the lack of clear legal precedent, economic and policy considerations could inform whether platforms that facilitate third-party transactions should be liable for a range of harms caused by their third-party sellers.

On one hand, there is a disconnect between the goals of price gouging regulations and the appetite for holding platforms responsible for enforcing them. That disconnect can be traced to a miscalculation of which parties are best situated to monitor and avoid price gouging in the first place. Platforms are perhaps not in the best position to do so. They may, for example, lack the actual sellers' level of detail and transparency needed to determine what price increases are properly justified by supply disruptions or increased costs. Extending liability could therefore threaten the viability of many online marketplaces while doing very little to improve price controls. Indeed, if platforms are asked to shoulder the burden of price gouging liability on behalf of their third-party sellers, the outcome could be inefficient enforcement and unwelcome and unintended effects on sellers and consumers. It may make more sense and prove more of a deterrent for the liability to remain with the actual "bad actors," i.e., the third-party sellers that set their own prices.

Further, expecting platforms to monitor and determine appropriate pricing raises possible antitrust risks. In particular, for platforms that are also participants in their own markets, there may be concerns about the motivations for and considerations that are factored into pricing decisions.

On the other hand, platforms, rather than being mere bystanders to price hikes on their platforms, do profit from this behavior. Based on their level of control, platforms may be in the best position to protect consumers and their own reputations by setting price caps and/or publishing suggested, average or historical prices. Rather than addressing price gouging only if and when it arises, platforms could conceivably draft and enforce strong policies and practices that trigger scrutiny when there is deviation from historical prices by the individual seller as well as across the market for the same or similar products. Platforms could also adopt the model that many state attorneys general have embraced and allow consumers to report price gouging incidents to the platforms themselves. Given where price gouging harms fall, consumers could be valuable—and easily accessible—allies for platforms that either want, or are forced to, shoulder

more of the burden of preventing and responding to price gouging allegations. Online platforms are also more nimble than most if not all enforcement mechanisms, and are often have the human, financial, and technological resources to develop workable solutions.

Federal and local governments have been understandably busy dealing with the day-to-day challenges brought on by the COVID-19 pandemic. But as this emergency abates, likely in the near future, these actors will at some point have the opportunity to take a step back and consider what changes might be desired before the next emergency. Platform liability will certainly be on the table in many of these conversations.

The Future of Price Gouging

We close with an assessment and prediction on the future of price gouging compliance and related legislation. Price gouging is likely to remain top-of-mind for politicians and commentators as the United States transitions into a post-COVID-19 economy.

Lawmakers have claimed that recent rapid increase in consumer good prices—most notably for food and gasoline—can be attributed to businesses in concentrated markets engaging in price gouging. Relatedly, price gouging accusations began to circulate immediately upon the onset of a nationwide infant formula shortage. The FTC quickly launched an investigation into, among other things, "anyone who deceives, exploits, or scams American families trying to buy infant formula." Many state AGs have issued warnings and launched investigations into potential price gouging with respect to sales of infant formula both in stores and online. Price gouging compliance is not going away and with pending federal legislation coupled with new or renewed efforts to bolster consumer protections at the state level, businesses at all levels must remain vigilant to ensure compliance.

To stay ahead of the next wave of price gouging accusations, businesses must focus on indicators that their industry could face the types of market disruption that precede price gouging accusations, and monitor enforcement and legislative developments.

Price Gouging Indicators

A few indicators may provide useful in predicting the next target for price gouging complaints.

- Significant, rapid, and public price increases, such as the dramatic increase in gasoline prices during the first half of 2022.
- Prices outpacing inflation or the consumer price index (CPI) by a large margin.
- Shortages that result in bare shelves, while not a price gouging violation, indicates that an industry is likely to come under greater scrutiny and will be the target of accusations of opportunism.

These indicators can serve as valuable signals to businesses that they can expect to receive inquiries from state AGs, the FTC, or consumer groups. As discussed in the *Preparing for and Responding to Price*

Gouging Inquiries section above, there are proactive steps business can take to minimize litigation risk and satisfy regulatory inquiries.

Enforcement Developments

Perhaps the most significant economic development to emerge post-COVID-19 is the rapid rise of inflation. In June, the Bureau of Labor Statistics reported that the CPI increased 8.6 percent over the past year. Price increases for rent, gas, used cars, and food are hitting consumers hardest. Most state price gouging laws do not specifically allow for cost increases as a result of inflation, although most allow for cost increases to sellers to be passed on to consumers. Price gouging laws do not address inflation or explicitly permit price increases to keep pace because they typically contemplate short term usage, and inflation normally would not be a significant factor in the short term. Companies that face inflationary cost increases, or need to increase prices to keep pace with inflation, should track such increases and their bases, because these may be a defense to future allegations of price gouging.

Recently, lawmakers have honed in on increased margins as evidence of price gouging. The allegation is that businesses are not merely passing along increased costs, but instead are taking advantage of market conditions to tack on additional and unfair increases—and add to their own profit margins. As shortages occur in certain industries, the spot-market for the supply of products may also drive up the prices. This can result in a period of strong revenues and profits, which draws scrutiny. For example, oil refiners and some food processors have posted record profits while consumers are facing widely publicized price increases. To prepare for such scrutiny, companies should track increases in their usual and customary margins and be prepared to justify them if faced with allegations of price gouging.

Legislative Developments

At the time of this writing, the introduced federal price gouging legislation is not expected to pass both chambers and be signed into law. At a state level, lawmakers in states without price gouging laws may face pressure to enact stronger consumer protection measures, and states with existing price gouging laws are likely to address some of the perceived holes in statutes and enforcement mechanisms. We anticipate that lawmakers in the second group will look to impose greater liability on platforms for the

pricing practices of third-party sellers and address size and quantity issues that arise when trying to calculate price increases under current laws.

First, as discussed in *What About Platforms?* above, liability for retail platforms for the prices of third-party sellers remains an open question. Some platforms state publically that they have a "zero tolerance for price gouging" policy. However, pending litigation seeks to hold Amazon liable for the sale of products by third parties on its platform to consumers at significantly increased prices during the height of the COVID-19 pandemic. Regardless of the outcome in that case, lawmakers may see platforms as an easy target to demonstrate that they are combatting high consumer prices.

Second, new legislation may look to address holes in the methods existing price gouging laws use to calculate price increases. Because price gouging laws were originally intended to be in effect for short periods of time, there was little need to consider changes to product lines.

For example, many price gouging statutes calculate price increases by comparing a product's price before an emergency with its price during the emergency. This method does not consider product variations that may occur. Consider a hypothetical water bottle producer that typically sells in 16 and 24 ounce bottles for $2.25 and $2.75 respectively discontinues both lines and begins selling a 20 ounce bottle for $2.65 during an emergency. On a per ounce basis, the price of the water bottle increased approximately 15% from the 24 ounce bottle, but marginally decreased in per ounce cost from the 16 ounce bottle. While many price gouging measures would restrict a 15% price increase absent a showing of increased costs neither the 16 nor 24 ounce bottles would be the *same product* as the new 20 ounce bottle under typical price gouging statutes, and thus the prices could not be compared for a potential violation.

A related concept is shrink-flation; the practice of reducing the size or quantity of a product to maintain its sticker price. As currently written, many states' price gouging laws compare prices of *the same good* before and after the start of the emergency to determine if the price is in violation. Are goods the same if they are packaged in different size containers or sold in different quantities? Legislatures may now look to address some of these issues by supplementing existing price gouging laws to address these scenarios.

The Path Forward

At the outbreak of the COVID-19 pandemic two and a half years ago, businesses were forced to creatively find ways to safely sell their products to consumers. Price gouging laws, intended to serve as consumer protection shields, placed many well-intentioned businesses in their crosshairs as supply-chain disruptions, labor costs, and inflation all pushed prices higher. As COVID-19 recedes, many of these same forces continue to drive prices up. Politicians, regulators, and plaintiffs' attorneys have taken notice. Businesses seeking to avoid and minimize the cost of price gouging compliance must ensure they are well informed on the ever-changing price gouging landscape and are prepared for when their industry comes under increased scrutiny.

The Basics

Can You Sue for Price Gouging?

State attorneys general are not the only ones enforcing price gouging laws in the current pandemic. Many states also provide a private right of action for victims of price gouging. Depending on the state, private litigants may seek injunctions, civil penalties, or even damages under state price gouging statutes and consumer protection laws. These remedies, and recent case filings, highlight the importance of price gouging compliance during this unprecedented global pandemic.

Violators of price gouging statutes in states with a private right of action could find themselves facing class actions and hefty damages claims. Remedies available to private litigants range from damages, restitution, injunctive relief, and/or attorneys' fees. New Jersey's Consumer Fraud Act, for example, provides that

[a]ny person who suffers any ascertainable loss of moneys or property . . . may bring an action . . . . In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. [T]he court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

N.J. Stat. Ann. § 56:8-19. North Carolina also provides for a private right of action under its consumer protection laws, which allows victims to recover treble damages, as well as attorneys' fees if the judge finds that the defendant willfully engaged in price gouging. N.C. Gen. Stat. § 75-16.

Some states, like Arkansas, have enhanced penalties for violators that target the elderly or disabled persons. Under Arkansas' Deceptive Trade Practices Act, "[a]n elder or disabled person who suffers damage or injury as a result of an offense or violation described in this chapter [including price gouging under § 4-88-301 et seq.] has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees." Ark. Code Ann. § 4-88-204. Michigan not only allows victims to recover their actual losses but also specifically allows for class actions. Under the Michigan Consumer Protection Act, "[a] person who suffers loss as a result of a violation of this act may bring a class action on behalf of persons residing or injured . . . for the actual damages caused by

. . . a method, act, or practice in trade or commerce defined as unlawful under section 3 [including price gouging].” Mich. Comp. Laws § 445.911(3)(a). California’s consumer protection laws provide a private right of action for an injunction, though some have argued that restitution may also be available for price gouging—as in a recently filed California class action.

Several class actions have already been filed by consumers against companies for alleged price gouging, and more are expected in the coming weeks and months—even potentially where there have been only modest pricing movements and even after the emergency declarations have been lifted. Companies that are subject to the scope of price gouging statutes can engage in appropriate compliance efforts to seek to avoid such claims, and to ensure they can address such claims if they arise.

Anatomy of a Price Gouging Suit

If there is a silver lining to the extended application of most state price gouging laws, it is that we now know more about their ramifications. State attorneys general have launched numerous investigations and brought many lawsuits, and several class actions have been filed by consumers against companies for alleged price gouging up and down the supply chain. Insights can be gleaned from these price gouging-related suits to understand the "anatomy" of these suits, including what they allege, how to avoid them, and, when necessary, how to defend against them.

Activation

States activated their price gouging statutes in March. As we have noted, most states continue to signal that their pricing restrictions remain in effect. These statutes create different ranges of time during which lawsuits can be initiated, by varying actors.

- **Continuing impact:** Since some of the statutes allow for private causes of actions to be brought for years following the alleged violations, price gouging liability will be an ongoing issue.
- **Authority to sue:** While some state price gouging laws vest prosecutorial authority solely in the state's attorney general, others permit private plaintiffs to bring suit on their own. In practice, we have seen state attorneys general, private plaintiffs, and the federal government all involved in price gouging investigations and enforcement actions targeting the entire supply chain.

Proactive Strategies

Companies can consider certain steps to avoid being entangled in investigations or actions, and to best situate themselves to defend against actions that may arise.

- **Internal practices:** In general, companies will benefit from reliance on their compliance practices and their own internal documentation of costs and justifications, both in avoiding investigations and in defending against any eventual lawsuit.
- **Declaratory Judgments:** As previously suggested on this blog, businesses should consider whether, in the appropriate circumstances, they may be able to head off a significant expense, or

even ultimate liability, with a well-constructed declaratory judgment action.

Legal Theories

Should a company ultimately wind up on the other side of an investigation, or defending against a lawsuit, they should be cognizant of the variety of legal theories that are being raised in similar actions. In addition to straightforward claims of violations of the state price gouging laws, many other statutes or legal theories are also being used to prosecute price-gouging claims, including:

- **Unfair competition laws:** In multiple federal district court actions, plaintiffs' complaints have included a cause of action based on violation of a state unfair competition law.
- **Consumer protection laws:** In at least one case in a federal district court, class action plaintiffs' complaint included a cause of action based on violation of a state deceptive trade practices act.
- **Quasi-contract / unjust enrichment:** In multiple federal district court actions, plaintiffs' complaints included a cause of action based on unjust enrichment theories.
- **Negligence:** In at least one price gouging case in a federal district court, class action plaintiffs' complaint included causes of action based on negligence and negligence per se.
- **Fraud and deceit:** In at least one case in a federal district court, a private plaintiff's complaint included a cause of action based on the alleged willful and intentional injury plaintiff suffered and/or defendant's willful and intentional injury, intentional misrepresentations, and/or negligent misrepresentations.
- **Other statutes:** In at least one case in a federal district court, a private plaintiff's complaint included a cause of action based on RICO, alleging a pattern of racketeering activity and for the unlawful purpose of intentionally defrauding and extorting monies from Plaintiff.

Penalties:

The available remedies sought for price gouging violations can range widely. (For more in depth discussion of some of the damages claims companies could face, see our prior post.) In addition to injunctive relief, other penalties can include:

- **Restitution:** Many price gouging statutes include restitution as a possible (and, importantly, a nonexclusive) penalty, providing for companies to refund customers any amounts those customers paid in excess of the permissible prices.
- **Civil penalties:** Many states allow for civil penalties to be imposed on a "per violation" basis. Some statutes impose a daily or a total cap on potential liability, but not all price gouging statutes that allow for financial penalties include such caps.
- **Recovery of costs of litigation:** Some statutes, like those of Delaware and Pennsylvania, allow for fees and costs incurred when investigating the price gouging at issue to be shifted to the defendant.
- **Criminal penalties:** Some statutes allow that, depending on the circumstances, violators could be jailed, with potential sentences ranging from thirty days up to ten years.

Defenses:
Finally, companies can also familiarize themselves with the defenses and legal justifications for their price increases, including:

- **Goods or services not covered**: The specifics of the coverage varies widely, and many price gouging statutes only apply to limited goods or services.
- **Standing**: Consumers often lack a private right of action, and hence lack standing to sue under many of the state price gouging laws. Some statutes also require plaintiffs to prove that they suffered actual damage or injury, not just identify an impermissibly heightened sales price.
- **Class certification:** Differences in pricing may pose barriers to class certification.
- **Mootness:** Depending on the timeline of the case and the status of the relevant state(s) of emergency, permanent injunctive relief may become moot.
- **Justifications**: Many state price gouging statutes contemplate justifications and exceptions that act as a complete defense where, for example, the seller can prove the price increase was directly attributable to its own rising costs of supply, labor, or materials. A New York Supreme Court recently dismissed a price gouging case

despite allegations that defendant's costs had not increased, where the defendant was able to demonstrate that its prices were not "unconscionable or overall extreme."

No Country for Price Gouging: States Can Punish Price Gouging Without Price Gouging-Specific Laws

Though much attention has been paid to state price gouging laws, several states without price gouging laws have nevertheless been active enforcers. Governors in many of these states have issued executive orders empowering their enforcers to target price gouging. Other states have repurposed existing laws to target price gouging. Price gouging in these states may pose greater compliance risk than in states with specific price gouging laws because these the states may not have statutory definitions or clear standards for what conduct constitutes unlawful price gouging. In this post, we consider price gouging rules and enforcement in states without price gouging-specific laws. Numerous states without price gouging laws have taken steps to prevent price gouging, often adopting rules similar to those in states with price gouging laws. For example, in Arizona, Governor Ducey issued Executive Order 2020-07, which mirrored many states' price gouging statutes by defining the practice as "charging a grossly higher price than that which was charged before the onset of the emergency." Unlike most states however, Governor Ducey limited the restriction to "licensed health professional[s] or healthcare institutions," and authorized the Department of Health Services to investigate.

Similarly, Delaware's Governor John Carney used his emergency statement to declare price gouging a violation of the state's consumer protection laws. Delaware's consumer protection statute forbids the use of "deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with the intent that others rely upon" that concealment. 6 Del. Code § 2315. On its face, this language would not appear to cover price gouging. However, Governor Carney's order declared price increases of over 10% to be price gouging, and explained that price gouging would be treated as an unlawful practice under § 2513. If and until the Governor's order is successfully challenged, Delaware will apply this framework. As written, the order applies to all goods and services, and bars price increases of more than 10% unless the increase is attributed to costs imposed by seller's suppliers. Notably, the Delaware consumer protection law specifically provides a private right of action in § 2525.

Minnesota, a leading enforcer of price gouging, does not have a price gouging law. However, on March 20, 2020, Governor Tim Walz signed an executive order stating: "all persons are prohibited from selling, offering to sell, or causing to sell in this state any essential consumer goods or services for an amount that represents an unconscionably excessive price." The order defined "unconscionably excessive" in three different ways, each of which borrows from language in other states. First, prices can be unconscionably excessive if there is "a gross disparity between the price of the good or service and the price of the same good or service that was sold or offered for sale in the usual course of business during the thirty (30) days immediately prior to the peacetime emergency." Second, the price is 20% or greater than the price of the same good or service in the 30 days before the state of emergency. Or third, the amount charged for the good or service "grossly exceeds the price at which the same or similar good or service is readily obtainable by other purchasers in the trade area."

Governor Walz's order used existing Minnesota law to implement penalties for price gouging. Minnesota, like many states, permits Governors to implement emergency rules during a state of emergency. In Minnesota, this authority includes the ability to make rules that can come with penalties. Governor Walz relied on Chapter 12 of the Minnesota Code to implement a fine of "up to $10,000 per sale or transaction." See Minn. Stat. § 12.45. These are some of the highest penalties for price gouging in the United States, and they indicate just how seriously Minnesota intends to take price gouging.

After Governor Walz issued his executive order, Attorney General Keith Ellison took quick steps to investigate price gouging. Reports indicate that many of these investigations began with retailers. Consumer complaints often lead investigators to specific retailers. In a number of cases however, these retailers then send investigators along to their suppliers, and so-on up the supply chain. So even though commentary suggests many investigations began with retail, upstream companies may want to consider Minnesota's efforts, along with others investigating upstream suppliers.

Other states have simply repurposed consumer protection laws to target price gouging. For example, in Montana, Attorney General Tim Fox issued a statement saying "state law protects [consumers] from unfair and deceptive trade practices and price fixing." AG Fox's statement argues that the states' standard consumer protection statute covers price gouging. The statute prohibits unfair methods of competition and unfair or deceptive acts or practices. MT Stat. § 30-14-103. This statute also comes with civil fines up to $20,000 for willful violations, along with extra criminal penalties. Most other states also have similar consumer protection laws, which may leave open the possibility for enforcement under these laws.

These efforts and other new price gouging laws demonstrate how rapidly the price gouging landscape is evolving. Two states have passed new price gouging laws in the past few weeks, and six have pending legislation. There are still a number of states without price gouging laws, including: Colorado, Nebraska, New Hampshire, and North Dakota. But companies would be well advised to keep an eye on their price gouging compliance efforts even in states without price gouging-specific laws presently in place.

Price Gouging Compliance Practice Tips: Conduct a Price Gouging Audit

Understanding and Reacting to New and Increased Risks

Businesses are facing new and increased risks as they work to continue operations and meet changing demand. The unprecedented duration and nationwide scope of the emergency has created additional complexities for companies that operate on a nationwide basis. They often must comply with price gouging laws in many more states and over a substantially longer period of time than has ever occurred in any prior emergency in which price gouging laws were activated.

The definition of price gouging varies significantly from state to state, and consequently, so do the compliance standards. Non-compliance could be met with hefty penalties, as most states charge per individual violation. State attorneys general, private plaintiffs, and the federal government have all been active in price gouging investigations and enforcement actions up and down the supply chain.

Because these price gouging compliance risks are both new and unique to this pandemic, companies cannot necessarily rely on their existing monitoring and risk mitigation systems (for price gouging or otherwise). Even those few companies that had price gouging compliance procedures in place before this pandemic may find that those procedures are out of date or incomplete due to recent changes in the law and changes in enforcement priorities. Given the increased risks to national and multi-state companies across the supply chain, companies should consider conducting what effectively amounts to a "Price Gouging Audit."

Creating a Compliance Tracking Process

Companies should consider a review of their current policies and procedures to track and comply with the particular price gouging laws that affect their business. A Price Gouging Audit may include a range of steps, depending on a particular company's facts and circumstances, and could include:

- Identifying which goods and/or services may be subject to various price gouging laws and regulations;
- Tracking sales and identifying the states in which a company may be deemed to do business for the purpose of the price gouging laws;

- Determining which state or local regulations may apply;
- Determining how to set a compliance baseline;
- Evaluating current employee training processes to see if additional training on price gouging is necessary; and/or
- Evaluating current price setting and documentation processes to see if changes should be made in light of price gouging laws.

Depending on the results of their review, a company may also want to take affirmative steps to create additional protocols for price gouging compliance. These steps could include:

- Developing additional employee training processes to account for price gouging training;
- Developing additional price setting and documentation processes to account for price gouging laws; and/or
- Creating an overarching price gouging compliance monitoring team to help oversee the above processes.

Benefits of Conducting a Price Gouging Audit

Engaging in a Price Gouging Audit may help companies understand the unique risks and requirements of this moment, and enable them to create a single strategy to do business in multiple states while staying within the bounds of the multiple and varying state price gouging legal regimes to which they may be subject.

Pandemic Price Gouging Laws Unintentionally Harming Businesses and Consumers

Most price gouging laws have been in effect for upwards of five months. These laws were not designed for the length and national scope of the current pandemic, which has led to them unintentionally harming businesses and the economy, and ultimately consumers along the way. In a recent Fortune article, Proskauer's antitrust lawyers Chris Ondeck and Jennifer Tarr discuss several options to remedy these issues while still achieving the goals of these laws.

COVID Specific

Price Gouging Laws Remain Even When Social Distancing Laws Have Ended

Florida Governor Ron DeSantis recently made headlines around the country by announcing that he was lifting physical distancing restrictions on restaurants and other businesses in Florida. The Governor's order allows restaurants to open at full capacity, and prevents cities and counties from ordering them to operate at less than half capacity unless justified by health or economic reasons. Florida cities and counties are also barred from collecting fines for violations of social distancing or mask rules. But, while such actions may seem to indicate an imminent return to something resembling normalcy, or at least the end of widespread social distancing restrictions, it is important for companies to remember that price gouging laws may not follow the same path.

Indeed, while Florida's Governor has moved to re-open the state's economy, the Florida Attorney General has continued to actively monitor and enforce compliance with the state's price gouging law, including by continuing to operate the state's price gouging hotline. And as Florida continues to deal with the aftermath of the hurricane season, it is likely that price gouging laws will continue to remain in effect there for some time to come.

Florida does not stand alone as the only state attempting to both re-open its economy while also maintaining its price gouging laws. In Texas, the Governor likewise loosened social distancing restrictions, allowing many businesses to operate at 75% capacity. These businesses, previously allowed to operate at only 50% capacity, include retail stores, restaurants, and office buildings. However, as in Florida, the move to physically re-open businesses does not mean a similar freedom of pricing actions, as Texas' current price gouging law is set to remain in effect indefinitely under the President's national emergency declaration, which currently has no end date.

On the other hand, the fact that a state is still under a state of emergency because of the COVID-19 pandemic does not mean that the state's price gouging laws are necessarily still in place. Recently, Wisconsin allowed its price gouging laws to expire, despite the fact the state remains in a state of emergency. Just as a business should not simply assume they are safe to raise prices because social distancing restrictions have been lifted, a company should not assume it cannot raise prices until all government measures related to the pandemic have ceased.

Therefore, companies must remain vigilant in monitoring the legal landscapes in which they operate, and not assume that price gouging laws either are or are not in operation because of other trends in the headlines. Given that the statute of limitations for many state price gouging laws will allow plaintiffs to bring claims for several years into the future, it is important that price gouging remain a key compliance concern for businesses for the foreseeable future.

A Test Costs What? Pricing and Reimbursing COVID-19 Tests

Out-of-network providers appear to be inflating the price of COVID-19 diagnostic and antibody tests, according to a recent America's Health Insurance Plans (AHIP) survey. The October 2020 survey reports that out-of-network providers, as a whole, were charging higher prices for nearly half of the COVID-19 diagnostic tests and a third of antibody and antigen tests—a 10% increase since July. As the AHIP reports, nearly half of all out-of-network diagnostic testing exceeded $185, with between 9% and 16% of out-of-network test claims charging "more than $390 (three times the average cost)." The amount of COVID-19 tests administered out of network has also increased since July, by 14%.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted on March 27, 2020, provides that insurance plans must "provide coverage, and shall not impose any cost-sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements," on COVID-19 testing. The Act requires test providers to publicize the "cash price" for COVID-19 diagnostic tests—though it does not set pricing benchmarks for reasonable pricing. (In practice, major commercial labs have reported posted prices that range from $95-$209 for diagnostic tests.) Should providers not comply with the requirement to publicize the "cash price," the Secretary of Health and Human Services is authorized to impose a civil fine of up to $300 per day that the information is unpublicized.

Unless insurers have negotiated their own reimbursement rates with providers, the CARES Act requires health plans to reimburse up to that "cash price," "as listed by the provider on a public internet website." From the providers' point of view, as AHIP notes, the requirement that providers reimburse the cash price "eliminates their ability to negotiate more affordable test prices."

From the consumers' perspective, the CARES Act does not set forth billing procedures, and, in particular, does not prohibit out-of-network providers from billing patients directly for the COVID-19 test. This can lead to confusion for consumers, who may be eligible for reimbursement from their health plan under the CARES Act, but may not be aware of their eligibility. Some states have stepped in to interrupt this practice. In Washington, for example, the insurance commissioner issued an emergency order that prohibits labs from billing insureds.

Policymakers may take action to constrain prices, or perhaps an increase in testing availability and options will help lower costs. In the meantime, in addition to the federal protections under the CARES Act, states can also take action on perceived price gouging related to COVID-19 diagnostic tests.

Some state price gouging laws clearly apply to COVID-19 testing. For example, Virginia's statute explicitly applies to "medical supplies and services." Even more directly, the Florida Attorney General issued a statement on the commodities covered under the state of emergency that includes "COVID-19 test kits, swabs, and related consumable medical supplies used in administering tests." (Indeed, the state initiated a price gouging investigation of a Florida hospital for high-priced COVID-19 tests, though the hospital was eventually cleared of wrongdoing.).

While the form of their response varies, high testing prices are triggering state action. Politico has reported that several states have taken steps to either cap costs or provide more guidance as to what insurance should pay for COVID-19 testing; at the same time some insurers, who are supposed to cover these tests but are balking at high prices, "have tried to get out of paying lab claims even for those patients showing symptoms." We expect states to continue to take an interest in this area, and to take additional steps and pursue investigations as appropriate.

Costs of COVID-19 Vaccines: What We Do and Don't Yet Know

The roll-out of vaccine approvals has led to some confusion over what charges consumers might be asked to cover. This echoes the confusion previously discussed with respect to COVID-19 diagnostic and antibody test pricing. But consumers, providers, and others that will have any involvement with vaccine production, distribution, or administration should be aware that the Coronavirus Aid, Relief, and Economic Security (CARES) Act provides different rules for treatment (including testing) than it does for preventative care, like the recently approved vaccines.

The CARES Act provides that all insurance plans that are subject to the Affordable Care Act's (ACA) preventative services coverage standards must cover any qualifying coronavirus preventive services, including approved vaccines, without cost-sharing. It also provides that Medicare plans must cover the cost of the COVID-19 vaccine and its administration, without cost-sharing. This coverage applies to both in-network providers. In short, if the primary purpose of a medical visit is to receive a covered vaccine, then the vaccine recipient should not be responsible for any out of pocket costs. However, if their appointment or doctor's visit includes health services unrelated to COVID-19—such as bloodwork—the recipient may be charged for those services.

Notably, federal rules require that coverage must begin to apply within 15 days of a vaccine's approval by the Advisory Committee on Immunization Practices (ACIP), accelerating the usual timeline required for plans to incorporate a new recommendation. Insurance plans are therefore currently required to cover the cost of both of the vaccines that have been approved in the United States. (The ACIP provided its interim recommendation for the Pfizer-BioNTech COVID-19 vaccine on December 12, 2020 and subsequently issued its interim recommendation for the Moderna COVID-19 vaccine on December 19, 2020.)

Not all health care plans are covered by these requirements. Plans that are not subject to the ACA's preventative services coverage standards are not subject to the CARES Act and its vaccine coverage requirement. These plans—which could include short-term health plans, fixed indemnity plans, or some grandfathered plans—may take varying approaches to vaccine coverage. It appears that these plans can require that beneficiaries pay cost sharing for vaccines or can exclude recommended vaccines from coverage altogether. Individual states may ultimately

require plans to cover the vaccine and waive cost-sharing. Alternatively, the plans may decide, for any number of reasons (including, e.g., concerns about employee health and safety) to provide coverage, though they may or may not decide to waive cost-sharing. At least one such plan has already said that COVID-19 vaccine costs will be "shareable."

Several open questions remain. First, it is unclear how much the vaccine could cost (either to recipients or to insurers) in the future, following the conclusion of the public health emergency.

Second, uninsured vaccine recipients may see differences in billing in the long term. Providers that administer an approved COVID-19 vaccine to uninsured recipients will be reimbursed for vaccine administration costs through a provider relief fund created by the CARES Act. The federal government has not indicated how it will handle these reimbursements if that relief fund should be depleted.

Third, because vaccine coverage arises from the ACA's preventative services coverage standards, the Supreme Court's forthcoming decision on a pending challenge seeking to invalidate the law's individual mandate could greatly impact this area, and potentially eliminate or reduce cost coverage.

Finally, and of particularly salience for price gouging concerns, even though the vaccine itself is free, vaccine recipients might still see bills. Some providers can legally charge an administration fee for giving the shot, according to the CDC. Those providers can seek reimbursement for such a fee from either the recipient's "public or private insurance company or, for uninsured patients, by the Health Resources and Services Administration's Provider Relief Fund." Several states prohibit price gouging for medical services, and it remains to be seen whether and how any fees could be justified or challenged under different state laws.

In summary, most but not all COVID vaccines costs should be covered without cost sharing to recipients, related additional charges for the treatment visit might not be covered, and all the non-covered charges likely are subject to state price gouging laws.

Non-COVID Industries/Triggers

Price Gouging Laws and Overlapping States of Emergency

Most price gouging laws have been in effect throughout the country since early March due to the pandemic. As hurricane season gets underway, businesses should be aware that new states of emergency may be declared, overlapping with current pandemic states of emergency. New states of emergency may trigger price gouging laws that cover a variety of goods not currently covered under those related to COVID-19.

While some price gouging laws cover a wide range of goods and services, many laws are narrower, focusing on the type of emergency. For example, Florida's price gouging law states that it is unlawful "to rent or sell or offer to rent or sell at an unconscionable price within the area for which the state of emergency is declared, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency." Fla. Stat. § 501.160. Florida has been under a state of emergency related to the pandemic since March 9, 2020, but on July 31, 2020, Governor Ron DeSantis declared another state of emergency for multiple east coast counties due to Hurricane Isaias.

The effect of an overlapping state of emergency means that new goods and services may be covered under Florida's price gouging laws, separate and apart from commodities related to the health crisis. According to Florida Attorney General Ashley Moody, "[e]ssential commodities for each event may differ." While some essential commodities are already covered under the pandemic related state of emergency, additional goods and services related to preparing and recovering from the storm will be covered under the July 31, 2020, emergency declaration.

Similarly, North Carolina declared a state of emergency on July 31, 2020, due to Hurricane Isaias. According to North Carolina Attorney General Josh Stein, "North Carolina's price gouging law is already in effect because of the coronavirus, but it applies to hurricanes as well." North Carolina's price gouging law prohibits any person from selling or renting goods or services which are "consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive

under the circumstances." N.C. Gen. Stat. §75-38. Like Florida, North Carolina's law may cover additional goods or services specifically related to preparing and recovering from the hurricane.

There have also been a variety of states of emergency in effect throughout the pandemic completely unrelated to COVID-19. For example, some West Virginia counties were under a state of emergency in mid-June due to flooding. West Virginia's price gouging law, among other items, covers "goods for emergency cleanup" and "emergency supplies," which likely differ from the goods covered under the pandemic state of emergency. One Tennessee county was similarly under a state of emergency for flooding in July. Tennessee's price gouging law, among other items, covers "emergency supplies," which again, likely differ in the event of a flood.

Price gouging related to the public health crisis has been the focus of State Attorney General enforcement actions and private litigation in recent months, but a variety of natural disasters can lead to increased scrutiny around price gouging as well. Businesses should keep these short term emergencies in mind when pricing products that may be covered by a state price gouging law. Further, businesses should also be aware that with a new state of emergency unrelated to the pandemic potentially comes a new baseline price for certain products. See our blog post on How to Calculate a Baseline Reference Price for Price Gouging Compliance for more details.

Beyond Essential Goods and Services: Price Gouging Laws Being Applied to a Wide Range of Products

The majority of price gouging laws have been activated throughout the country for over a year now, but reports of price gouging continue, along with enforcement and lawsuits. While many are aware that price gouging restrictions apply to essential goods such as medical and emergency supplies, some covered goods are often mistakenly thought not to be covered. As a result, companies should remain vigilant and familiarize themselves with the scope of covered products and services in the states in which they conduct business.

A recent example of a product potentially subject to certain state price gouging restrictions is fertilizer, a product that has reportedly been increasing in price in recent months. A recent report details how the price of anhydrous ammonia, a foundation for all nitrogen fertilizers, has increased almost 60% since the fall, rising to $655 a ton. According to one fertilizer expert, "[y]ou have to go back at least half a decade to see values of where we're at today. It's been a stark turnaround compared to where we were last summer." While fertilizer is not covered by all state price gouging laws, some state laws have broad applicability and thus, while activated, arguably may cover such products.

Another category of goods that some mistakenly believe may be excluded from price gouging prohibitions are building materials. With home improvement projects on the rise during the pandemic, complaints of price gouging have been widespread. Most recently, contractors in Maryland reported that "the cost of building materials in the wake of the pandemic is going to put them out of business." According to a poll by the Associated General Contractors of America, 93% of respondents claim that they have seen increased costs due to the pandemic. Many state price gouging laws across the country apply to building materials, including Colorado, Iowa, Kansas, Texas, and Virginia, to name a few.

More specifically, a recent CNBC article reports that "[s]oftwood lumber prices are now about 112% higher than they were a year ago," reportedly jumping just 10% in the week prior to the February article's posting. However, CNBC reports that it is not just demand driving up prices, but also "because both mill operators and lumber dealers misread the 2020 market." Consistent with CNBC's report, an August 2020 Wall Street Journal article similarly reported that "[s]aw mills didn't see this coming. Lumber prices tumbled in late February as the U.S. economy began to

shut down to slow the spread of the deadly Covid-19. An estimated 40% of North American lumber production was curtailed in March and April as millions of people lost their jobs. Futures hit a four-year low on April 1. They have been rising ever since. By July, prices had returned to their pre-pandemic level and have subsequently added another 47%."

While energy prices prompted discussions and investigations in the wake of winter storms, other factors in supply chains could lead to price gouging scrutiny of energy prices. In Michigan, the state is planning a response to energy markets with the potential closure of "Line 5," a natural gas pipeline in the northern part of the state. The pipeline serves the Detroit Airport and many consumers who rely on propane for heat. The Michigan Governor expressed concerns that consumers could face price gouging as a result of the pipeline's closure and the state's Attorney General has urged the legislature to reconsider amending the state's price gouging laws to increase enforcement capabilities.

While some states, like California, have begun limiting the scope of their price gouging restrictions, most state price gouging laws remain active and in full force. To guide your company in compliance with state price gouging laws, read our State Price Gouging Laws Coast-to-Coast Reference Guide.

Rental Properties Not Exempt From Price Gouging Laws

While PPE, toilet paper, and groceries make price gouging headlines, consumer goods are not the only goods covered by price gouging laws in many states. Less publicized, but equally important, lodging or housing may be found on lists of products covered by many price gouging statutes.

A recent case in California offers a glimpse. In California, the statute prohibits selling, or offering for sale, a lengthy list of goods and services "for a price of more than 10% greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency." Among other things, California's price gouging statute covers "housing."

In February, the City of Santa Monica filed suit against a property owner alleging a violation of the state's price gouging law. The City alleged the owners of a multi-unit apartment building in Santa Monica had raised tenants' rent by more than the allowable 10%. On December 23, 2019, the California Governor extended a state of emergency declaration in relation to the California wildfires. The Governor also declared a state of emergency in response to the spread of COVID-19 beginning March 4, 2020.

The City's complaint alleges that a tenant at the apartment building had been paying $865 per month in rent in December 2019 and January 2020. According to the City, that price increased to $2,336 in February 2020. The City also alleges that the property owners raised the rent prices again in March 2020, from $2,336 to $3,000. The property owners deny wrong-doing, and stated that the City's suit is in retaliation for the property owners' filing suit against the City on another issue. The case is scheduled for a hearing on March 24, 2021.

California is not alone in prohibiting price increases on housing during an emergency. Arkansas, Kentucky, Tennessee, and West Virginia also explicitly list "housing" in their price gouging statutes. Similarly, Kansas and Vermont include both "housing" and "lodging." Texas is the lone state to mention only "lodging."

While most of these states simply include "housing" or "lodging" in the longer list of covered items, others, like South Carolina include a specific provision for housing. South Carolina prohibits "impos[ing] unconscionable prices for the rental or lease of a dwelling unit, including a motel or hotel

unit, or other temporary lodging, or self-storage facility within the area for which the state of disaster is declared."

In light of the restrictions in place and the ongoing enforcement, property owners, landlords, and hoteliers should consider how their prices have changed or may change in response to the COVID-19 pandemic. These business should use best practices, conduct a price gouging audit, and assess the risk of price gouging claims when managing their compliance efforts and measures.

How to Freeze a Case: Defending a Price Gouging Suit after the Winter Storms

As Texas and other southern states thaw from a frigid winter storm, companies doing business in these states should assess and take steps to minimize the risk of a price gouging claims. As suits are filed in the wake of the storms, companies should prepare now to defend such claims, whether from state attorneys general or from private plaintiffs. In road-mapping a defense strategy, the following information may be helpful.

Covered Products

Only certain products are covered by price gouging laws and these laws vary by state. It is important to identify whether products are being sold in states hit by the winter storm. For example, the Governors of Texas and Oklahoma declared states of emergency in the wake of the February winter storm, and the laws in those states cover different products. The Oklahoma statute covers, "any goods, services, dwelling units, or storage space" sold in the emergency area. Whereas in Texas, covered products include "fuel, food, medicine, lodging, building materials, construction tools, or another necessity." As only products covered by the statute are subject to pricing restrictions, businesses facing price gouging allegations should carefully evaluate which products at issue may not be covered by the statute.

Permitted Increases

If a product is arguably within the scope of the emergency pricing restrictions, determine what price increases are permitted, as most states allow some price increases. If suit is brought alleging price gouging of a covered product, the extent of permitted increases will help determine whether the price at issue potentially violated the statute. Some states, like Texas, prohibit selling products at an "exorbitant or excessive price." Other states, provide specific percentage caps, such as Oklahoma and Arkansas, which cap price increases at 10% more than the price charged immediately before the state of emergency.

Baseline Prices

The precise amount of a permitted price increase will often depend on a baseline price. Establishing the baseline price for each covered product at issue is essential – and not always straightforward. The formulas for baseline prices vary by state. For instance, in Oklahoma, the baseline

price is the price charged "immediately prior to the state of emergency." Any price increase above 10% of that baseline is presumptively illegal. In Oklahoma, the Governor declared a state of emergency on February 12, so the baseline price would be the seller's price on February 11. These baseline prices lay the foundation for showing that the price increase was permitted by the statute. Unlike the states mentioned above, Texas does not provide a specific baseline measurement – instead, it prohibits selling covered products at an "exorbitant or excessive price." However, prices for these products just before the emergency would most likely still be relevant in determining whether a price increase is exorbitant or excessive. Additionally, businesses should consider that COVID-19 states of emergency may still be in effect, adding an additional layer to consider when calculating a product's baseline price.

Calculating the Increase

From the established baseline, there are a variety of ways a price increase may be justified and permissible under the statute. In some states, simply exceeding the baseline price, or the statutory percentage increase for the covered product may violate the pricing restrictions. Other states evaluate price increases relative to profit margin. For example, in Oklahoma, if costs increase or non-emergency factors led to the price increase, the increase could be legal if the profit margin for the seller did not increase as well. Most likely, for states without specific percentage caps, such as Texas, stable profit margins will provide evidence that the price increase was not "exorbitant or excessive." Margins, costs, and comparable competitive prices could all serve as data points for a court determining the legality of a price increase.

Defenses

Other defenses may be available as well. For example, in Arkansas, the price gouging statute provides a specific exception for increased costs. A successful defense might establish that the alleged price increase was "directly attributable" to increased labor or materials costs, or to price increases by suppliers. Similarly, Oklahoma provides a specific exception for increased costs attributable to price increases on a petroleum commodity market or other non-emergency factors. Texas does not explicitly provide such an exception, but increased costs would arguably serve as defense to an allegation of "excessive" prices.

Additionally, the plaintiff in any suit must have the right to sue under the price gouging statute. Some states limit price gouging enforcement to the state's attorney general. Others provide a private right of action. However, for a private individual to bring such a suit, they must have experienced a direct harm from the allegedly illegal conduct. A careful analysis of a private action may reveal that the complainant does not have sufficient grounds to bring a claim.

When facing a price gouging suit, companies should be wary of claims that a simple price increase inevitably imposes liability. With multiple factors at play in pricing calculations and the availability of defenses, many price increases are permissible. Companies at risk of price gouging claims should consider the extent to which their products or services may be covered by a state's pricing restrictions along with and the availability of potential justifications for price increases.

While the South digs out of the snow, companies should not unnecessarily fear being buried in price gouging suits.

Nationwide Deep Freeze Leads to Spike in Natural Gas Prices

In the wake of the deep freeze that recently swept the nation, natural gas has taken the forefront among a slew of price gouging allegations. Last week's winter storms caused natural gas spot market prices to spike, with some reporting up to a 100% percent increase. Reports also surfaced of spot prices for wholesale electricity in Texas' power grid increasing more than 10,000%. In response, Minnesota Senator Tina Smith (D-MN) has not only encouraged federal regulators to investigate the price spikes, but has also requested regulators to "[i]nvoke, as appropriate, any emergency authorities available, including under the Natural Gas Policy Act, to allocate natural gas supplies at fair prices." Whether natural gas prices exceeded allowable limits under applicable price gouging statutes currently in effect depends, among other things, on whether natural gas is within the scope of these laws in the first place.

As with many products, whether natural gas is covered under state price gouging laws varies state-by-state. Certain state price gouging laws, like Vermont, apply to "petroleum or heating fuel products," defined as "motor fuels, liquefied petroleum gas, fuel oil, kerosene, and wood pellets used for heating or cooking purposes." Vt. Stat. Ann. Tit. 9 § 2461d(a). Illinois' price gouging law, triggered by "[a]ny abnormal disruption of any market for petroleum products," takes a similar approach, defining "petroleum product" to include motor fuels, and fuel used for heating or cooking purposes. 14 Ill. Code R. § 465.20-464.30.

Other states, however, more broadly cover "fuel" or "home heating oil." For example, Minnesota, Alaska, Colorado, Idaho, and Texas cover "fuel." While Kansas, Kentucky, Rhode Island, Virginia, and West Virginia, to name a few, cover "home heating fuel" or "home heating oil." However, some states only cover "gasoline," which arguably does not cover natural gas. For instance, Tennessee's price gouging law covers gasoline, but does not cover heating oil or fuel. Tenn. Code Ann. § 47-18-5103(a)(1). There are also states that broadly cover "goods and services," such as Louisiana and Mississippi.

Fuel producers and suppliers are not necessarily without a defense. Alaska, for example, may allow for a price increase in fuel if "caused by normal fluctuations in the market for fuel based on supply and demand." Alaska Ch. 10 SLA 20 § 26. Kentucky may allow for price increases in home heating oil if the increase is "[g]enerally consistent with fluctuations in applicable commodity, regional, national, or international markets, or

seasonal fluctuations." Ky. Rev. Stat. Ann. § 367.374(1)(c). Similarly, Louisiana provides that a price increase is not a violation if it is "attributable to fluctuations in applicable commodity markets, [or] fluctuations in applicable regional or national market trends[.]" La. Stat. Ann. § 29:732(A).

While essential goods and services related to the pandemic have been the topic of discussion regarding price gouging over the past year, energy and fuel suppliers and distributors should be aware that price gouging laws may also apply to them if covered by an emergency declaration. Natural gas companies and others should also be aware that beyond state attorneys general investigating the price spikes, the Federal Energy Regulatory Commission has also announced that it "is examining wholesale natural gas and electricity market activity during last week's extreme cold weather to determine if any market participants engaged in market manipulation or other violations."

Price Gouging and Services: Third-Party Food Delivery Price Gouging?

As new restrictions addressing the economic impacts of COVID-19 continue to be proposed, some are targeting price increases for services. Businesses may want to re-familiarize themselves with the "services" covered by existing price gouging laws and pay close attention to developments, as they may cover unexpected areas.

Many existing state price gouging rules already covered a range of services, including not only "necessary" or "essential" services, or "emergency" services, but also:

- transportation;
- construction;
- healthcare services;
- storage services;
- video streaming; and
- child care.

Price increase restrictions are being enforced at the state level already. Perhaps unsurprisingly, given the current health crisis, one early example was an action brought against physician and healthcare provider groups. A class action complaint alleging price gouging and other claims was filed in April in Washington state court, alleging unreasonable and excessive fees for medical services. Private plaintiffs are increasingly taking a role, and this case is the latest in a series of class actions filed alleging price gouging and seeking damages.

At the federal level, a bill pending in the Senate would cover a broad range of services. In mid-May, the House passed "The Heroes Act," HR 6800, a proposed pandemic relief bill that would in part create a federal price gouging regime for the current state of emergency. The Act would make price gouging a violation the FTC Act's prohibition on unfair or deceptive practices, while also authorizing actions by state attorneys general. It would apply to "any person" who sells or offers for sale a "good or service" at an "unconscionably excessive" price that "indicates the seller is using the circumstances related to such public health emergency to increase prices unreasonably." "[G]ood or service" would be defined broadly as:

> "a good or service offered in commerce, including—
>
> (A) food, beverages, water, ice, a chemical, or a personal hygiene product;
>
> (B) any personal protective equipment for protection from or prevention of contagious diseases, filtering facepiece respirators, medical equipment and supplies (including medical testing supplies), a drug as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)), cleaning supplies, disinfectants, sanitizers; or
>
> (C) any healthcare service, cleaning service, or delivery service."
>
> Local governments have also recently taken a more targeted approach to managing the pricing on services during this emergency. In addition to the existing restrictions on price increases for various covered services, for example, several cities and counties have taken additional steps to cap how much food delivery services can charge for orders made during a state of emergency.

New York City recently capped certain fees that a third-party delivery service may charge—15% for delivery services, and 5% for other services. Third-party services would be subject to a civil penalty of up to $1,000 per restaurant per day for violations. These caps will extend 90 days after the emergency has ended.

Comparable limits are now in place in San Francisco, Seattle, and, most recently, Los Angeles. The Los Angeles City Council approved a similar third-party food delivery app fee limit. The ordinance creates a civil cause of action, with a right to obtain attorney fees, against potential violators. The L.A. County Board of Supervisors is preparing its own ordinance to cap third-party delivery fees in the unincorporated areas of the County of Los Angeles, which notably may keep the measure in place permanently, irrespective of the pandemic.

The focus on third-party food delivery services is just one example of the kinds of regulation on the service offerings companies may need to account for as the state of emergency persists and the price gouging landscape continues to evolve. The broad approach in The Heroes Act and the industry-specific examples at the local level attest to regulators' close attention to prices on services, and should prompt companies to continue aggressively managing their price gouging compliance efforts.

Ordering Out During the Pandemic: Surcharges and Delivery Fee Caps Might Be Here to Stay

Reports of restaurants adding a "COVID surcharge" have become widespread during the pandemic. In recent months, cities and states across the nation have implemented a number of measures designed to help struggling restaurants adapt to the new normal. These include allowing restaurants to implement a "surcharge," as well as capping fees that third-party delivery services can charge restaurants. However, while "surcharges" may be more benign than direct price increases, a recent California price gouging lawsuit demonstrates that restaurants still need to be vigilant in their compliance with state price gouging laws.

In an effort to help struggling restaurants, Cleveland has become the latest city to implement a cap on the amount of fees that third-party food delivery services may charge restaurants. The limitation, passed on December 15, caps third-party delivery fees at 15% of the order. Similarly, Chicago implemented a ban in November, prohibiting third-party food delivery services from charging a delivery fee that is greater than 10% of the order price. Washington Governor Jay Inslee also signed a proclamation in November, capping third-party delivery fees at 15%, and total fees at 18% of the purchase price. Prior to these caps, Los Angeles and Portland implemented similar restrictions.

While some places are implementing food delivery caps, other cities, like New York City, have taken a different approach to helping restaurants during the pandemic, by passing legislation to allow restaurants to add surcharges. In September, the city imposed a temporary "COVID-19 recovery charge" that allows restaurants to add up to 10% to in-person dining bills. According to the bill's sponsor, "New York was actually the only city that we knew of that actually had a ban . . . [that] prevent[ed] restaurants . . . from applying a surcharge."

However, the majority of states have not explicitly authorized restaurant surcharges like New York City, and this may create legal uncertainty about their use in those jurisdictions. As we reported, a class action lawsuit was recently brought in California against a restaurant group accused of unjustifiably charging a 10% or 15% so-called "service or packaging fee" for takeout orders. Like most states with price gouging laws on the books, California's price gouging law applies to consumer food items. Barring any defenses or justifications, such "surcharges" possible could be construed

as price increases in contravention of price gouging restrictions if the surcharge exceeds the allowable price increase under the statute.

With indoor dining season underway at significantly reduced capacities, many are hopeful that the coming months will bring additional legislation and measures as cities seek to keep their restaurants afloat. In the meantime, restaurants should be aware of the relevant state price gouging restrictions in the jurisdictions in which they operate when considering whether to implement a surcharge.

Beyond the Pandemic: Pharmaceutical Industry Compliance Considerations

Since the ongoing states of emergency were put in place in response to a health crisis, pricing in the pharmaceutical industry is under more of a microscope than usual. While the immediate focus may be on products that are used to diagnose, treat, or prevent COVID-19, price gouging laws cover a wide variety of pharmaceutical products covering the full range of conditions. Given the current and proposed regulations that may impact pricing, companies should remain mindful of their price gouging compliance policies when considering pricing movements during the states of emergency.

In terms of pricing for products that relate to the novel coronavirus, bipartisan Senate and House bills propose prohibiting market exclusivity for taxpayer-funded COVID-19 drugs, and would not only empower but require the federal government to mandate affordable prices. The bills would also apply the same criteria—prohibiting exclusive licensing, requiring that manufacturers report their federal funding and total expenditures, and mandating federally-set affordable pricing—to drugs used to treat future diseases that would cause a public health emergency. Precisely which drugs might fall into that category will be hard for companies to predict in advance.

The President also issued several executive orders recently that appear to be aimed at reducing prices paid by consumers for certain pharmaceutical products. While their practical impact remains to be seen, the actions indicate that the industry's prices remain on the White House's radar, suggesting that pricing will likely continue to be scrutinized at the federal level.

Setting aside predictions and political issues surrounding the pricing of any coronavirus treatments, at the local level, many states already explicitly cover a range of pharmaceutical products, not just those related to the pandemic. California's price gouging law limits permissible price increases on "medical supplies," including prescription and nonprescription medications. Texas prohibits "exorbitant" pricing of "medicine." Maine limits price increases on "pharmaceutical products," including but not limited to prescription medications." Idaho prohibits "[t]aking advantage of a disaster or emergency" with "exorbitant or excessive" pricing on "pharmaceuticals." Minnesota's March 20, 2020 Executive Order prohibits charging "unconscionably excessive prices" for "pharmaceuticals."

While many price increases during the pendency of these states of emergency will likely fall within permissible exceptions, including justifications for increased costs, companies would benefit from reviewing those exceptions and documenting the permissible bases for any pricing movements.

While it may be typical for some in the industry to adjust pricing on a regular basis, companies may wish to consider how pricing constraints due to the ongoing states of emergency could impact those practices. If the planned increases fall within permissible justifications or exceptions, then any presumed price caps may not apply. Delaying or staggering increases may also be prudent, depending on the product and which statutes and restrictions are triggered.

For additional guidance on how to evaluate and, if necessary, update internal compliance practices to account for these considerations, read our article on conducting a price gouging audit and our blog post on Price Gouging Dos & Don’ts for Supply Chain Companies.

Price Gouging Compliance

What's My Price? Price Gouging Enforcement, Bargaining Power and Stealth Price Increases

Businesses may be wondering whether there is increased risk of price gouging liability when they impose higher penalty terms, ask for higher up-front payments, raise rates, or otherwise seek terms that may be more burdensome. Sellers and service provides should consider the risk of being held liable for non-price terms that result in higher customer costs.

Some direct price increases are expressly allowable. California, for example, allows that hotel or motel rates may be increased if directly attributable to "seasonal adjustments in rates that are regularly scheduled, or to previously contracted rates." Cal. Penal Code § 396(d). Exceptions related to cost increases are also frequently permitted, as discussed previously.

The majority of state price gouging laws do not address the question of non-price terms head on. Nonetheless, the perception that customers may suffer from a lesser bargaining position may impact how alleged price increases are perceived and potentially investigated. Several state attorneys general describe price gouging as involving unequal bargaining power when explaining to consumers how to identify and report concerns. The Maryland Attorney General's website explains price gouging to consumers by saying the term is defined as "sellers attempting to take unfair advantage of consumers during the COVID–19 emergency by excessively increasing prices for essential consumer goods and services." A similar explanation by the California Attorney General defines price gouging as "sellers trying to take unfair advantage of consumers during an emergency or disaster by greatly increasing prices for essential consumer goods and services." The Texas Attorney General's explanation of "How to Spot and Report Price Gouging" advises that, "if a disaster has been declared … and businesses raise the price of their products to exorbitant or excessive rates to take advantage of the disaster declaration, then it is quite likely that price gouging is taking place."

The New York state price gouging law explicitly incorporates the concept of unequal bargaining power, and past decisions indicate how courts are likely to interpret the NY statute. Though New York's price gouging law only applies to a subset of goods and service—it prohibits selling goods or

services that are “vital to health, safety or welfare of consumers” for an “unconscionably excessive price”—the question of unequal bargaining power plays a definite role in determining whether prices, or other terms of sale, violate the state law. When the Attorney General brings an action alleging price gouging, the court must determine whether the price increase was “unconscionably extreme.” This is a question of law for the court to decide based on, among other things, whether there was an “exercise of unfair leverage . . .” General Business Law § 396-r(3)(a).

New York courts have held that a “showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price.” *People v Two Wheel Corp*.

In *People v. Two Wheel Corp*., the New York price gouging statute was applied to a generator distributor for its pricing in the aftermath of Hurricane Gloria. The defendant was charged with selling generators for prices ranging from 4% to 67% over the distributor’s base prices immediately before the hurricane. In its decision, the New York Court of Appeals explained that price gouging takes place when a merchant “enjoys a temporary imbalance in bargaining power by virtue of an abnormal level of demand, in terms of both the number of consumers who desire the item and the sense of urgency that increases that desire.” *Id*. at 697. This imbalance can grant sellers and service providers leverage “to extract a higher price.” *Id*. at 698.

The burden is on the defendant to rebut the presumption of improper leverage. A more recent example of a business failing to do so is in *People ex rel. Spitzer v. Wever Petroleum, Inc.*, which dealt with a gas station’s pricing after Hurricane Katrina. The court considered the increase in the wholesale cost of gasoline, compared it to the price the gas station was charging customers, and found that while the “increase in retail price [may have been] the result of a supplier increase,” the gas station failed to rebut the inference that the price increases were attributable to [their] use of the leverage provided by the market disruption and [the increases] were therefore unconscionably excessive.” *Id*. at 816. (The court imposed a $2,500 penalty for price gouging plus $2,000 in costs.)

Additionally, even in situations where price gouging laws do not apply, federal antitrust law prohibits selling the same product at different prices to similarly situated business customers. Many customers have asked for and will continue to ask for extended payment terms based on decreases

in business and other economic factors. To ensure their responses are fair and in compliance with antitrust laws, companies should develop and apply consistent standards for determining how they will respond and when they will extend credit or payment terms to their customers.

As always, businesses that carefully document their costs and their decision-making processes will put themselves in a better position to demonstrate that any direct or indirect increase in prices of a good or service (through payment terms or other terms) during an abnormal market disruption is permissible and defensible.

Good Cause for Surcharges

Almost a year into the business disruptions caused by the pandemic, businesses continue to find ways to adapt and to comply with new pricing restrictions. Some of these changes relate to additional costs that businesses may need to pass along to consumers—at least in part. Given what we have seen in recent months, it is worth revisiting how businesses can implement these surcharges with an eye towards compliance with local price gouging laws.

Whether a surcharge is permissible generally depends on a number of factors, including: the industry, how and when the surcharge was disclosed to consumers, and the amount of the surcharge. Legal surcharges are not uncommon, though, as a spokesperson for the Michigan Attorney General's Office recently noted, "determining if a COVID-19 surcharge is legal or illegal is 'no quick and easy answer.'"

Industry: It is hard to imagine an industry that has not been impacted by the challenges of the past year in one way or another. Different industries may face different levels of scrutiny, however, and may bear different kinds of additional costs. We have discussed a number of industries that have been experimenting with surcharges to offset their increased costs, and they range from health care providers to hair salons to restaurants.

Disclosure: Disclosure is often a key consideration when surcharges are being challenged or investigated. Concerns are likely to be raised—and complaints and investigations are more likely to follow—when these fees are perceived as "hidden," as reflected in a recent Washington Post article. In some instances, disclosing a surcharge in advance is an explicit requirement, such as for the "COVID-19 Recovery Charges" restaurants are permitted to pass on to customers in New York City.

Amount: It remains true that, to the extent surcharges are put in place to reflect cost increases, they may fall within allowable price gouging exceptions. An important consideration is whether the contemplated surcharges are related to increase costs *because of the pandemic*. This could look like increased transportation costs, procurement costs, or labor costs due to new or increased expenses to cover, such as for testing, disinfection, personal protective equipment, or infection control.

Businesses that are otherwise subject to pricing restrictions under current emergency orders and the attendant regulations may be able to justify such surcharges. But that may not always be the case. Even if they bear new costs, businesses may be constrained by the language of the particular price gouging laws that apply to them. Some businesses may find themselves subject to local price gouging laws, which, for example, ban "exorbitant" or "unconscionable" price increases," cap them at a specific percentage, or simply bar increases outright. The Massachusetts Attorney General, for example, issued an advisory opinion in December with information for consumers and dental practices, noting that contracts between a consumer's insurer and their provider may prohibit *any* additional fees.

The takeaway is that business often are able to legitimately recover cost increases and pass them on as surcharges or price increases, but must remain mindful of the limitations that remain in place, and maintain strong compliance measures when implementing surcharges.

Q&A Follow-Up from "The Price is Right…or Is It? What Supply Chain Businesses Should Know" Webinar

On June 3, 2020, Proskauer's Antitrust Group hosted a webinar on what supply chain businesses should know about price gouging laws and regulations, and, during and after the webinar, we fielded some thoughtful follow-up questions from clients and friends who attended. We have collected and provided answers to the questions we received below in an effort to further inform and share insights on price gouging concerns raised by attendees. Thank you to all who joined us for the webinar.

Background: State price gouging laws have been activated around the country due to the COVID-19 pandemic. As a result, businesses at all levels of the supply chain are faced with complying with at least 34 individual states' price gouging laws. Several class actions lawsuits have already been filed against supply chain businesses and we expect to see lawsuits to continue in the coming months and beyond.

Q: How much of a risk is there really of enforcement?
We have seen over the last several months that the risk of enforcement is real. Some state attorneys general, such as AG Bob Ferguson (WA), AG Letitia James (NY), and AG Keith Ellison (MN) have been very active. The majority of AGs are actively investigating price gouging complaints on an ongoing basis, even in states where there is no price gouging statute. Attorneys General are also taking measures to inform the public of their efforts to fight price gouging. New Jersey, for example, posts updates on its enforcement efforts weekly. As of June 5, 2020, AG Gurbir Grewal (NJ) had issued 1,586 cease-and-desist letters and 108 subpoenas. Beyond government enforcement, several class actions have been filed against companies accused of price gouging. We expect to see enforcement proceedings and private class actions continue in the coming weeks, months and beyond.

Q: Is raising prices to meet a supplier's minimum advertised price ("MAP") during a state of emergency—even if more than 10%—a defense under price gouging statutes?
The majority of state statutes do not contemplate minimum advertised pricing as a defense. However, some states may take this into consideration. Tennessee, for example, does not prohibit price increases that are directly attributable to prices set forth in a pre-existing agreement. Kentucky's price gouging law also provides that a price does not violate

the statute if it is "[a] contract price, or the result of a price formula, established prior to the order implementing" the statute. Further, this could potentially be taken into consideration in those states that apply an "excessive" or "unreasonable" standard.

Q: I typically provide notice to retailers prior to increasing my prices. If my effective date lands right before the pandemic, can I still execute the increase? What if that execution date falls after the effective date of the prohibition?

Whether a planned price increase—which becomes effective during a state of emergency—could trigger liability under price gouging laws depends on many factors. At a high level, there are no explicit exceptions for planned price increases. However, assuming your goods are sold in California, for example, such increases may be permitted under certain circumstances. If the planned price increase would not increase the prices on covered goods or services above the 10 percent cap, the increase may be permissible. Even a price increase of greater than 10 percent may be permissible if: (1) the increase was "directly attributable" to certain additional costs during the state of emergency, and (2) the new price is no greater than 10 percent more than the "total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business," as compared to the period immediately preceding the emergency.

Q: If I raise my prices to cover my costs, can I keep my profit margin the same?

Most state price gouging statutes do not specifically address profit margins. The majority of states that do include defenses or exceptions for a seller's customary markup do not provide guidance as to whether this is profit margin or profit dollars. For example, Utah prohibits charging an "excessive price" which is defined as a price that "exceeds by more than 10% the average price charged by that person for that good or service in the 30-day period immediately preceding the day on which the state of emergency is declared." Utah's statute also includes an exception for increased costs, as well as the seller's customary markup. It does not, however, define what customary markup is.

Wisconsin, on the other hand, prohibits certain price increases greater "than 15% above the highest price at which the seller sold like consumer goods or services to like customers in the relevant trade area during the 60-day period immediately preceding the emergency declaration." The statute, however, also provides an exemption to this if the "selling price does not exceed the seller's cost plus normal markup." The statute defines "normal markup" as a percentage markup. Therefore, Wisconsin's statute likely allows for a seller to maintain its profit margin. Similarly, Missouri also includes an exception for "customary profit margin," which likely allows the seller to maintain its profit margin as well.

Q: If I can't raise my price in line with increased costs, do I have to sell at a loss?

The majority of states have a defense for increased costs. So long as you have sufficient documentation that your costs increased, it is likely that you can raise your prices to cover the increased costs. However, whether you may also increase your profit margin depends on the state. As discussed in Question 4, some states do expressly allow sellers to keep their pre-emergency profit margins. Even in states that do not specifically say anything about profit margins, it may be arguable that maintaining profit margins on top of increased costs is allowed, but needs to be analyzed on a state-by-state basis.

Q: Are promotional prices factored into my baseline price?

Not all states explicitly address whether promoted prices are factored into the baseline price for a good. In many states, however consideration will be given to documentation that those promoted prices do not reflect "normal" pricing. Several states explicitly exclude factoring "temporar[y] discount[s]" (Mississippi), "discounted prices set and offered as a result of bona fide manufacturer's or supplier's limited discounts or rebates" (Rhode Island) into the average price calculation, and instead identify price gouging by comparing sales prices to the "normal average retail price" (D.C.) or the "average price at which the same or similar commodity was readily obtainable" (Florida) during the relevant baseline period.

Q: Is there a maximum financial penalty a company could face for price gouging?

While penalties vary from state to state, civil penalties range from $99 to $40,000 per violation. Some states limit the amount a person found guilty of price gouging can be fined for in one day. For example, Rhode Island's price gouging law provides that a court may impose a civil penalty of "not more than one thousand dollars ($1,000) per violation with an aggregate total not to exceed twenty-five thousand dollars ($25,000) for any twenty-four-hour (24) period." Other states, however, provide for more severe penalties. Texas' price gouging law provides an enhanced penalty of no more than $250,000 if "the act or practice that is the subject of the proceeding was calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older."

Further, violators of price gouging statutes could face hefty civil damages in some states. North Carolina, for example, provides for a private right of action under its consumer protection laws, which may allow victims to recover treble damages, as well as attorneys' fees if the judge finds that the defendant willfully engaged in price gouging. Similarly, New Jersey's Consumer Fraud Act states that "[i]n any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. [T]he court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."

Q: Once you've raised your prices, is it too late to avoid liability?
The majority of states do not take into account a price reduction after a statutory violation has occurred where the price increase does not fall into a defense or exception. However, note Hawaii's price gouging statute which provides "the defendant shall be deemed not to have violated this section if …(1) [t]he violation of the price limitation was unintentional; (2) [t]he defendant voluntarily rolled back prices to the appropriate level upon discovering that this section was or may have been violated; and (3) [t]he defendant has instituted a restitution program for all consumers who may have paid excessive prices."

Q: What can I do if my supplier raises prices?
Most states provide an exception for increased costs. While you may be able to raise prices if your costs increase, maintaining and not increasing margins will be an important element of any defense. Accordingly, it is essential to maintain documentation to accurately track your price movements in order to be prepared to demonstrate why applicable defenses may apply.

Q: How long are price gouging laws in effect?

Price gouging laws are temporary restrictions that are activated by local, state, or national emergencies. While most laws end when state of emergencies expire, some states take a different approach. For example, New Jersey and Pennsylvania's price gouging laws remain in effect for 30 days after the state of emergency expires. Other states, like California, have provided an explicit date indicating when the price gouging law expires. Note though that lawsuits and enforcement actions may be brought for years to come until the applicable statutes of limitations have expired.

Compliance with price gouging prohibitions is manageable but requires stepped-up compliance efforts and scrutiny of pricing movements. Proskauer's antitrust practice group counsels clients on a wide range of business issues, including price gouging issue spotting and compliance best practices. Please contact any of our lawyers if we can answer any questions on these issues.

Price Gouging Laws: Can Promotional Pricing Become Your New Price?

Businesses regularly engage in promotional pricing and discounts as a sales strategy to attract customers. However, what happens if a business enacted a promotional price right before the pandemic struck and price gouging laws were triggered? Are those businesses stuck with those promotional prices until states of emergency come to an end and price gouging laws are turned off? Some state price gouging laws explicitly provide an exception for promotional or discount pricing. And while other states are silent on the issue, that doesn't mean businesses are without a defense.

Some state price gouging laws specifically address promotional pricing. Mississippi's price gouging law, for example, includes a provision providing that "[t]he prices ordinarily charged for comparable goods or services in the same market area do not include temporarily discounted goods or services." Miss. Code Ann. § 75-24-25. Rhode Island's price gouging law similarly addresses promotional pricing, "the average price calculation during said thirty-day (30) period shall not include discounted prices set and offered as a result of bona fide manufacturer's or supplier's limited discounts or rebates." R.I. Gen. Laws § 6-13-21(b)(1). While Virginia's price gouging law considers "the price charged by the supplier for the same or similar goods or services during the 10 days immediately prior to the time of disaster, provided that, with respect to any supplier who was offering a good or service at a reduced price immediately prior to the time of disaster, the price at which the supplier *usually* offers the good or service shall be used as the benchmark for these purposes." Va. Code Ann. §59-1-527 (emphasis added).

In states that do not specifically address promotional pricing, businesses may nonetheless have available defenses. Some states prohibit price increases that are excessive or unconscionable based on the price charged the day before the emergency was declared. Under these standards, to the extent a pre-emergency price was a promotional or temporary price, it may not trigger the price increase prohibitions. If a business was running a promotional price, for instance, the day before the emergency of $20 – a 20% discount from its typical and customary price of $25 – documentation showing this may help justify the reasons for what might appear to be a 20% increase following the declaration of emergency.

Some states also provide that the baseline price is not based on the day before the emergency, but rather an average over a certain period of time. Pennsylvania, for example, considers the "average price . . . during the last seven days immediately prior to the declared state of emergency." Penn P.L. 1201, No. 133 §4(b). Other states provide a more generous time period for calculating average prices such as Alabama (30 days) or Washington, D.C. (90 days). For short-term promotional discounts in place immediately preceding a state of emergency, states that consider longer periods of time in calculating average baseline prices may be more favorable.

As price gouging laws continue to remain in effect under states of emergency, additional guidance on how promotional pricing and temporary discounts factor into the analysis may arise. In the meantime, businesses should maintain well documented evidence of any promotional pricing or other discount prices in effect pre- and post-emergency declarations.

"Covid Surcharges" – Fair Game, or a Price Increase by Another Name?

As businesses figure out how to be creative and continue to operate during the pandemic, some have turned to "Covid surcharges" to account for new or increased costs. "Surcharges" may seem more benign than direct price increases. Still, they need to be considered with an eye towards compliance with local price gouging laws.

To the extent surcharges are put in place to reflect cost increases, they may fall within allowable price gouging exceptions. Even businesses whose products or services are covered by their relevant state price gouging laws may be able to add surcharges, since many state price gouging statutes provide exceptions for increases directly attributable to increases in the cost of labor or materials.

Consumer-facing businesses are experimenting with different methods to account for their new costs, such as increasing the price on specific menu items that are now more expensive to provide, or adding small fees or surcharges to a bill to offset the overall added costs of operating, to varying customer responses. Many restaurant surcharges seem to be minor, with recent examples from Florida reflecting fees around 3 percent of a total bill. There are similar reports of hair salons that have added surcharges of a few dollars to cover the costs of additional cleaning and sanitation measures.

These surcharges do not appear to have drawn many official complaints under price gouging frameworks. A spokesman for New York's Attorney General told the Wall Street Journal that, at the time of publication, the New York office had not yet received any complaints about "surcharges," while a spokesman for the Missouri Attorney General's office reported one complaint about "surcharges" out of a total of 1,501 price-gouging complaints.

At least one state has received complaints about a particular business's surcharge, and found the surcharge in question to be permissible. The Rhode Island Attorney General's office reportedly received numerous complaints about a business charging customers an optional 2% surcharge, which they explained was intended to cover hazard pay for their front-line employees. Because the charge was optional, and had been clearly and prominently disclosed throughout the store, the attorney general found no laws had been violated.

Health care providers may also wish to utilize such a surcharge. They indisputably have additional expenses to cover, as infection control and prevention have led to increasing personal protective equipment costs. As noted in a recent "Price Gouging Weekly Round Up," however, local officials have noted the surcharges imposed by dentists in Maryland and Tennessee, and their responses serve as a reminder that their respective state price increase regulations still apply.

Regardless of the new costs that businesses and providers are shouldering, they are expected to comply with their state's limitations on price increases, which may, e.g., ban "exorbitant" or "unconscionable" prices increases," cap them at a specific percentage, or simply bar any price increases at all. A surcharge may be permissible in some circumstances, but businesses should remain cognizant of the risks and regulations when implementing any new pricing strategies.

Annual Contract Renewals at the Intersection of Price Gouging and Antitrust Laws

As annual supply contracts come up for renewal, businesses may be wondering whether price increases for annual contracts are permitted under the panoply of price gouging laws currently in effect. Parties may want to negotiate contracts with "normal" price increases, operating under the assumption that, at some point during the contract year, price controls will expire. But if states of emergency remain in effect when the new contract prices become effective, parties can find themselves facing questions about how the agreement can be carried out.

When agreeing to a new contract price, companies should consider how price gouging laws may be interpreted or enforced in ways that overlap or interact with antitrust laws. There is no precedent that definitively reveals the interplay between these laws, given the unprecedented geographic and durational scope of the ongoing emergency. We do, however, strongly suspect that annual contract prices that could be investigated for either price gouging or antitrust reasons will likely be investigated for both.

In terms of antitrust, companies are generally free to set their prices as they see fit, provided, among other things, they make their pricing decisions unilaterally. Since most arrangements between suppliers and distributors benefit consumers, given the distribution and cost reducing efficiencies, annual contracts between suppliers and distributors typically do not run afoul of antitrust laws.

Under price gouging restrictions, however, enforcers will look to evidence that prices increased beyond a permissible level during a state of emergency. Price gouging laws apply broadly to annual agreements between suppliers and downstream distributors and sellers, to the price at which the supplier provides goods, or to the ultimate sale price.

A practice may be permissible under federal antitrust law and unlawful under state law, or vice versa. But, as we have previously discussed, antitrust and price gouging investigations and possible violations are not mutually exclusive. State attorneys general frequently are choosing to investigate pricing moves under both enforcement regimes simultaneously. Given the spotlight on price gouging in response to the ongoing pandemic, contract prices may be scrutinized for antitrust compliance, particularly if there is any whiff of coordinated activity in a market or industry.

Consider this possible scenario: a California-based supplier is preparing to enter into a new annual contract with its California-based distributor. Last year, the supplier agreed to sell its products to the distributor for $10/unit. This year, the presumptive ceiling for the supplier's sale to the distributor would appear to be $11/unit based on California's current pricing restrictions. The parties are considering a contract under which the supplier sells its product to the distributor for $13/unit.

Perhaps the higher price is justified by documented costs, and perhaps the distributor can lawfully pass those costs on as well. Assuming however, that the $13/unit price cannot be fully justified by cost increases, it may not be permitted within the price gouging exceptions. Also, should the price gouging laws be deactivated mid-contract, it may be that parties could be exposed for any sales that took place during the pendency of the states of emergency.

In light of the state and federal enforcement activity against price gouging and the considerations discussed above, companies should ensure that their contract prices are reasonable and justified. Use data to your advantage in contemplating pricing movements. Such records will be especially useful to support any increases should there be an investigation in the future.

Pricing Around the Margins: Is it Price Gouging if My Costs Have Gone Up?

Despite the continued implementation of state price gouging laws, many companies have been able to legally raise their prices by relying on exceptions related to cost increases. Many have asked whether the exception nevertheless presents risk to the extent it is used as a basis to maintain current margin levels. While this is not a settled question, there are good arguments that cost increase exceptions would typically permit a company to maintain its current margin levels.

Gross margin is typically defined as a company's net sales revenue minus its cost of goods sold. If a company increases its prices to reflect a proportional increase in costs, its gross margin may actually increase in absolute terms – even if the company still retains the same profit ratio. Some have questioned whether this may attract scrutiny from regulators or private plaintiffs. However, while margins are specifically referenced in several state statutes, the role of margins is largely secondary to the primary concerns of supplier cost and final price.

Most state price gouging laws are only triggered by an increase in prices, and margins are simply not part of the analysis. These laws operate by setting a baseline over which any price increase is presumptively illegal, subject to various exemptions as defined. In New York, for example, price gouging is defined simply as charging an "unconscionable" price that cannot be justified by evidence of costs outside of the seller's control.

To the extent that some states do address margins, it is generally as a condition on price increases allowed past the triggering threshold. For example, California law provides that in responding to a cost increase from a supplier, a seller may only apply the "markup customarily applied" by the seller, plus up to 10%, for that good or service in the usual course of business immediately before the state of emergency (in California's case, March 4, 2020). Similarly, Utah's statute also includes an exception for increased costs, with the limiting factor of the seller's customary markup. Notably absent from either state law is a definition for customary markup.

Some states provide more guidance, such as Wisconsin which provides an exception to its price gouging law if the "selling price does not exceed the seller's cost plus normal markup," where "normal markup" is defined as a percentage markup. Therefore, Wisconsin's statute likely allows for a seller to maintain its profit margin. Similarly, Missouri also includes an

exception for “customary profit margin,” which likely allows the seller to maintain its profit margin as well. Yet while these statutes address profit margins, they are silent as to gross margins.

To the extent price increases are put in place to reflect cost increases and maintain profit margin (potentially even increasing gross margins), they likely fall within the majority of the allowable exceptions. It becomes riskier, though, where actual profit margins are also increased, as that component of the price increase may not get the benefit of the exception. Defending any such pricing movements on the basis of the exception will necessarily require solid data on pricing and cost movements, and the relationship between them, along with evidence of a strong price gouging compliance program.

Does 'New and Improved' Products Mean I Can Charge a New and Improved Price?

State price gouging laws do not typically address product improvements or reformulations. Still, businesses should consider price gouging restrictions when releasing "new and improved" products, as the same pricing considerations that may apply to new products may also apply to improved, updated or reformulated products.

A company that is developing or considering releasing a reformulation of its current product may have previously evaluated whether the product is subject to state price gouging laws. Where the previous version of the product was covered, any reformulation is likely covered as well.

Given the additional costs that may accompany a reformulation, there may be additional justifications for price increases when releasing a new version of a product. In California, for example, a company can increase the price for its reformulated product to factor in the costs for, among other things, sourcing new or more expensive ingredients. As long as the total price does not exceed 50 percent greater than the total costs of producing and selling the product, it should not run afoul of that state's law. A business that resells that reformulated product arguably may then price it at up to, but no more than, 50 percent greater than the amount it paid for the product, to the extent it is treated as essentially a new product.

In other states, a company considering reformulation may want to reference the price of similar goods as a baseline, while also gauging what the state statute considers to be legal justifications for setting prices that exceed the price of similar goods. Under Pennsylvania law, the state typically presumes prices are unconscionably excessive if they are 20 percent or more above "the average price at which the same or similar consumer goods or services were obtainable in the affected area during the last seven days immediately prior to the declared state of emergency." But those provisions do not apply where a higher price is "substantially attributable to additional costs that arose within the chain of distribution in connection."

In Florida, the price gouging statute suggests there would be a comparison of the amount charged for the reformulated product to "the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior to [the] declaration of a state of emergency," which, for purposes of the current COVD-19 emergency, was

March 9, 2020 in Florida. If the reformulated product is more expensive than similar products, companies can provide evidence that "the increase in the amount charged is attributable to additional costs incurred," or due to "regional, national, or international market trends," and thereby rebut a presumption of price gouging.

Given the lack of direct treatment of this category of products in the price gouging laws, pricing in these instances may require additional thought to ensure compliance. As a general rule, however, businesses looking to bring reformulated products to the market should be aware that price increases for reformulated products likely fall within the majority of the allowable exceptions if they reflect cost increases and maintain (or even, in some cases, increase) a measure of profit margin.

Introducing a New Product or Service? Why Price Gouging Laws May Still Apply

While price gouging is often discussed in the context of existing products, new products and services may be covered as well. As a result, businesses looking to introduce new products during a price gouging emergency can seek guidance from the relevant price gouging laws before setting a price for their new good or service.

Since not all price gouging regulations cover the same products, a business that plans to bring a new product to market may first want to determine whether that product appears to be subject to their state's price gouging laws. Many price gouging laws only cover essential goods, though definitions of "essential" vary. The range of goods and services covered varies widely, and any pricing constraints would only apply to products that are covered. Analyzing the relevant statutes will be instructive.

Some states have statutes that specifically address the pricing of new products. These statutes fall into several categories:

Considering the costs of production

Some statutes and regulations evaluate pricing for new products by considering the costs incurred in bringing them to market. California's executive order addresses covered goods that were not offered for sale prior to this emergency, providing that such goods would be sold at an "unconscionably excessive price" if they were priced at more than fifty percent greater than either: (a) the amount an entity paid for them or (b) if the entity did not purchase the goods, then the total costs they bore in producing and selling them. EO N-44-20.

Comparing a new product to similar existing products

Other statutes evaluate pricing for new goods by using the prices of similar goods as a comparison. For example, under Maine's statute, there is generally a "rebuttable presumption that a price is unconscionable" if it exceeds by more than 15% the price of similar goods offered prior to the state of emergency, plus the "increased cost" due to the market disruption. When considering whether the price of a new product is "unconscionable" for purposes of the statute, Maine considers the prices of "similar goods or services offered for sale by another person similarly situated prior to the abnormal market disruption" as a baseline, allowing for increased costs and the 15% margin above that. Me. Rev. Stat. Ann. Tit. 10, § 1105.

Comparing to other sellers

If the product is new to a seller, but not necessarily new to the market, then some states will consider the prices at which others sold that good. In North Carolina, for example, if the "seller did not sell … or offer to sell" the new good prior to this state of emergency, then "the price at which the goods or service was generally available in the trade area shall be used as ***a factor*** in determining if the seller is charging an unreasonably excessive price." N.C. Gen. Stat. §75-38(a) (emphasis added). Other factors that will be considered include whether there are "additional costs imposed by the seller's supplier or other costs of providing the good or service during the triggering event," or whether "[t]he price charged by the seller is attributable to [market] fluctuations," "or to reasonable expenses and charges for attendant business risk incurred in procuring or selling the goods or services," all of which may support prices that are higher than the exact price for a similar product.

Statutes that address "similar" products

Even if a statute does not explicitly contemplate the issue of new products, statutory language referring to "similar goods and services" may provide guidance as to how these restrictions may apply to new products and services. For example, Massachusetts considers a price to be unconscionably high when there is a gross disparity between the price charged and "the price at which the same or similar product is readily obtainable from other businesses…" Addendum to Mass Req. tit. 940. § 3.18. Alabama's statute treats a price markup that is greater than 25% of the price of a similar good as prima facie evidence of an unconscionable price. Ala. Code § 8-31-4. Many states' price gouging laws include a "similar goods and services" reference, so it would benefit businesses within those states to consider the prices of existing products as potential benchmarks for pricing decisions.

Other considerations when setting prices

Businesses looking to bring new products to the market will likely find such new products treated similarly to other existing products. While not all states have definitive standards for reviewing the prices of new products, the exceptions built into many statutes, such as increased costs justifying high prices, will likely be applicable to new products as well. As previously discussed on this blog, to the extent that prices are increased to reflect cost increases and maintain (or even, in some cases, increase) profit margin, they likely fall within the majority of the allowable exceptions.

Companies should nonetheless do their diligence to ensure they comply with the relevant price gouging laws given the wide range of methods that states use to evaluate the fairness of new product pricing.

How to Calculate a Baseline Reference Price for Price Gouging Compliance

Price gouging statutes typically operate by setting a baseline over which any price increase is presumptively illegal, subject to various exemptions. But different states use different formulas for their baselines. Businesses who provide covered goods or services therefore need to determine the relevant baselines in order to calculate whether, and how much of, a price increase is permissible.

Consider a seller in New Jersey, where calculating the baseline reference price is relatively simple. In New Jersey, the relevant price for calculating a baseline is the price of the good or service "immediately prior to the state of emergency." N.J. Rev. Stat. § 56:8-108. Given New Jersey's March 9, 2020 emergency declaration, the baseline reference price for goods or services will be the price at which they were offered on March 8, 2020. The statute also provides that increases of more than 10% above that baseline price are presumed excessive. Assuming the seller offered a covered good or service for $100 on March 8, absent an exception to the law, it cannot raise its prices above $110 in New Jersey during the ongoing state of emergency.

Other states have more complicated processes for determining the reference price, and will consider the average prices of the same or similar goods or services in the 30 days (i.e., Alabama), 60 days (i.e., Wisconsin), or 90 days (i.e., Washington D.C.) before the emergency. Florida, for example, uses the average price in the 30 days before the declaration of a state of emergency. Fla. Stat. § 501.160(1)(b). Since Florida also declared its state of emergency on March 9, 2020, the baseline price would be the average price at which a good or service was offered between February 8 and March 8, 2020.

If covered goods or services were offered at a sale price in February or early March, those lower prices could bring down a seller's average for that baseline calculation period. Many statutes, however, provide that consideration will be given where the promoted prices do not reflect "normal" pricing. Several states explicitly exclude factoring "temporar[y] discount[s]" (Mississippi), "discounted prices set and offered as a result of bona fide manufacturer's or supplier's limited discounts or rebates" (Rhode Island) into the average price calculation, and instead identify price gouging by comparing sales prices to the "normal average retail price" (D.C.) or the "average price at which the same or similar commodity was

readily obtainable" (Florida) during the relevant period. For example, Virginia's statute provides that the state will refer to the price charged for the same or similar goods or services "during the 10 days immediately prior to the time of disaster," but allows an exception for good or services that a supplier offered at a reduced price immediately before an emergency was declared. In those cases, "the price at which the supplier usually offers the good or service shall be used as the benchmark for these purposes." Va. Code § 59.1-527.

Baseline prices can also be exceeded if other exceptions are met, such as for increases directly attributable to increases in the cost of labor or materials, or for increases specifically authorized by a state agency. Georgia, a state that appears to bar *any* price increases above the benchmark reference, nonetheless includes an exception for increased costs. According to the state statute, prices can be increased "only in an amount which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area." Ga. Code § 10-1-393.4.

These exceptions are not uniform across the state laws, however, and do not obviate the need for baseline price calculations. Calculating a baseline reference price necessarily precedes any evaluation permitted price increases and risks. With the repeated extensions of the original emergency declarations, the baselines from the original declarations of emergency (primarily in March) will likely control for the foreseeable future, and knowing them will simplify the process of complying with the various state price gouging restrictions.

Defending Against Price Gouging Claims

Calculating Damages for Price Gouging Violations: Why Customer Refunds are Only Part of a Company's Concerns

As the COVID-19 pandemic continues and the triggering states of emergencies are largely extended, companies are increasingly focused on compliance with state price gouging statutes. State attorneys general have launched investigations and brought lawsuits, and several class actions have been filed by consumers against companies for alleged price gouging, up and down the supply chain. The relief sought in these actions highlights the risk that violators of price gouging statutes could find themselves facing hefty damages claims—perhaps to a greater extent than immediately obvious.

Depending on the state, damages could arise from enforcement actions by the state attorney general or by private rights of action; some states provide for damages under both enforcement mechanisms.

The categories of damages permitted vary widely. As an example of the range of relief sought in a single action, the New York Attorney General recently filed suit against a wholesale grocery distributor based on increased wholesale prices for the sale of Lysol disinfectant products to New York grocery and discount stores, and her complaint seeks a permanent injunction, an accounting, disgorgement of profits and restitution to consumers, as well as a civil penalty and costs.

Restitution: Many price gouging statutes include restitution as a penalty, with the expectation that companies refund customers any amounts those customers paid in excess of the permissible prices. But even if companies faced with price gouging lawsuits or investigations provide that restitution to customers, they can nevertheless face additional—and potentially quite onerous—financial penalties.

Penalties per transaction: Dozens of states allow for civil penalties to be imposed on a "per violation" basis, meaning that each and every sale could be tallied for purposes of determining damages. Some states impose a daily cap on potential liability, such as Utah, which allows for up to $1,000 per violation, with a maximum of $10,000 per day, and Alabama and Rhode Island, which allow for up to $1,000 per violation, with a maximum of $25,000 per day. Rather than capping penalties on a daily basis,

Vermont's Attorney General can seek up to $10,000 per violation, up to a maximum of $1,000,000 for a company.

Other states provide no caps for civil penalties, including:

- **Indiana** and **Tennessee** (up to $1,000 per violation)
- N**orth Carolina**, **South Carolina** and **West Virginia** (up to $5,000 per violation)
- **Washington** (up to $2,000 per violation)
- **California** and **Virginia** (up to $2,500 per violation)
- **Delaware**, **Maryland**, **Pennsylvania**, and **Texas** (up to $10,000 per violation)
- **Colorado** (up to $20,000 per violation)
- **Alaska**, **Michigan**, and **Oregon** (up to $25,000 per violation)
- **Iowa** (up to $40,000 per violation)

Other financial penalties: A variety of other forms of financial penalties may be available in addition to those "per violation" penalties. Some statutes allow for fees and costs incurred in investigating the price gouging at issue to be shifted, such as Delaware and Pennsylvania. Others allow for the appointment of a receiver (Georgia, Illinois, Montana), revocation of business licenses (Kansas, Mississippi, South Carolina), or corporate dissolution (Rhode Island, Illinois, Massachusetts) to be ordered if non-compliance is determined. Delaware even permits treble damages.

Other relief: In some extreme cases, depending on the circumstances, violators could be jailed for up to thirty days (South Carolina), or even for up to one year (California, Connecticut, or West Virginia), five years (Mississippi), or ten years (Oklahoma).

Some states also have special protections in place if the customers affected include senior citizens. In New Jersey, the statute provides for up to twice the amount of normal restitution to be repaid to senior citizens. In Illinois, the attorney general may seek a civil penalty of up to $50,000 per violation if there was intent to defraud, but if the violation was committed against a person 65 years or older, that ceiling on civil penalties is raised and up to an additional $10,000 per violation may be imposed.

While even a small price increase could result in such penalties, there are many justifications and exceptions that permit some price increases. To avoid these risks, companies will benefit from reliance on their compliance practices and their own internal documentation of costs and justifications. This post does not cover all the damages that may be sought, nor does it address every state whose statutes may be implicated if a price increase does not fall within those exceptions. Rather, it illustrates the most common forms of damages available to enforcers and private plaintiffs, which should counsel caution in pricing movements for the duration of the emergency.

Price Gouging and Bad Intent: How Much Does It Matter?

Although much of the coverage relating to price gouging enforcement has focused on bad actors hoarding pandemic-related goods, businesses that make good faith efforts to comply with the panoply of price gouging restrictions may nevertheless find themselves in the crosshairs. The relevant statutes typically impose a form of strict liability, and do not take motive into account as we have discussed. Even if we assume that states should be able to freeze prices out of their desire to protect their citizens, it is not clear that states should impose strict criminal liability for price gouging violations.

Criminal offenses tend to have two essential part: the actus reus, or prohibited act, and the mens rea, or required mental state. The Supreme Court has observed that this intent requirement reflects a sense of culpability:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Though a mens rea requirement, our justice system attempts to differentiate between an actor who did not mean to commit a crime and an actor who intentionally or recklessly committed one.

There are some exceptions to this general rule, including for strict liability laws. Strict liability is a standard under which an actor who did not intend to commit a crime can nonetheless be held liable. A common example of a strict liability crime is a traffic offense, like speeding.

Some criminal price gouging laws impose this kind of strict liability. For example, only “knowing and willful” price gouging in Mississippi can lead to felony charges and up to 5 years imprisonment. However, other states, like California, have no such qualifying intent language, and nonetheless contemplate fines of up to $10,000 and/or imprisonment of up to one year. (Note: these maximums are per “violation.”)

The decision to treat price gouging as a strict liability offense is a judgment call; it reflects a weighing of the burdens on business activities and their possible damages. Courts are typically reluctant to hold industries strictly liable for possible harms caused by their activities, out of concern that this kind of liability would lead a disproportionate impairment of business. Other standards, like negligence, may allow more room for businesses to operate, while still allowing for injured parties to seek redress when appropriate.

The strict standards imposed in the majority of the price gouging laws presently in place are not likely to change midstream. But, should the federal government ultimately pass a price gouging law, and as local governments evaluate the impact of their laws and contemplate revisions, strong consideration must be given to the standards applicable to liability under these type of broad pricing restrictions.

Spotlight on Past Price Hikes: Anticipating and Establishing Defenses to Price Gouging Class Actions

Six months into the states of emergency triggered by the COVID-19 pandemic, there is a sizeable amount of data on how prices have actually moved, potentially leading to more private actions as plaintiffs now have the opportunity to review prices retroactively and establish claims based on hard data.

Reports have noted the impact of the pandemic on food and drug prices, for example. In a recent post, we flagged a report from a consumer watchdog group, noting how it leveraged some of that data to shine light on a handful of notable price increases for products sold by and through Amazon during the pandemic. The group analyzed pricing on a handful of products from May through August, and found that prices had been marked up well in excess of many price gouging limitations, including, for example, price increases of up to 425% on flour sold by Amazon and up to 941% increases on flour sold by third-party sellers through Amazon.

A class action proceeding pending against Amazon based on allegations of price gouging was filed in April. Private actions have also been filed against other retailers and online platforms related to purchases of goods such as N-95 masks, disinfectants, eggs, and even wine storage. This is likely only the tip of the iceberg.

While most states of emergency remain in effect, companies have likely acclimated to many of the present economic and social challenges. Companies and industries that have not yet been targeted by state attorneys general or private plaintiffs are not necessarily out of the woods with respect to allegations of price gouging. Indeed, it is extremely unlikely that Amazon will be the only company facing this sort of backward-looking attention from advocacy groups, let alone from plaintiffs given the time and opportunity to review months of data.

Pricing data alone may not tell the whole story. Price gouging laws – which have received limited analysis in the past – are subject to limitations, based on potential ambiguities, exceptions and defenses. The raw data does not control for factors affecting prices paid by consumers, nor will it isolate the impact of industry-specific facts, cost or supply factors, and the nature of demand. The prudent course is to document any justifications for pricing movements so that defenses are at the ready in the event claims are made or investigations are initiated against your company.

What Constitutes a "Trade" or "Market" Area Under State Price Gouging Statutes?

Price gouging enforcement is at an all-time high, but many ambiguities about the application of these state laws remain. Among the many questions left unanswered: what does a statute mean when it says "trade area" or "market area"? Many laws refer to the price at which the same or similar good or service is available in the "trade area" or "market area," but do not provide a definition. Does it mean goods or services sold within a city or county? Or the entire state? What about sellers who offer goods or services in an area that borders another state, especially one without a price gouging law? With no direction provided, antitrust law principles may provide some guidance.

Florida's price gouging law, for example, provides that a price is unconscionable if "[t]he amount charged grossly exceeds the average price at which the same or similar commodity was readily obtainable in the ***trade area*** during the 30 days immediately prior to a declaration of a state of emergency . . . ." Fla. Stat. § 501.160(1)(b). Under Kansas' price gouging law, the trigger is "[w]hether the amount charged by the supplier during the time of disaster grossly exceeded the price at which the same or similar property or services were readily obtainable by other consumers in the ***trade area*** . . . ." Kan. Stat. Ann. §50-6, 106(b)(1). In New York a price is unconscionably excessive if, among other things, "[t]he amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable in the ***trade area***." N.Y. Gen. Bus. Law § 396-r(2).

Other states refer to "market area." Louisiana, for example, includes the prohibition, "prices charged or value received for goods and services sold within the designated emergency area may not exceed the prices ordinarily charged for comparable goods and services in the ***same market area*** at or immediately before the time of the state of emergency . . . ." La. Rev. Stat. Ann. §29:732. Mississippi's price gouging law similarly refers to the "same market area." Miss. Code. Ann. § 75-24-25.

Some states provide more clarity with respect to geographical scope. For example, Oregon's price gouging statute provides that a price is unconscionably excessive if "[t]he amount charged for the essential consumer goods or services exceeds by 15 percent or more the *price at which the same or similar consumer goods or services were readily obtainable by other consumers in or near the geographical area covered by the declaration* of an abnormal disruption of the market." Or. Rev. Stat. §401.965(3). Oregon's state of emergency is statewide, which arguably means that a seller may be liable for price gouging anywhere in the state.

In defining what constitutes a relevant trade area, courts have held that "trade area" is not necessarily "equivalent to a relevant geographic market." *Little Rock Cardiology Clinic PA v. Baptist Health*. "[T]rade area considers the extent to which customers will travel in order to do business [with a seller] . . . [r]elevant market considers the extent to which customers will travel in order to avoid doing business [with a seller] . . . ." *Bathke v. Casey's Gen. Stores, Inc*. (internal quotations omitted). However, "trade area" can be defined as "the market area in which [a] seller operates," which is more akin to a relevant geographic market under antitrust law. *Little Rock Cardiology Clinic PA*, *Id.* at 598. The application of price gouging statutes that refer to a "trade area" may therefore be informed by antitrust law when determining what a seller's "trade area" is.

As explained in our blog post, Pricing in An Emergency: Where Price Gouging Meets Antitrust, antitrust and price gouging enforcement are connected by a shared purpose—consumer protection. They are also statutorily related, often employing similar statutory terms. Price gouging enforcement actions and lawsuits accordingly may be expected to turn to antitrust principles for guidance. As more lawsuits continue to be filed, businesses should be familiar with applicable state laws in determining the geographical scope of pricing restrictions.

Can a Declaratory Judgment Protect My Company From a Price Gouging Lawsuit?

Much of the discussion to date regarding price gouging laws has rightly focused on the two core elements of a price gouging lawsuit: what constitutes a violation and what are the defenses? And while these defenses are valid, most would prefer to never have to spend the time and expense getting a case dismissed in the first place – raising the question of whether a declaratory judgment may be the right solution.

A declaratory judgment allows a court to define the relationship between parties where there is an "actual controversy" between the parties at or before the filing of the suit. Declaratory judgments are creatures of statute, and both the federal government and most states have a form of declaratory judgement. While declaratory judgments cannot be used to seek an opinion advising what the law would be on a hypothetical set of facts, this does not mean that plaintiffs need wait for liability in order to bring a declaratory judgment action. Indeed a chief purpose of a declaratory judgment action is to define one's rights before they are violated.

In the price gouging context, a declaratory judgment action would likely challenge a price gouging law in one of two ways: by arguing that the law or its application was unconstitutional or otherwise invalid. Under either scenario, a party would potentially be able to affirmatively bring suit to determine whether its conduct was prohibited, without having to wait for a lawsuit.

Declaratory actions are often used by plaintiffs to challenge laws they find unconstitutional. In 2018, for example, the Sixth Circuit held that a district court properly ruled that Tennessee's durational-residency requirement for retail alcohol licenses was unconstitutional in violation of the Dormant Commerce Clause. The suit arose when two non-Tennessee companies applied for retail alcohol licenses, prompting Tennessee's Attorney General to bring a declaratory judgment action seeking to construe the constitutionality of the durational-residency requirement.

While this may potentially provide a path to avoiding price gouging liability with a declaratory judgment action, questions remain. The first is standing, a legal concept that limits who may bring a suit to those that have actually been harmed by the offending conduct in question. Generally, in order to have standing, a plaintiff must show that it suffered an injury, that there is a causal connection between the defendant's conduct and the plaintiff's injury, and that it is likely that the injury would be redressed by the court's decision.

Where there exists only the specter of a suit, but not a sufficiently definite threat of one actually occurring, a declaratory judgment may not always be appropriate. However, standing may potentially or arguably arise for instance, where a company is foreclosed from engaging in normal course of business pricing practices as a result of an extended state of emergency declaration and attendant pricing restrictions. Similarly, where a company is the subject of a government investigation or private lawsuit—the question of standing will be easily decided in the affirmative. Even if there is standing, a court may nevertheless view the question as unresolvable at the declaratory judgment stage if it involves questions of fact. This could be particularly so in the price gouging context where a company's pricing decisions may be the result of a complex process. Proving that such complicated pricing decisions were or were not caused by some other (or many other) set of facts may be just the type of investigation that a judge would find appropriate to let play out in discovery.

Businesses should consider whether, in the appropriate circumstances, they may be able to head off a significant expense, or even ultimate liability, with a well-constructed declaratory judgment action. As price gouging law develops, it is important for companies to remain agile and consider all options to avoid price gouging lawsuits.

International

Price Gouging Restrictions Beyond the 50 States

We continue to cover the patchwork of price gouging laws and enforcement actions brought under them, providing an overview of the current legal landscape. We are also following and will report on the application of price gouging restrictions outside the U.S. In this post, we provide an overview of price gouging restrictions applied by several jurisdictions that may be important to our readers.

European Union

While there are not price-gouging-specific laws in the EU, under EU competition law, companies can be sanctioned for using their market power to exploit consumers, including by price gouging. Article 102 of the Treaty on the Functioning of the European Union (TFEU) provides that an abuse by a "dominant" business may consist of "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions[.]" Dominance has been defined as "the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumer." This law applies to all goods and services. Dominant companies continue to be subject to excessive and discriminatory pricing restrictions, and authorities are likely to take an expansive approach when considering which companies are dominant, even if only as a result of the pandemic. Other rules may also be applied, like the EU unfair trade practices rules (Council Directive 2005/29/EC, 2005 O.J. (L 149) 22), which is implemented and enforced at the member state level, and several European jurisdictions have persuaded platforms such as Amazon and eBay to delist products advertised for sale at inflated prices where the seller is not a "trusted seller" on that platform.

UK

There are no price gouging-specific laws in the UK. The UK's Competition and Markets Authority (CMA), however, which "work[s] to promote competition for the benefit of consumers," has launched a COVID-19 Taskforce to monitor price gouging and set up a form for consumers to report businesses that are perceived as behaving "unfairly."

China
In China, price gouging is regulated by the Price Law, which generally requires "operators" to set prices based on, for example, fairness, the costs of manufacturing, and supply and demand. Other regulations may also apply to price increases, including antitrust and consumer protection rules.

South Africa
South Africa's Competition Act, like Article 102 of the TFEU, prohibits excessive pricing by "dominant" businesses. South Africa, however, has relatively low thresholds for establishing dominance. Section 7 provides that a business with a market share above 45 percent is irrebuttably presumed dominant, while one with a market share of above 35 percent is rebuttably presumed dominant, unless it can demonstrate that it does not have "market power." Companies with market shares of less than 35 percent may also be dominant where they are found to possess "market power," which the Act defines as the power to "control prices, to exclude competition, or to behave to an appreciable extent independently of its competitors, customers, or suppliers."

U.S. Territories
American Samoa's Commerce and Trade regulations prohibits price gouging "during states of disaster." During an emergency, it is unlawful to "sell, rent or offer to sell or rent any consumer food items or goods, emergency supplies, medical supplies, building materials, housing, gasoline, or any other goods or services necessary in an emergency response for a price of more than ten percent (10%) above the price charged by that person, contractor, business or other entity for those goods or services immediately prior to the declaration of a state of emergency."

Guam, under its deceptive trade practices act (Guam Code Ann. tit. 5, §32201), prohibits price gouging during disasters, with some exceptions. The Governor of Guam also passed a bill in March 2020, Public Act 35-74, that permits short-term freezes on price increases on specified goods and services, beyond the addition of any "increased import" or "air freight" costs.

The Northern Mariana Islands' Consumer Protection Act makes it unlawful for any business to engage in price gouging, which the Attorney General has defined as "when a business increases prices based on the shortage of goods caused by a natural disaster or any other emergency."

We have noted elsewhere, during emergencies, Puerto Rico law prohibits "speculative, unwarranted, and abnormal increases in prices," "excessive profits," and "other disruptive practices resulting from abnormal market conditions and scarcity caused by the national emergency[.]"

The U.S. Virgin Islands allows the government to freeze price increases during states of emergency (V.I. Code Ann. tit. 23, §1005).

Navajo Nation

In response to the pandemic, the Navajo Nation approved the enactment of a law prohibiting excessive pricing during emergencies, which makes it unlawful "for any person to intentionally, knowingly or recklessly sell or rent any commodity or rental facility to any person at a price greater than ten percent (10%) above the average price of the same commodity or rental facility for the thirty days immediately preceding the declaration of a state of emergency."

United Kingdom's CMA Issues Guidance to Businesses on Co-Operation During the Crisis

As we reported here, the UK government announced that, as part of a package of measures to allow UK grocery supermarkets to work together to feed the nation during the COVID-19 crisis, certain provisions of UK competition law will be relaxed temporarily for the domestic food sector. The CMA has now published a document setting out its approach to business co-operation more generally in response to COVID-19.

Summary of CMA Guidance

The CMA guidance makes clear that its primary focus in the next few months will be to protect UK consumers to the greatest extent possible from the adverse consequences of the COVID-19 crisis. Recognizing that co-ordination between competing businesses may be necessary to ensure adequate availability of essential supplies and services, the CMA has, through this guidance, provided business with reassurance that it will not take an enforcement action against otherwise anticompetitive activity, so long as it is:

- Appropriate and necessary or otherwise ensures security of supply of necessary goods and services;
- Clearly in the public interest;
- Contributes to the benefit or well-being of consumers;
- Deals specifically with critical issues arising out of the crisis; and
- Lasts no longer than is necessary to deal with critical issues.

However, the CMA also cautioned that it will not tolerate opportunistic businesses exploiting the crisis as a front for non-essential collusion, by, for example:

- Competitors exchanging commercially sensitive information on future pricing or business strategies, where this is not necessary to meet the specific needs of the crisis; or
- A business abusing its dominant position in a market (which might be a dominant position conferred by the particular circumstances of this crisis) to raise prices significantly above normal competitive levels.

The CMA also cautioned business against engaging in price gouging, stating that prices of products or services considered to be essential to protect consumers' health during the crisis (for example, face masks and hand sanitizers) should not be inflated artificially by businesses seeking to take advantage of the crisis. The CMA also noted that manufacturers can take steps themselves to help combat price gouging by setting maximum prices for the retail of their products.

Proskauer Comment

Whilst the CMA's guidance addresses the UK's approach, international businesses with international operations should seek specific guidance about whether relevant proposals will be treated similarly by the relevant competition authorities given that the UK's guidance is not binding on the European Commission or any other competition authority from the application of applicable international competition rules.

Flexibility within a Crisis: The European Competition Network's Response to COVID-19

On March 23, 2020, the European Commission announced that all competition authorities in the European Competition Network (ECN) (the Commission, the European Surveillance Authority, and the national competition authorities of each EU/EEA Member State) issued a joint statement on how to apply the European competition rules during the COVID-19 crisis.

More specifically, the joint statement underlines that European competition rules (along with the domestic rules of each EU/EEA Member State) are flexible enough to take into account changes in market circumstances such as those caused by the crisis. The joint statement states that:

- The ECN is fully aware of the social and economic consequences triggered by the COVID-19 outbreak in the EU/EEA.
- The different EU/EEA competition instruments have mechanisms to take into account, where appropriate and necessary, market and economic developments. Competition rules ensure a level playing field between companies. This objective remains relevant also in a period when companies and the economy as a whole suffer from crisis conditions.
- The ECN understands that this extraordinary situation may trigger the need for companies to cooperate to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place to avoid a shortage of supply.
- Considering the current circumstances, such measures are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 of the Treaty on the Functioning of the European Union (TFEU) / Article 53 of the EEA Agreement or otherwise generate efficiencies that would most likely outweigh any such restriction. If companies have doubts about the compatibility of such cooperation initiatives with EU/EEA competition law, they are encouraged to contact the European Commission, the EFTA Surveillance Authority, or the applicable national competition authority concerned at any time for informal guidance.

- At the same time, the ECN makes clear that it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (such as face masks and sanitising gel) remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position.
- In this context, the ECN points out that the existing rules allow manufacturers to set maximum prices for their products. This could prove useful to limit unjustified price increase at the distribution level.

Outside of the ECN's joint statement, many competition authorities are implementing legislative changes or otherwise made temporary changes to the rules to ensure their respective competition law regimes have the necessary flexibility to permit relevant conduct required due to the extraordinary circumstances caused by the crisis.

International Spotlight: Price Gouging Restrictions in China

China has a very different approach to price gouging restrictions than the state level system in place in the United States. As the Chinese market is of particular importance to our readers and their businesses, operators may benefit from unpacking the anti-price gouging rules contained in national laws and the reinforcing measures against price gouging adopted by Chinese regulators since the outbreak of the COVID-19.

PRC Price Law

In China, the state regulates price gouging centrally through the PRC Price Law, which was originally promulgated on December 29, 1997. In addition to the Price Law, certain price gouging practices may also raise anti-monopoly, unfair competition, or consumer protection concerns under the PRC Anti-Monopoly Law, the PRC Anti-Unfair Competition Law, or the PRC Consumer Rights and Interests Protection Law.

Under the Price Law, with some exceptions, business operators in China are required to set prices for their goods and services based on the costs of manufacturing, operation, and market supply and demand, and, as such, reasonable-price increases due to rising costs or changes in market supply or demand are allowed. (This does not account for the limited number of goods and services that are subject to government-set prices or government-guidance prices.)

Certain types of "unfair price behaviors" are also explicitly prohibited, including:

- fabricating and/or disseminating price increase information to drive up prices;
- hoarding commodities with tight supply or abnormal price fluctuations;
- using other price gouging practices to push up commodity prices excessively;
- using misleading or false pricing practices;
- covertly manipulating prices by raising or reducing grade levels of goods or services; and
- illegally seeking exorbitant profits (even absent any market power).

SAMR Guidance

In response to the COVID-19 pandemic, and to deter hoarding and price gouging of daily necessities and epidemic prevention products, Chinese regulators took additional steps to enhance the implementation of the Price Law and other relevant laws and regulations. On February 1, 2020, the China State Administration for Market Regulation ("**SAMR**", the agency that enforces the Price Law) issued the Guidance on Investigation and Handling of Illegal Acts of Price Gouging During the Novel Coronavirus Pneumonia Epidemic Prevention and Control Period (the "**SAMR Guidance**"). The SAMR Guidance sets out detailed guidance on the application of the Price Law and determination of illegal price gouging for daily necessities and products related to epidemic prevention.

Specifically, the SAMR Guidance categorizes the following practices of excessive pricing as illegal price gouging:

- selling the same product in such a manner that results in the margin between the seller's cost and the selling price being significantly higher than that of the last actual transaction on or before January 19, 2020 (being the day immediately prior to the Chinese government's official declaration of the Novel Coronavirus as a Class B level communicable disease); or
- otherwise selling products at a margin above levels determined as acceptable by the local counterparts of SAMR. Although SAMR has not issued national guidance on acceptable margins, local governments have set thresholds ranging between 15% and 35%.

Penalties

Violation of the price gouging laws may result in administrative penalties, including: (i) restitution, (ii) confiscation of any illegal gains and a fine up to 5 times of the illegal gains (capped at RMB 3 million, or approximately $450,000 USD, if there is no illegal gain), (iii) halting business operation pending rectification, and/or (iv) revocation of business licenses.

For more significant violations (e.g., those involving a large amount of illegal gains, or causing significant market disruption), the individuals directly responsible for the violations may incur criminal liability, which may include imprisonment for up to 5 years (or longer for "extremely serious" violations).

In addition to administrative and criminal penalties, affected consumers may also launch civil lawsuits against violators to recover losses caused by the violation.

Follow this space

This international spotlight series will unpack country-specific laws that may be of particular interest. Watch for additional overviews of price gouging restrictions applied in markets that are important to our readers.

International Spotlight: Price Gouging Restrictions in Brazil Converging with U.S. Enforcement

Companies that sell consumer products worldwide should note the growing convergence between Brazil and the United States for the use of anticompetitive practices laws to prosecute price gouging. The Brazilian Competition Law (Law No. 12,529, of November 30, 2011) prohibits a non-exhaustive list of anticompetitive practices, including engaging in acts that "arbitrarily increase profits." Brazil's antitrust authority, Conselho Administrativo de Defesa Econômica ("CADE"), however, has not traditionally investigated claims of price gouging as a standalone theory of harm, recognizing the difficulty of demonstrating that a price increase was "arbitrary" as opposed to a legitimate reaction to market developments. Instead, CADE typically has enforced the prohibition against price gouging as part of broader proceedings involving other anticompetitive practices.

Following the onset of the COVID-19 pandemic, CADE began taking steps to investigate price increases due to concerns about price gouging. This approach is significant to all businesses that sell products intended to reach consumers, and especially those businesses that manufacture or sell products that have seen increased demand due to the virus.

Ongoing Investigation

On March 18, 2020, CADE initiated a preliminary investigation involving companies in the pharmaceutical and medical industries, targeting prices charged to customers for laboratory tests, alcohol-based hand sanitizers, and surgical masks. The authority's top investigator, Alexandre Cordeiro, indicated that CADE "did research" and "figured out that prices for some products have increased in a non-reasonable and disproportionate way in relation to the demand." In response, and "[i]n view of the situation of high demand for medical-pharmaceutical products due to the need for emergency care motivated by the increase in cases related to COVID-19," CADE announced that it would be investigating whether "companies in the health care sector may be increasing prices and profits arbitrarily and abusively," making it necessary for CADE to take action "to ensure that such abuses, if effectively verified, are punished[.]"

As part of its investigation, the agency reports that it has contacted at least 80 hospitals, health insurance companies, pharmacy chains, and suppliers and manufacturers of surgical masks, hand sanitizers, and medicines used to treat COVID-19. In its effort to collect data and track

price changes, CADE asked for their invoices dating from November 2019 through July 2020. CADE has also requested similar pricing information from certain regional Departments of Health, to assess pricing changes in the public sector.

The matter is ongoing, and the result may set an important precedent. If the authority ultimately decides to press charges of "arbitrarily increasing profits" against the companies under scrutiny, this action could signal a broader change in CADE's stance on price gouging of which companies operating in Brazil should take heed.

Penalties

Violations of the competition law may result in administrative and criminal penalties. For the investigation noted above, failure to comply with CADE's requests constitutes a violation punishable by a daily fine of BRL 5,000 to 100,000 (approximately USD 1,000 to 20,000).

Importantly, private plaintiffs can also bring suit and seek damages as well as injunctive relief. If the plaintiff is a consumer, the Consumer Protection Code (Law No. 8,078, of September 11, 1990) also potentially may apply, which shifts the burden of proof to the business. In effect, once a plaintiff has stated the facts in support of their reasonable claim, defendants bear the burden of proving those facts are incorrect.

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Private Lawsuits

Private Plaintiff and Class Action Price Gouging Claims Spread as Emergency Continues

Private plaintiffs and state enforcers have been targeting businesses up and down the supply chain for price gouging violations. Some of these actions have been over the price of goods long associated with the COVID-19 pandemic, such as toilet paper and medical supplies. Yet others, such as a dispute in which a California winery has accused the company managing its storage facility of illegally increasing its rates, show the wide range of businesses potentially affected by price gouging laws. And with many state price gouging laws likely to remain in effect until at least early 2021, these lawsuits provide insight into the scope of expected price gouging claims going forward. A recent string of lawsuits brought against egg producers provides a particularly good vehicle for doing so.

The lawsuits were initially filed in April when the attorney general of Texas accused the country's largest egg producer of unlawfully increasing its prices. In recent weeks, the attorneys general of West Virginia and New York have also brought lawsuits accusing egg producers of unlawfully increasing their prices during the COVID-19 pandemic. Notably, the New York lawsuit accuses egg producers of colluding with a market research firm to inflate the price of eggs beyond mere cost increases. Similarly, private plaintiffs in California and Texas have brought suits alleging price gouging of eggs and, like the New York action, targets not only egg producers but also additional participants in the chain of distribution, including several grocery stores such as H-E-B and others.

There are several striking things about these lawsuits. The first is simply their expanded scope, demonstrating that state regulators have moved beyond those products most immediately associated with the COVID-19 pandemic like masks and hand sanitizer. And while those types of investigations continue apace, private and government plaintiffs will continue to target price increases for as broad a set of goods and services as their states' laws cover.

A second aspect is the increasingly sophisticated focus on price manipulation that goes beyond accusing companies of simply raising their prices after the onset of the pandemic. For example, the New York lawsuit alleges that egg suppliers and a market research company engaged in a

“feedback loop system” in order to inflate egg prices. Allegedly, the egg suppliers provided the market research firm with information about its egg prices, which was then used to create pricing indices that justified higher prices by other egg suppliers. This draws into stark relief the fact that while index pricing may seem like an intuitively safe way to price without price gouging liability, many state laws do not provide an exception for index pricing. To the contrary, in most cases pricing on an index simply does not provide legal protection. Indeed, it is the use of a pricing index that stands at the heart of the New York Attorney General’s complaint. Clearly, state regulators are taking a hard look at companies’ pricing schemes during the pandemic.

The inflated prices in the New York suit are alleged to have only persisted through March and April before returning to normal levels in May. State regulators and private plaintiffs will be scrutinizing any price increases even if they are only temporary and have returned to normal levels. And, as state statutes of limitations for price gouging can run for two to six years in most cases, and up to ten years in a handful of states, exposure for actions taken now will remain well beyond the end of the states of emergency.

State Enforcement

State Price Gouging Laws and Price Controls: A Historical View on a Questionable Objective

Price gouging laws have become more relevant than ever, but a historical review reveals that price gouging laws may be a historically recent, and misguided, development. It was not until 1979 that New York State enacted the nation's first law explicitly targeted at price gouging.

In response to the heating oil shortages during the winter of 1978-1979, New York enacted the first state price gouging law (New York Assembly Bill 25, 1979). The law provided that "the inability of these persons [heating oil consumers] to pay for home heating oil will result in severe hardship, especially among the elderly and the very young, and could result in the loss of lives." Specifically, under the NY statute:

> During any abnormal market disruption of the market for consumer foods and services vital and necessary for the health, safety and welfare of consumers, resulting from stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, national or local emergency, or other cause, no merchant shall sell or offer to sell any such consumer goods or services for an amount which represents an unconscionably excessive price.

Then Attorney General Robert Abrams brought the first known legal action under New York's price gouging statute in 1985 following Hurricane Gloria. AG Abrams "obtained $30,000 in refunds for Long Islanders who were overcharged for tree removal" following the storm. *See* Cale Wren Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws* (Jan. 2008) (unpublished M.S. thesis; Montana State University) (hereinafter "Davis"). However, it was not until 1998 that the New York statute was amended and expanded to reach up into the supply chain, prohibiting "any party within the distribution chain of consumer goods from excessively hiking prices" during an emergency (New York Senate Bill 2664, 1998). According to the bill's Assembly sponsor, the amendment was "particularly important in light of the destruction caused by the ice storms and tornadoes, which recently plagued parts of upstate New York." See Davis, *supra*, at 36. According to a summary of the bill, the amendment was

meant to protect consumers from the spikes in oil prices that followed from the invasion of Kuwait and the Exxon Valdez oil spill. *Id.* at 46.

During the 1980s, only three other states passed price gouging laws: Hawaii, Connecticut, and Mississippi. Ramping up in the 1990s, eleven states passed price gouging laws, including Florida and California. Florida's price gouging law was passed following Hurricane Andrew in 1992. While California's price gouging law was introduced in 1994 after the Los Angeles Department of Consumer Affairs received more than 1,400 complaints about price gouging following the Northridge earthquake. *See id.* at 58. The 10 percent limitation was originally opposed by the California Department of Consumer Affairs, who argued for a less restrictive ceiling of 50 percent, but ultimately withdrew its 50 percent recommendation. *Id*. at 59. In response to the 2003 wildfires in California, hotels were added to California's price gouging law in 2004. *Id*.

More recently, many states began to pass price gouging laws in response to the terrorist attacks on 9/11 and various hurricanes and natural disasters. Today, the majority of states have price gouging laws, including Colorado and Alaska which introduced and passed legislation in response to the COVID-19 pandemic.

However, while price gouging laws may be intended to protect consumers in states of emergency, some economists argue that "[p]rice controls interfere with the ability of merchants and consumers to settle freely on the prices at which they will trade." *See* Michael Giberson, *The Problem With Price Gouging Laws: Is Optimal Pricing During an Emergency Unethical?* CATO INST. (2011). Arguably, price controls may also "reduce economic welfare: by limiting price increases in areas harmed by emergencies"; "discourage conservation of goods and services precisely when they are needed most"; and "discourage extraordinary efforts to bring goods in high demand into the affected area." *Id*.

A brief review of the history of price gouging laws demonstrates that most price gouging laws were passed following natural disasters. Only time will tell if the remaining states without price gouging laws follow in the footsteps of their fellow states, and too, pass price gouging laws in response to the current state of emergency.

California Strengthens Penal Code Section 396, Codifies Price Gouging Executive Order

Since the beginning of the pandemic, many governors have issued executive orders targeted at combating price gouging. However, one California state senator, Senator Thomas Umberg, proposed going a step further. In April 2020, Senator Umberg introduced Senate Bill 1196, which would codify many of the provisions in California Governor Gavin Newsom's Executive Order N-44-20. On September 30, 2020, Governor Newsom signed the bill into law. In connection with the signing, Senator Umberg stated that "[t]his decisive action ensures that fewer of our neighbors will be victims of price gouging."

California Penal Code Section 396 prohibits price gouging during a declared state of emergency. Specifically, Section 396 states that "it is unlawful for a person, contractor, business, or other entity to sell or offer to sell . . . [a covered good] for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency." Section 396, however, does not address situations where a seller did not sell a product prior to the declaration of emergency. Executive Order N-44-20 closes this loophole. The Executive Order provides:

> If a person or other entity (including, but not limited to, any business enterprise of any kind) did not offer an item for sale on February 4, 2020 . . . that person or entity shall not—from April 4, 2020 until September 4, 2020 . . . offer to sell that item for an unconscionably excessive price. [A] price is unconscionably excessive if that price is more than 50 percent greater than whichever of the following applies: a) The amount that the person or entity paid for the item; or b) If the person or entity did not purchase the item, the total cost, to the person or entity, of producing and selling the item.

On September 3, 2020, Governor Newsom extended Executive Order N-44-20 through March 4, 2021.

Similar to Executive Order N-44-20, Senate Bill 1196 amends Section 396 to address sellers that did not offer the product at issue prior to a declared state of emergency. The bill prohibits a seller that did not sell the product prior to the declared state of emergency from charging a price that is 50 percent greater than the seller's existing costs. The bill also authorizes the Governor or Legislature to extend the duration of price gouging provisions

for periods greater than 30 days. According to San Diego District Attorney Summer Stephan, “[t]his law will close a troubling loophole in California’s price gouging law, and ensure that all sellers—brick-and-mortar stores or online business, previous sellers or new market entrants—are prohibited from preying on our state’s consumers during a declared emergency like the COVID-19 pandemic.”

As the pandemic drags on, and many states continue to extend their pricing restrictions put in place earlier this year, other states may take similar actions to codify executive orders to strengthen existing (or non-existing) price gouging laws. For more information on state price gouging laws and executive orders, view our interactive price gouging map.

Idaho Attorney General Pumps Brakes on Gas Sales

On November 18, 2020 the Idaho Attorney General entered into a settlement agreement with three gasoline retailers following an investigation into alleged price gouging. The settlement agreement, which focuses largely on the unique restitution system it creates, discloses that the allegations in the case stemmed from the companies' motor fuel prices following Idaho's declaration of a state of emergency on March 13, 2020. Findings in an Idaho Statesman investigation into the settlement agreement suggest that Attorneys General are continuing to push the envelope and bringing sometimes aggressive price gouging claims.

The settlement requires each company to provide a benefit to Idaho consumers by selling gas at reduced profit margins. To calculate this benefit, each company is awarded credits when the margin between their retail price and the wholesale price of its product is less than the existing average margin of the states surrounding Idaho. Using the Attorney General's example, if the average margin in a given month between retail and wholesale prices in the states surrounding Idaho is $.25 per gallon, and one of the retailers sells a consumer ten gallons of gas at a price with a margin of $.15 per gallon, the retailer would earn a $1 credit toward their redress obligation. The three companies have until January 2021 to satisfy these credit obligations.

The novelty of the credit system was not the only thing that raised eyebrows. An open question following the settlement was why a settlement for engaging in price gouging was focused largely on profit margins. Idaho's price gouging statute, like many price gouging statutes, proscribes firms from charging "exorbitant or excessive *prices*." But the settlement agreement frames restitution entirely in terms of margins. This question was answered last week by the Idaho Statesman who obtained 193 pages of documents on the state's investigation pursuant to a public records request.

The documents reveal that the Attorney General's theory of liability was indeed based entirely on profit margins. Despite the fact that gas prices dropped in Idaho following the declaration of a state of emergency in March, the investigated companies allegedly saw profit margins steadily rise from the 10-cent margins the companies had been collecting in February. Despite the drop in prices, the Attorney General focused on profit margins that allegedly reached as high as 70 cents/gallon,

concluding that such markups are “excessive at any time, but during a declared emergency it is unconscionable.”

Accordingly, even though prices had been dropping, the Idaho Attorney General nevertheless concluded that the prices were unconscionable because the companies were not dropping them even further to keep their historical margins in place. The settlement represents a significant development in price gouging enforcement and one that threatens to make it more difficult for companies to maintain compliance with applicable laws.

California Price Gouging Update: Class Action Filed Against Restaurant Group

On November 24, 2020, a class action price gouging claim was filed against a California-based operator of casual fine dining restaurants. The class action lawsuit against Hillstone Restaurant Group alleges price gouging in violation of California Penal Code § 396. According to the lawsuit, "Hillstone engaged in unfair and unlawful business practices by increasing its price on food items and also unjustifiably charging a 10% or 15% so-called 'service or packaging fee' for takeout orders." The lawsuit further states that "despite increasing the cost of its food items and adding this Fee, there has been no change in the quality or quantity of the food sold or the packaging being offered for pickup by consumers as compared to Hillstone's pre-pandemic offerings." Plaintiffs seek restitution, injunctive relief, attorneys' fees, and punitive damages. The complaint is striking not only because it shows the extent to which plaintiffs will bring claims at the margins of price gouging restrictions, but also for the glimpse it gives into what may be the coming wave of price gouging claims in 2021.

When California's price gouging law was activated on March 4, 2020, observers expected the focus of price gouging enforcement and litigation would be on goods and services most readily associated with the pandemic: necessary food products, medical supplies such as facemasks or hand sanitizer, and other goods required in emergencies. In a move, however, that is being seen with increasing frequency, plaintiffs are finding broad application of the pricing restrictions, and a swath of potential claims. In the Hillstone case, a restaurant group was sued for, among other allegations, adding a $13.50 service charge to a $90 dollar order of sushi and barbecue ribs. While Hillstone started charging a "service and packaging fee," the complaint alleges that it is "unclear what precisely the Fee is being charged for" given that plaintiffs allege that paper receipts referred to either a "service fee" or a "packaging fee." Nationwide, prospective plaintiffs are scrutinizing all aspects of pricing decisions.

At least two key takeaways come immediately to mind: (1) plaintiffs will continue to not only target businesses operating well above relevant state price gouging baselines, but also those who operate right at the margin set by state law; and (2) any company whose product is covered by a state price gouging law must maintain strict compliance measures to guard against potential claims. While many price gouging lawsuits in the early days of the pandemic targeted companies for increasing prices on

emergency supplies by two or three times what they were charging before the pandemic, the fact that plaintiffs in this case are targeting a 10-15 percent service packaging fee in a state that caps price increases at 10 percent serves as reminder that compliance with all applicable pricing restrictions will be critical for the foreseeable future—we are in unusual times.

The Hillstone matter also provides a case study for all businesses dealing with price gouging restrictions during the COVID-19 pandemic. While some restaurants like Hillstone have found themselves on the punitive side of California's attempt to protect consumers, elsewhere California restaurants have benefited from local ordinances that cap fees for app-based delivery companies like Uber and DoorDash at 15 percent. These measures, currently gaining steam in Santa Clara County and already in effect in San Mateo County and elsewhere, are meant to protect restaurants as their revenue streams shift increasingly toward delivery and takeout food, and away from in restaurant meals. Restaurants find themselves as both the target, and the intended beneficiary, of price gouging laws in California.

As lawmakers continue to lean heavily on pricing controls to protect consumer welfare during the COVID-19 pandemic, and as prospective plaintiffs look for foot-fault opportunities to bring high dollar claims, compliance with the patchwork of pricing controls in place has become the order of the day.

Alleged Price Gouging in the District of Columbia? Attorney General Racine Sets Sights on Local Business

On November 12, 2020, D.C. Attorney General Karl Racine filed a lawsuit against Capitol Petroleum Group, LLC ("CPG"), a retailer and distributor of gasoline in the District. According to Attorney General Racine, CPG overcharged its customers for gasoline in violation of the Natural Disaster Consumer Protection Act ("NDCPA"). This is the latest example of aggressive Attorneys General investigating price gouging allegations that go well beyond personal protective equipment and other staples.

The complaint alleges that CPG violated the law by engaging in price gouging during an emergency, as well as unfairly increasing profits on gas distribution. In its investigation, the OAG obtained data that during the three months preceding the March 11, 2020 declaration of emergency, CPG's average profits per gallon on regular gasoline and premium gas were $0.44 and $0.88, respectively. In the complaint, the Attorney General alleges that CPG's average profit per gallon in the weeks following the pandemic increased to $0.88 per gallon of regular gas, and $1.23 per gallon of premium gas that it sold. Attorney General Racine is seeking injunctive relief, restitution, civil penalties, and attorney's fees.

D.C.'s price gouging law prohibits sellers from charging "more than the normal average retail price for any merchandise or service sold during a public health emergency." D.C. Code § 28-4102(a). The "normal average retail price" under the NDCPA is "the price equal to the wholesale cost plus a retail mark-up that is the same percentage over wholesale cost as the retail mark-up for similar merchandise sold in the Washington Metropolitan Area during the 90-day period that immediately preceded an emergency." *Id.* § 28-4101(2)(B). A violation of the law can result in penalties of up to $5,000 per violation. A key issue in the case is likely to be whether the defendant's prices or markup exceeded the "normal average retail price," as there are numerous questions of fact that must be determined, and defenses may be available.

Attorney General Racine's lawsuit is not the first of its kind. In the early months of the pandemic, Attorney General Racine brought a lawsuit against a D.C. convenience store for allegedly charging $12.99 for 121-oz. bottles of bleach. This, Attorney General Racine said, was 200 percent higher than the price offered by other retailers in the District. The lawsuit followed a cease and desist letter ordering the store to reduce its price. Attorney General Racine stated that the "Office of the Attorney General

will enforce the law against stores like [this] that flatly refuse to adhere to a cease-and-desist letter that it received from my office."

This lawsuit reflects a further reach by Attorneys General against a broad range of companies, accusing them of price gouging goods and services beyond personal protective equipment. Like the District's price gouging law, many state laws are broad in scope, and potentially may be applied to a variety of goods and services that arguably should be outside the scope of price gouging laws. To mitigate this risk, businesses should be familiar with the variety of goods and services that state laws may cover and implement compliance practices as necessary. For more compliance practice tips, read our previous blog post.

A Comedy of Errors Sinks a Local Government's Price Gouging Case

In a case of mistaken identity and a web of conflicting testimony, a Fresno local business successfully appealed a price gouging fine. The saga between the store and the City of Fresno offers insights in the importance of maintaining proper business records to defend potential price gouging allegations.

On April 8, 2021, an Administrative Hearing Officer for the City of Fresno, California dismissed an Administrative Citation issued by the City Attorney's Office against a local business for allegedly price gouging. City Inspectors issued the $10,000 citation in March 2020 while Fresno was under a State of Emergency. The store owner appealed the fine, and after a virtual hearing, the Hearing Officer determined that the City had not met its burden of proving each element of the case against the business.

The price gouging provision in the Fresno Municipal Code ("FMC"), prohibits any person, during a declared state of emergency, from selling or offering for sale certain products at more than 10 percent of the price charged for those products immediately prior to the declaration of the emergency. Products covered by the provision include, "consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, or building materials." However, if the seller's costs have increased, then the seller may not charge a price greater than 10 percent more than the seller's total cost plus the usual business mark-up. Violating this section of the Code can result in a misdemeanor, including either a maximum fine of $1,000, imprisonment for up to one year, or both. Alternatively, the City can issue an administrative citation of up to $10,000. *See* FMC § 2-513.

The City alleged that the local business had quoted $16.00 for a 24-pack of 16.9 ounce bottles of water. The business appealed the fine, claiming the quoted price was for a different product—a 24-pack of 20-ounce bottles of water—and contending the City had failed to review the proffered records regarding the store's costs and prior sales.

According to the evidence presented at the hearing, two City inspectors planned to visit the store on March 19, 2020 after their office received a complaint that the store in question had engaged in price gouging relating to the sale of bottled water. The first inspector testified he entered the store, asked the clerk the price of a case of water, and, after pointing at

the case of water, the clerk replied it was $16.00. The inspector testified he “voiced his surprise” at the price of the water, declined to make the purchase, re-joined his colleague outside the store, and informed her of the quoted price for the water “close to the sales register at the front of the store.” Then his partner testified that she entered the store, identified herself to the clerk, and was quoted a price of $9.99 for what she believed to be the same pack of water as her partner.

On cross-examination, the attorney for the store pressed the inspectors on the specific size water bottles at issue and the baseline prices the inspectors had used in determining that a price gouging violation had occurred. The City had failed to document whether the water bottles referenced by both inspectors were indeed **16.9 ounces**. Instead, the attorney argued, the price differences were easily explained by the fact that the $16.00 price was quoted for a case of **20-ounce** bottles. Further, the inspectors had not scanned the water bottles in question to ascertain the price or the SKU number at the register. The store’s attorney also elicited testimony from the inspectors that they had not obtained evidence of the price charged by the local business immediately before the state of emergency was declared. Instead, the investigators used evidence of other retailers’ prices in early March 2020.

Next, the store’s business manager testified that the store had only recently acquired **16.9 ounce** bottles at the time of the inspectors’ visit and accordingly that product was in storage awaiting processing in the store’s computer. At the time of the inspectors’ visit, the business manager declared, the store sold only **20 ounce** water bottles. Further complicating the matter, the Hearing Officer noted the absence of the store clerk who had communicated with the inspectors on the day in question. The clerk was unable to attend the hearing because of a family emergency.

Despite the tangled facts, the Hearing Officer concluded that the City had failed to prove two elements of the case by failing to provide sufficient evidence as to the specific product at issue in the citation and failing to calculate the retail price charged by that company prior to the state of emergency. Accordingly, the case against the business was dismissed.

In price gouging cases such as this, businesses across all industries can learn valuable lessons about the prosecution of a price gouging case. First, the government carries a heavy burden of proving its case. It must prove each element under the specific terms of the statute. Second, identifying the specific product at issue is vital—particularly noting sizes, styles, or other upgrades that make two items different products. Finally, businesses ought to maintain proper records of the timing of product purchases, the costs for these products and historical pricing data.

Idaho Attorney General Pumps Brakes on Gas Sales

On November 18, 2020 the Idaho Attorney General entered into a settlement agreement with three gasoline retailers following an investigation into alleged price gouging. The settlement agreement, which focuses largely on the unique restitution system it creates, discloses that the allegations in the case stemmed from the companies' motor fuel prices following Idaho's declaration of a state of emergency on March 13, 2020. Findings in an *Idaho Statesman* investigation into the settlement agreement suggest that Attorneys General are continuing to push the envelope and sometimes bringing aggressive price gouging claims.

The settlement requires each company to provide a benefit to Idaho consumers by selling gas at reduced profit margins. To calculate this benefit, each company is awarded credits when the margin between their retail price and the wholesale price of its product is less than the existing average margin of the states surrounding Idaho. Using the Attorney General's example, if the average margin in a given month between retail and wholesale prices in the states surrounding Idaho is $.25 per gallon, and one of the retailers sells a consumer ten gallons of gas at a price with a margin of $.15 per gallon, the retailer would earn a $1 credit towards their redress obligation. The three companies have until January 2021 to satisfy these credit obligations.

The novelty of the credit system was not the only thing that raised eyebrows. An open question following the settlement was why a settlement for engaging in price gouging was focused largely on profit margins. Idaho's price gouging statute, like many price gouging statutes, proscribes firms from charging "exorbitant or excessive prices." But the settlement agreement frames restitution entirely in terms of margins.

This question was answered last week by the *Idaho Statesman* who obtained 193 pages of documents on the state's investigation pursuant to a public records request.

The documents reveal that the Attorney General's theory of liability was indeed based entirely on profit margins. Despite the fact that gas prices dropped in Idaho following the declaration of state of emergency in March, the investigated companies allegedly saw profit margins steadily rise from the $.10 margins the companies had been collecting in February. Despite the drop in prices, the Attorney General focused on profit margins that allegedly reached as high as $.70 per gallon, concluding that such mark-

ups are “excessive at any time, but during a declared emergency it is unconscionable.”

Accordingly, even though prices had been dropping, the Idaho Attorney General nevertheless concluded that the prices were unconscionable because the companies were not dropping them even further to keep their historical margins in place. The settlement represents a significant development in price gouging enforcement and one that threatens to make it more difficult for companies to maintain compliance with applicable laws.

NY Court Embraces the Law of Supply and Demand, Shows Hostility to Price Gouging Complaint

On September 23, 2020, the New York Supreme Court dismissed Attorney General Letitia James's lawsuit against Quality King Distributors alleging that the wholesaler unlawfully increased the price of its Lysol products. In a decision no longer than a page, Judge Eileen A. Rakower found that Quality King's prices were neither "unconscionable [n]or overall extreme."

The lawsuit, a first of its kind to reach a decision during the COVID-19 pandemic, may provide useful guidance to other courts analyzing similar issues. Particularly, in determining whether Quality King's pricing was unconscionable, Judge Rakower appears to have considered its average prices for a particular product or category of products, rather than looking at each transaction individually. This basis, along with Judge Rakower's determination that Quality King's prices were not unconscionable when considered in the scheme of things may provide future price gouging defendants with a plausible defense to any alleged price increases.

This case began in May 2020 when AG James filed a lawsuit against wholesale grocery distributor Quality King and its CEO for price gouging in violation of New York's General Business Law § 396-r. Section 396-r, which has since been amended, 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, § 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 lawsuit alleged that between January 2020 and April 2020, the wholesaler raised the price of Lysol from around $4.25 for a 19-ounce can, up to as high as $9.15. According to the lawsuit, Quality King's costs did not increase. The wholesaler's alleged actions resulted in a median unit margin on sales of Lysol of 47% for February, and 95.5% for March 2020. 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. Furthermore, Quality King's customers passed those price increases on to their customers, charging as much as $16.99. AG James sought, among other relief, disgorgement of all profits from the illegal practice and a civil penalty of $25,000.

Judge Rakower heard oral arguments on September 22, 2020, and just one day later issued an order dismissing the lawsuit. The Court concluded that while Quality King may have sold Lysol at prices that "were seemingly increased to the extreme," it did not "uniformly" raise the price of the product. Further, when considering the wide array of Lysol products offered at the time, "the pricing overall did not indicate any use of unfair leverage, an abuse of bargaining power or unconscionable means; nor did the pricing represent a gross disparity between the price of the goods and their value measured by the price at which they were sold immediately prior to March 7, 2020." Lastly, Judge Rakower concluded that not only were Quality King's prices competitive when compared to some competitors, Quality King demonstrated that their costs increased.

Price Gouging Takedowns – The Online Platforms Have a Say

Over the past month, state enforcers have declared a war on price gouging, but some of the most effective enforcers have not been the states. Online platforms and other large retailers have taken extraordinary steps to restrict price gouging, and their monitoring has already led to hundreds of thousands of items pulled from e-commerce websites. With entire countries engaging in social distancing, e-commerce has become de-facto commerce for many, and this dramatic and sudden shift gives online sellers enormous influence on price gouging enforcement.

Online platforms were some of the first to take action on price gouging. For example, on February 28, before most states had declared a state of emergency, eBay reminded sellers that price increases during an emergency can be considered violations of eBay's listing policies. And on March 5, eBay decided to block all listings of facemasks, hand sanitizer, and disinfecting wipes, citing "regulatory restrictions" across the United States.

Similarly, Amazon has reminded sellers: it "has zero tolerance for price gouging." By partnering with local law enforcement and using automated monitoring, in the month of March alone, Amazon suspended thousands of accounts for "violating [Amazon's] fair pricing policies," and removed hundreds of thousands of items from its online marketplace. Walmart took a similar tack by "automatically depublish[ing] listings that price items substantially in excess of other listings." *See* Alexandra S. Levine, *State AGs join DOJ, FTC, Congress to fight price-gouging*, Politico (Mar. 26, 2020), https://www.politico.com/newsletters/morning-tech/2020/03/26/state-ags-join-doj-ftc-congress-to-fight-price-gouging-786404.

Despite active enforcement online, many state attorneys general do not think the platforms are doing enough. In a March 25th letter to major online platforms, 32 attorneys general cited high prices for hand sanitizer and face masks on Craigslist and eBay during the month of March. The AGs wrote that the major online marketplaces "have an obligation to stop illegal price gouging," and the AGs' letter includes recommendations for doing so. Notably, these recommendations include "creating and enforcing strong policies that prevent sellers from deviating in any significant way from the product's price before the emergency," and creating a portal for customer price gouging complaints.

It is important to note that many of the entities being taken down do not appear to be well-established retailers. Nevertheless, reputable sellers likewise may want to monitor their sales and pricing, as well as the sales of their resellers. Also, firms using algorithmic pricing can consider monitoring these algorithms to prevent sudden price spikes as part of their compliance efforts.

Sixth Circuit Remands Price Gouging Case, Allows Kentucky AG to Resume Investigations

The Sixth Circuit issued its opinion in the *Online Merchants Guild v. Cameron* case on April 29, 2021, dissolving a preliminary injunction that had prevented the Kentucky Attorney General from investigating alleged violations of Kentucky's price gouging laws, and remanding to the district court for further proceedings. 995 F.3d 540 (6th Cir. 2021).

Last June, a Kentucky federal court granted a preliminary injunction to the Online Merchants Guild, halting the AG's investigations "into potentially excessive prices charged on Amazon's online store." The Online Merchants Guild argued that Kentucky's enforcement of its price gouging laws violated the dormant Commerce clause for multiple reasons, including that they were impermissibly extraterritorial. According to the Online Merchants Guild, because their sales of goods in Amazon's online marketplace were governed by Amazon's own internal requirement that all goods in the Amazon marketplace be priced the same nationwide, by investigating violations of Kentucky's price gouging laws, in effect, Kentucky was demanding that the vendors charge Kentucky-based pricing in all 50 states. The district court found that the Online Merchants Guild was "likely to succeed in showing that the practical effect of [the] Attorney General's recent investigations into possible violations violate the dormant Commerce Clause." The district court's decision was based in large part on the determination that the impact of the application of the Kentucky price gouging laws on the Online Merchants Guild was impermissibly extraterritorial.

Kentucky Attorney General Daniel Cameron appealed the preliminary injunction to the Sixth Circuit. The Sixth Circuit agreed with AG Cameron that Kentucky's law was not impermissibly extraterritorial in violation of the dormant Commerce Clause because even if Kentucky's price gouging laws did have an effect on "wholly out-of-state commerce, that effect is not the law's direct or inevitable result." In effect, it was Amazon's pricing structure that led to any extraterritorial effect, not the price gouging law itself. The Circuit's ruling was narrowly tailored to the district court opinion on extraterritoriality and did not touch the other dormant Commerce Clause arguments that were pleaded but not fully briefed below. Instead, the Court found the extraterritoriality argument a particularly bad fit, given that "in a modern economy just about every state law will have some 'practical effect' on extraterritorial commerce."

Online Merchants Guild has filed papers indicating they plan to move for an en banc hearing. Its motion papers for rehearing are due on June 1, 2021.

Price Gouging Settlements Around the Country: Non-Compliance May Cost You

As companies continue to examine their pricing in light of the ongoing COVID-19 pandemic, state attorneys general and private plaintiffs continue to bring suits under state price gouging laws. The complaints include requests for a range of remedies, including injunctions, disgorgement, restitution, fines, or other financial penalties. With the majority of price gouging laws having now been in effect for almost a year, we have seen businesses and state attorneys general enter into a variety of settlements. These settlements are a useful tool for businesses looking to gauge their risk as it relates to price gouging enforcement and compliance.

In the main, we are seeing three types of financial damages being claimed with respect to alleged violations of state price gouging laws: restitution, penalties per transaction, and other financial penalties such as costs or treble damages.

Restitution: Under many price gouging statutes, companies may be required to refund customers for the amount charged in excess of the permissible amount allowed under the statute.

Penalties per Transaction: In many states, civil penalties are imposed on a "per violation" basis. In these cases, every sale could count as a separate violation subject to penalty. Penalties range from a minimum of $1,000 to $40,000 maximum. For example, North Carolina, South Carolina, and West Virginia provide for up to $5,000 per violation with no upper limit on the total exposure. Other states provide for a daily cap on penalties, such as Alabama with up $1,000 per violation with a daily maximum of $25,000.

Other Financial Penalties: In addition to restitution or penalties, other financial penalties could include fees and costs associated with the investigation, or treble damages.

Since the uptick in price gouging enforcement actions, several cases have concluded with settlement agreements. These settlements illustrate the variety of damages and financial liabilities companies face in price gouging suits. For example, the North Carolina Attorney General recently settled a case against a PPE seller for allegedly marking up prices by over 100%. While not admitting wrongdoing, the company agreed to a $150,000 settlement including costs.

- Similarly, a Colorado company agreed to pay $70,000 in restitution and fees to settle a suit alleging price gouging in the sale of face masks. The Colorado Attorney General's complaint alleged that the company increased prices, in some cases in excess of 250% of the cost to acquire the PPE.
- The Idaho Attorney General agreed to a sales credit system to recover restitution from three gas retailers who were accused of violating the state's price gouging statute. According to the settlement agreement, the companies will provide $1.5 million in restitution through sales credits to consumers over the next year. The companies did not admit to any wrongdoing.
- In Vermont, a surgical mask seller settled a suit brought by the state Attorney General alleging that the company had engaged in price gouging with respect to sales to a medical center. The terms of the settlement agreement require the company to supply 80,000 units of PPE to the medical center and an additional 10,000 units of PPE to the state as restitution.

Enforcement actions and private lawsuits pending in state and federal courts around the country include claims for damages such as restitution, and attorneys' fees. For example, in a class action lawsuit filed against a gourmet grocer in California, the plaintiffs seek actual damages, restitution, and attorneys' fees. The suit alleges that "Defendants willfully increased their prices [of food items and other consumer goods] beyond permissible limits after the March 4, 2020 declaration of a state of emergency in California in violation of Penal Code § 396, Executive Order N-44-20, and Executive Order N-78-20."

In November, the DC Attorney General brought a suit against a local gas retailer for alleged price gouging beginning in March. Fines for violating D.C.'s price gouging laws are up to $5,000 per violation. The Attorney General's complaint seeks an injunction, damages and restitution, civil penalties and attorneys' fees.

Price gouging suits can be triggered by even a small price increase, bringing the risk of significant financial penalties. However, numerous justifications and exceptions may permit companies to increase prices in some cases. As an essential part of managing risk, companies should examine their compliance practices and prepare their own internal documentation of costs and justifications.

Federal Enforcement

DOJ Continues Price Gouging Enforcement Under the Defense Production Act

On April 2, 2021, the acting U.S. Attorney for the District of New Jersey released an update of her office's efforts to prevent fraud related to the COVID-19 pandemic, noting prosecutions involving the Paycheck Protection Program, the Economic Injury Disaster Loan program and the Unemployment Insurance programs, as well as prosecutions involving price gouging and hoarding of critical personal protective equipment. The announcement comes on the heels of a similar one by Attorney General Merrick Garland last month, who marked the first anniversary of the passage of the CARES Act by announcing that, in the past year, the Department of Justice has charged nearly 500 individuals with COVID-related fraud. These announcements serve as important reminders that, even as the vaccine roll-out continues and life regains a sense of normalcy, federal prosecutors continue to actively monitor price gouging compliance.

In New Jersey, acting U.S. Attorney Rachael A. Honig stated that in the past year her office has charged 18 defendants, including four companies, with fraud, price gouging, and other crimes related to the COVID-19 pandemic. Of the corporate defendants, two were Chinese manufacturers charged with exporting misbranded and defective masks falsely purporting to be respirators. The first company, Crawford Technology Group (HK), was charged with misbranding over 140,000 masks purporting to be KN95 respirators. The charge in the complaint carried a maximum fine of $200,000. Relatedly, King Year Packaging and Printing was charged earlier this year with three counts of violating the Federal Food, Drug and Cosmetic Act for importing nearly half a million defective masks that falsely purported to be N95 respirators.

Two import companies from Ocean County, New Jersey, CSG Imports and KG Imports, entered deferred prosecution agreements for alleged violation of the Defense Production Act. The prosecutions arose following the seizure of over 11 million items of PPE, mainly respirator and disposable face masks, from three warehouses in Lakewood, New Jersey. Notably, CSG Imports had never imported PPE, or indeed health-care products of any kind, prior to the pandemic, and KG imports was formed after the

pandemic began, specifically to import PPE. Under the terms of the agreements, the companies were required to sell the 11 million items at cost and disgorge nearly $400,000 in profits stemming from transactions with two customers who purchased PPE from CSG at excessive costs.

Attorney General Merrick Garland has said that the DOJ would continue to vigorously monitor fraud related to the pandemic, an effort started last March by then-Attorney General William Barr. Still, questions remain about the ability of the government to prevent fraud. This was the sentiment expressed by the House Select Subcommittee on the Coronavirus, which stated in a majority staff memo released last month that the Trump administration's lax oversight of CARES Act funds led to billions of dollars in potential fraud. While questions over the scope of DOJ enforcement may remain, it is clear that pricing enforcement remains at the front of the Department's mind and enforcement priorities.

Pricing Controls under the Defense Production Act

With the federal government's increasing focus on enforcing price gouging compliance, attention has turned to the Defense Production Act (the "DPA"). Passed in 1950 in response to the Korean War, the DPA is modelled on the War Powers Acts of 1941 and 1942 and gives the President, among other things, sweeping power to control the domestic economy during times of crisis. Despite these origins, the DPA is routinely invoked in a variety of circumstances, including in response to natural disasters like Hurricane Katrina and now COVID-19 (the DPA as later amended in 1988 is also the basis for the president's authority to block certain foreign investment into the U.S. on national security grounds through the Committee of Foreign Investment in the U.S.—or CFIUS).

Beyond CFIUS, much of the federal government's recent work under the DPA has focused on combating the COVID-19 pandemic through market intervention and pricing controls. For example, President Trump used the DPA to order several companies to produce ventilators and PPE for the federal government, and the CARES Act authorizes the Department of Defense to spend nearly $1 billion pursuant to the DPA to help fight COVID-19 and stabilize impacted economies. Along with these powers to control production and spending, however, the DPA also penalizes hoarding or price gouging of any materials deemed scarce. On March 25, 2020 the Secretary of Health and Human Services announced 15 categories of goods covered by the Act.

The DPA provides in 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." 50 U.S.C. § 4512. While such prohibitions may ring similar to state price gouging laws, there are several noteworthy distinctions.

First, the DPA specifically prohibits "accumulation" as a triggering condition for price gouging liability, while states' price gouging statutes focus simply on the price charged. Accumulation is not defined in the Act, highlighting perhaps the key challenge in DPA compliance: Many of the DPA's key terms are undefined, and there exists almost no case law applying this part of the statute.

Along with “accumulation,” it is unclear what “the reasonable demands of business . . . consumption” are, particularly given that many of the products identified by HHS and covered by the DPA have seen extreme price and supply fluctuations over the past few months. How exactly is one to calculate “reasonable demands” for products whose relevance has exploded, but whose use may quickly recede again in the near future (for example, news of a COVID-19 vaccine would seriously affect the value of various COVID-related goods and services)?

Moreover, precisely what constitutes price gouging under the Act is not clear. While most state statutes provide specific benchmarks like “unconscionable” or 10% above normal market prices, the DPA simply bans “prices in excess of prevailing market prices.” Arguably, the statute would not ban any price increases above prevailing market prices, but there is little guidance on what would be too much. Other ambiguous language such as prevailing market price leads to further uncertainty. Is the market price defined as the price at the beginning of the pandemic? If so, what then was the start of the pandemic? While the DPA does not provide these answers, recent enforcement by the Department of Justice may provide some insights.

Until courts have dealt more with the price gouging provisions of the DPA and defined some of the key terms, state law may provide the closest analogue to shed light on unanswered DPA questions. While “excess” may not be defined, existing state laws provide for price increases between 10% and 30%, and this range provides a reasonable starting point for any pricing decisions. Accordingly, best practices for DPA compliance, much like compliance with state price gouging prohibitions more generally, include determining whether your goods or services are covered, making sure to track document pricing and cost information as well as reasons for any price movements, and making efforts to ensure that prices do not exceed any conservative benchmarks.

Federal Price Gouging Enforcement Update

While the majority of price gouging enforcement has occurred at the state level, *see* Proskauer on Price Gouging—A Coast-to-Coast Reference Guide, the federal government has also been active, and several federal price gouging bills have been introduced, though none have been signed into law. *See*, *e.g.*, S. 3574, 116th Cong. (2020) (empowers the FTC and Attorney General to enforce civil and criminal penalties for price gouging); H.R. 6472, 116th Cong. (2020) (prohibits "unconscionably excessive" pricing "indicat[ing] the seller is using the circumstances related to" the emergency to increase prices); H.R. 6264, 116th Cong. (2020) (creates a new criminal offense for price gouging during a state of emergency); H.R. 6450, 116th Cong. (2020) (based on California law, limits raising price of consumer goods to no more than 10% after an emergency declaration).

Therefore, with no comprehensive federal legislation on price gouging, enforcement has largely taken the form of the Department of Justice and other executive agencies acting under the Defense Production Act (the "DPA"), a law passed in 1950 in response to the Korean War which gives the president broad authority to manage domestic industrial affairs in the interest of "national defense." While originally enacted in wartime and more commonly employed to regulate certain foreign investment into U.S. businesses, authority extends to the Executive Branch to act in response to national emergencies like COVID-19.

The DPA has two sections relevant to the COVID-19 pandemic: an anti-hoarding provision and an anti-price-gouging provision. The anti-hoarding provision bars accumulation of materials "in excess of the reasonable demands of business, personal, or home consumption." The anti-price gouging provision bars accumulation of materials for the "purpose of resale at prices in excess of prevailing market prices." The act carries both civil and criminal penalties.

Pursuant to the DPA, President Trump has issued three executive orders to combat price gouging, which delegated authority to the secretaries of the U.S. Department of Health and Human Services and the U.S. Department of Homeland Security to prevent the hoarding of designated health and medical resources necessary for combatting the spread of COVID-19. On March 25, the Secretary of Health and Human Services designated 15 categories of health and medical resources as scare or threatened materials, with the designation expiring in 120 days, bringing them within the scope of DPA enforcement.

Also in March, Attorney General William Barr announced a nationwide task force to address hoarding and price gouging in the wake of COVID-19. The task force includes over one hundred federal prosecutors around the country and has opened hundreds of hoarding and price gouging investigations into companies and individuals selling PPE and other goods designated as "scarce" by HHS. While reporting has emerged that White House officials have resisted the reach of the Task Force, and that enforcement has not been as robust as advertised by the DOJ, federal price gouging enforcement is real and must be considered in any compliance program.

While a general prohibition on price gouging may seem familiar, two distinctions are worth highlighting with respect to federal enforcement. First, the DPA explicitly focuses on *accumulation* of materials. This is in contrast to many state price gouging laws that focus solely on whether the price being charged is in excess of a determined baseline level, with various exceptions like for increases in costs.

Second, while many state price gouging statutes have either specific benchmarks for price increases (generally ranging from 10-30%) or use specific language to target only extreme price increases (such as "excessive" or "unconscionable"), the DPA simply prohibits "resale at prices in excess of prevailing market prices." Because "excess" is not defined in statute and has not yet been defined by the courts, it is unclear what exactly qualifies as price gouging under the DPA (though state laws probably provide a reasonable analogue). In comments before the Senate Judiciary Committee on the progress of the Task Force, DOJ attorneys stated that the Task Force is focused on "profiteering." However, despite further noting that traditional costs may play a role in determining whether price gouging has occurred, the DOJ declined to offer any bright line rules.

Enforcement to date offers some guidance. In the first case brought by the federal government for COVID-19 related price gouging, criminal charges were brought against a defendant for allegedly using his retail sneaker and sports apparel store to amass and sell large quantities of PPE at a more than 1,000% markup. In other instances, federal prosecutors have brought criminal charges against companies and individuals, alleging either attempts to overcharge the government for PPE or simply defrauding the government with offers to sell equipment that never existed in the first place. However, while federal enforcement to date might seem focused on "bad actors" selling and hoarding PPE and other medical equipment associated with the COVID-19 pandemic, the broad language of the DPA, along with accounts of active DOJ inquiries, makes it important to continue to monitor federal actions in this space and to consider federal restrictions when putting a price gouging compliance program in place.

Price Gouging Laws and the Dormant Commerce Clause?

During the pandemic, businesses are asking about their potential price gouging liability in states that they do not sell into directly but where their products might end up. At least one federal circuit court addressed this question in examining a Maryland price gouging law that covered pharmaceuticals (outside the emergency context), ultimately striking down the law as a violation of the dormant Commerce Clause in a split decision.

In *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), the U.S. Court of Appeals for the Fourth Circuit examined a constitutional challenge to a Maryland price gouging law that prohibited "[a] manufacturer or wholesale distributor" from "engag[ing] in price gouging in the sale of an essential off-patent or generic drug." Md. Code Ann., Health-Gen. § 2-802(a). Notably, the statute did not apply to retailers that sell directly to a consumer. Unlike the price gouging laws triggered during states of emergency (such as the pandemic), the Maryland pharmaceutical statute operated all the time. The statute defined price gouging as "an unconscionable increase in the price of a prescription drug." *Id*. § 2-801. The statute further defined "essential" medications as those "made available for sale in [Maryland]" that either "appear[ ] on the Model List of Essential Medicines most recently adopted by the World Health Organization" or are "designated . . . as an essential medicine due to [their] efficacy in treating a life threatening health condition or a chronic health condition that substantially impairs an individual's ability to engage in activities of daily living." *Id*. § 2-801(b)(1).

The Association for Accessible Medicines (AAM)—a group of prescription drug manufacturers, wholesale distributors, and other pharmaceutical companies—brought suit to challenge the law. Only one of AAM's member-manufacturers was based in Maryland, and none of the member wholesale distributors were based in Maryland. Typically, AAM's member-manufacturers sold their products to AAM wholesale distributors. Therefore, the majority of the sales between the manufacturer and wholesaler occurred outside of Maryland. However, the Maryland Attorney General argued that the law nevertheless reached sales that took place outside of Maryland if the drug was eventually sold at retail to a consumer in Maryland.

AAM argued that Maryland's price gouging law violated the dormant Commerce Clause by "directly regulat[ing] the prices charged for prescription drugs in out-of-state transactions, even though its provisions are triggered only when one of those drugs is available for sale in Maryland." *Frosh,* 887 F.3d at 670. The Fourth Circuit agreed with AAM, relying on the principle against extraterritoriality, which is "derived from the notion that a State may not regulate commerce occurring wholly outside of its borders." *Id*. at 667. The Court stated that "[a] state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, or has that 'practical effect,' regardless of the legislature's intent." *Id*. at 668.

The court held that the Act violated the dormant Commerce Clause because (1) the Act was "not triggered by any conduct that takes place within Maryland," meaning that it "targets conduct that occurs entirely outside Maryland's borders, a conclusion supported by the Act's prohibition of a manufacturer's use of the defense that it did not directly sell to a consumer in Maryland"; (2) "even if it were, the Act controls the prices of transactions that occur outside the state"; and (3) if other states enacted similar statutes, it would "impose a significant burden on interstate commerce involving prescription drugs." *Id*. at 670.

The dissent, however, criticized the majority opinion: "[T]he majority opinion [improperly] concludes that the Commerce Clause bars Maryland from protecting its citizens against unconscionable pricing practices by out-of-state generic drug manufacturers who distribute their drugs to Maryland's citizens through an out-of-state intermediary." *Id*. at 675. According to the dissent, "Maryland legitimately targeted generic drug pricing practices specifically designed to prey on the special vulnerabilities of a defenseless group of Maryland's citizens. Simply put, the Maryland statute—which applies equally to in-state and out-of-state manufacturers and distributors—does not implicate the concerns that lie at the heart of the Supreme Court's dormant Commerce Clause jurisprudence: economic protectionism, discrimination against interstate commerce, and State regulation of streams of transactions that never cross through the State's borders." *Id*.

In 2019, the Supreme Court denied Maryland's petition for certiorari, leaving the Fourth Circuit's decision intact.

The *Frosh* decision provides some clarity as to how a court, at least in the Fourth Circuit, might construe a price gouging law's ability to reach conduct that takes place entirely outside of a state. However, it is important to note that Maryland's law was not triggered by a state of emergency and did not include a specific exception or defense for increased costs, like most state of emergency price gouging laws do. It remains unclear how a court would interpret the application of a price gouging law triggered only during a state of emergency to an out-of-state business. If in-state businesses have a defense that an out-of-state business raised costs, and the dormant Commerce Clause prohibits going down a level in the supply chain to challenge price gouging by the out-of-state business, that state's price gouging law would be neutralized—at least with respect to the subject transactions (and claims may exist where the sale occurred). It remains to be seen whether a court would enable such a result. Nonetheless, as more lawsuits are filed alleging COVID-19 price gouging allegations, businesses should be aware of the Fourth Circuit's decision in *Association for Accessible Medicines v. Frosh* and should be paying close attention to where their sales are taking place and may be deemed to take place.

Clearance to Reduce Capacity May Not Be Clearance to Raise Prices: Can Business Review Letters Impact Price Gouging Compliance?

In response to the current pandemic, antitrust enforcers at the Department of Justice have been issuing business review letters at record pace. One of these business review letters addressed an inquiry from the pork industry about reducing supply based on the COVID-19 pandemic disruption. This raises the question as to whether the DOJ letter about antitrust has any application to increases in price and price gouging statutes.

In the simplest terms, DOJ business review letters ratify conduct up front, giving companies cover to conduct activities that might otherwise raise antitrust concern. These letters typically state that DOJ enforcers "[do] not presently intend to bring an enforcement action" but do not guarantee they will not do so in the future, leaving room for changed circumstances later. These letters, however, do not address price gouging which is separate from antitrust enforcement. This leaves open the possibility that conduct endorsed by a business review letter later might be challenged under state price gouging statutes. This post will explore the potential conflict between these two regimes and what companies can do to manage the risk.

The Antitrust Division and the Federal Trade Commission both have longstanding processes for issuing ex ante opinions. The DOJ business review letter process, and the FTC advisory opinion process, both traditionally take months. However, in the first five months of 2020, the DOJ has already issued five opinions, more than in the past five years combined. This vigorous pace follows a joint statement the agencies issued in March, in which they committed to addressing COVID-19-related requests within seven calendar days. These COVID-19-specific letters offer companies a one-year limited assurance of a favorable view by the DOJ about antitrust compliance for the activities described, an attractive and often necessary incentive for companies to pursue sometimes unprecedented coordination in response to the current pandemic.

The most recent expedited letter was issued in response to a request from the pork industry. Faced with widespread plant closures, the pork industry stated it may need to euthanize millions of hogs that can no longer be processed into meat. Under orders from the President, the USDA has taken steps to coordinate efforts among pork producers. Still, such conduct potentially could raise antitrust risks. The industry therefore

sought a business review letter from the Antitrust Division to address the coordination that will be necessary for these industry-wide efforts.

Similar supply restrictions have led to antitrust complaints in the past. For instance in 2016, a number of dairy companies settled claims they euthanized cows to artificially inflate the price of milk. Basic economics dictates that lowering supply will lead to increased prices, which is why these kinds of supply restrictions can implicate antitrust laws. In the pork industry, plant closures and mass euthanasia of hogs likewise may lead to higher pork prices. While the industry's business review letter offers conditional assurance from federal antitrust enforcers, it says nothing about state price gouging laws. Price increases during an emergency can implicate state price gouging rules.

Price gouging laws are designed to cap or limit certain price increases during a state of emergency. There is no national price gouging law, yet nearly every state either has a price gouging statute, or enforces price gouging rules through consumer protection laws or executive orders. Many of these rules cover food and other consumer goods, which would include pork. Though most price gouging rules include an exception for cost increases, they often do not include exceptions for other circumstances. Many state price gouging laws also apply to supply-chain companies, which could cover the pork suppliers. If pork prices increased dramatically, sellers potentially could face claims of price gouging. The success of these claims would depend, in part, on whether state price gouging exceptions applied.

States have a range of exceptions—from permissive to very limited. For instance, California's law provides that a price increase over 10% (the state's cap) "is not unlawful if that person can prove that the increase in *price was directly attributable to additional costs imposed on it* by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services." Cal. Penal. Code § 396(b). By contrast, other states like Louisiana include broader exceptions for price increases "attributable to fluctuations in applicable commodity markets, fluctuations in applicable regional or national market trends, or to reasonable expenses and charges and attendant business risk incurred in procuring or selling the goods or services during the state of emergency." La. Rev. Stat. § 29:732.A. *Deliberately decreasing supply of a product might not fit within these exceptions*.

In short, applying state price gouging rules to the conduct outlined in the pork industry business review letter implies potential price gouging risk. Neither limited exception states like California nor broader exception states, like Louisiana, include language specifically exempting price increases caused by conduct directed or permitted by federal authorities. Certainly, plant closures caused by COVID-19 fit into the kind of cost increases contemplated by Louisiana's statute. But plant closures may not fit neatly into California's rule or others. And even if cost increases due to plant closures are covered by certain state exceptions, these rules may not cover cost increases one step removed from plant closures—like mass hog euthanasia. At the very least, the ambiguous language in many state statutes invites conflicting interpretations and creates potential risks.

While it may be unlikely that state attorneys general will challenge federally-endorsed conduct in a hard-hit industry that employs thousands, private plaintiffs may bear no such civic-minded checks. As a result, the current pandemic places some companies between a rock and a hard place, as avoiding antitrust risk may invite price gouging scrutiny. Companies face with such a dilemma may want to consider their price gouging compliance programs independent of and in addition to their antitrust compliance efforts. Companies facing these kinds of problems might also consider tracking both their prices (before and after the state of emergency) and the specific rationale and bases for any price increases. Later cases are likely to ask parties to justify their price increases and link the change to a specific cost, and contemporary documents often hold more weight than ex-post explanations.

The House Targets Price Gouging, Again

Even though states are leading the way on price gouging enforcement, recent action in Congress may lead to overlapping federal government enforcement. Recent congressional letters, statements, and proposed bills show a strong appetite for action on price gouging. House Democrats tried but failed to add price gouging language to the coronavirus relief package in March. Senators Klobuchar and Tillis have both introduced price gouging bills in the past month. In April 2020, Representatives Schakowsky, Pallone, Cicilline, and Nadler introduced a standalone bill to create a federal price gouging regime for the current state of emergency.

Congress has tried and failed to pass price gouging legislation in the past, for example after Hurricane Katrina. In addition to the bills currently pending, at least two other price gouging bills from the past three years made very little progress. It remains unclear how much support the current bills have and whether they would fare differently. It seems highly likely that congressional focus on this issue will continue, due to the extended length of the current emergency.

The current House bill, the "COVID-19 Price Gouging Prevention Act," would give the FTC explicit authority to attack price gouging, while also authorizing actions by state attorneys general. Interestingly, the bill would provide the FTC with authority that some argue it already possesses. The bill would make price gouging a violation the FTC Act's prohibition on unfair or deceptive practices. This is similar to the basis on which numerous senators petitioned the FTC to take action last month. If the FTC has authority to regulate price gouging, it has never done so before.

The House bill applies to "any person" who sells or offers for sale a "good or service" at an "unconscionably excessive" price that "indicates the seller is using the circumstances related to such public health emergency to increase prices unreasonably." H.R. 6472, 116th Cong. (2020).

Rather than offering exceptions, as do many state laws, the House Bill offers three criteria for judging whether a price is unreasonably excessive:

1. Whether the price "grossly exceeds" the average price during the 90-days prior to January 31, 2020 or the same 90-days the previous year;
2. Whether the price "grossly exceeds" the average price of similar goods or services readily obtainable from competing sellers before January 31, 2020; or

3. Whether the price "reasonably reflects additional costs" not within the control of the seller, or reasonably reflects the "profitability of foregone sales or additional risks taken to produce, distribute, obtain, or sell" the good or service.

The House bill defines a "good or service" as "a good or service offered in commerce" and specifically lists food, water, ice, chemicals, personal protective equipment, respirators, medical supplies, and healthcare services. The penalties under the House bill piggy back on the FTC Act, with the note that violations of the bill would be treated as violations of an FTC regulation. *See* 15 U.S.C. §§ 57a(a)(1)(B); 57b(b). Unlike other portions of the FTC Act, rules violations do not have a defined maximum fine. *Compare id.* § 57b, *with id.* § 45(m)(1) (providing for a civil penalty of not more than $10,000 for each violation (adjusted to $43,280)). Courts cannot grant exemplary or punitive damages for rules violations, but they can grant other relief deemed necessary, such as rescission or reformation of contracts, the refund of money or return of property, the payment of [actual] damages, and public notification respecting the rule violation or the unfair or deceptive act or practice under §57b(b).

DPA Update: Biden Administration Brings Renewed Focus to Defense Production Act

As part of the federal government's efforts to combat the COVID-19 pandemic, President Biden plans to "fully use" the Defense Production Act (the "DPA") to compel production of medical and protective equipment, and ensure adequate supplies and distribution of vaccines. On January 21, 2021, the White House released its *National Strategy for the COVID-19 Response and Pandemic Preparedness*, in which it stated that "the federal government will use its full powers to prevent hoarding and price gouging, including by reviewing and expanding the designated scarce materials under the DPA." In doing so, the new administration re-committed the federal government to using the DPA to combat price gouging, a practice started by President Trump in March 2020.

As previously covered, the DPA grants the President the power to command private industry in the name of national defense, by doing such things as compelling private companies to accept and prioritize contracts, or diverting production or materials to specified buyers. The DPA also criminalizes accumulating goods deemed "scarce" either (1) in excess of the reasonable demands of business, personal, or home consumption, or (2) for the purposes of resale in excess of prevailing market prices. The DPA is different from state price gouging laws in that it adds a requirement of "accumulation" in addition to sale at an inflated price. It remains unclear what a court would consider the reasonable demands of business or personal consumption, or what method it would use to calculate what exactly constitutes charging a price "in excess of prevailing market prices."

Some have raised questions about the general efficacy of the Trump administration's invocation of the DPA, including a July 28, 2020 report by the Congressional Research Service stating that the administration's implementation of the Act was "sporadic and relatively narrow" and that it was "unclear which executive agency leads overall efforts under DPA authority, in response to the pandemic." To the extent federal criminal charges were brought under the DPA, it was for clear acts of price gouging (including one seller charging mark-ups of up to 1,328%) that failed to shed light on the more nuanced questions surrounding the act.

Accordingly, the Biden administration will be painting on a relatively clean canvas under the DPA as it relates to price gouging enforcement. And while it is likely that the majority of the Biden administration's efforts under the DPA will be focused on the act's main purpose—directing the production and distribution of necessary goods, businesses can expect an expanded list of materials deemed scarce pursuant to the Act, as well as a renewed interest and focus by federal investigators. Accordingly, companies should continue to monitor the Biden administration's use of the DPA to combat price gouging and should continue to closely monitor their own compliance efforts.

Limits on Emergency Powers

When Emergencies Become De Rigueur

Many are asking how long states of emergency can continue to be renewed, and whether such extended renewals are permissible or valid. Given the lack of comparable precedent, there is some uncertainty around the issue. Expectations are that while some courts are likely to defer to the use of extraordinary executive power, not all will, and there may be strong arguments for a curtailing of things like pricing restrictions.

Several states have maintained price gouging restrictions in effect despite other COVID-19 related restrictions, such as physical distancing limitations on restaurants and other businesses, being lifted. It would not be unprecedented for states to keep such individual restrictions in effect for months to come.

Pennsylvania, for example, was already two years into an existing state of emergency before COVID-19 became a concern. Last month, Pennsylvania Governor Tom Wolf signed the twelfth consecutive renewal of the state's January 2018 disaster declaration to help the state fight the opioid epidemic. The "disaster emergency" related to the opioid crisis also appears to have triggered price gouging prohibitions, as the language of the state price gouging act provides that "[d]uring and within 30 days of the termination of a state of disaster emergency declared by the Governor . . . it shall be a violation of this act for any party within the chain of distribution of consumer goods or services or both to sell or offer to sell the goods or services within the geographic region that is the subject of the declared emergency for an amount which represents an unconscionably excessive price." Price Gouging Act, Pa. Pub. L. 1210, No. 133, §4(a) (2006). Since the conditions necessitating the emergency declaration remain a threat, the state has repeatedly renewed the disaster declaration and arguably extended the application of those price gouging laws.

We have discussed the effect of overlapping states of emergencies in the past, and some of the challenges and confusion they may pose for price gouging calculations. It remains to be seen how courts will parse the appropriate pricing baselines for products that may have been subject to ongoing price gouging controls before this past March.

Additionally, while challenges to the validity of long-term states of emergencies and price controls are likely, it is worth noting that their outcomes can be unpredictable. This fall, as discussed, the Michigan Supreme Court ruled that Governor Gretchen Whitmer had no authority to issue or renew executive orders relating to COVID-19 beyond April 30. And just last week, the U.S. Supreme Court enjoined New York Governor Andrew Cuomo from enforcing certain executive orders that imposed occupancy limits on religious services during the COVID-19 pandemic.

The Kentucky Supreme Court, however, recently upheld that state's emergency orders. On March 6, 2020, Kentucky Governor Andy Beshear declared a state of emergency, which remains in effect. Three Kentucky businesses sued Governor Beshear in June, challenging the validity of the governor's orders related to COVID-19. The court ultimately found that the orders "were, and continue to be, necessary to slow the spread of COVID-19 and protect the health and safety of all Kentucky citizens." Addressing challenges to the kind of authority that the governor was exercising in issuing these orders, the court concluded that, "the Governor is largely exercising emergency executive power but to the extent legislative authority is involved it has been validly delegated by the General Assembly consistent with decades of Kentucky precedent, which we will not overturn." While the order did not specifically address price gouging restrictions, those restrictions were activated by the Governor's March 6, 2020 state of emergency declaration per Ky. Rev. Stat. §367.374(1)(b).

In short, it appears that there is a real possibility that price gouging restrictions will remain in place for as long as the condition underlying the state of emergency persists. In the face of this uncertainty, businesses that gain comfort navigating price gouging compliance now are likely to have surer footing with respect to enforcement actions and legal challenges in the future.

When Governors Bite Back: Circuit Court Upholds Hawaii Governor's Emergency Powers

As mentioned in our previous post, the legality of state governors' emergency powers have come under scrutiny during the pandemic. Michigan's Supreme Court, for example, recently struck down Governor Gretchen Whitmer's emergency powers. The Hawaii Circuit Court, however, recently dismissed a legal challenge to Hawaii Governor David Ige's emergency powers. In response to the victory, Hawaii Attorney General Clare Connors stated "[t]his decision sends an important message at an important time—the governor's emergency proclamations are lawful. By continuing to follow these rules, all residents and visitors protect each other and promote public health during this pandemic crisis."

The lawsuit alleged that Governor Ige's powers were time-limited, lapsing after the initial 60-day period following the declared state of emergency. Plaintiffs argued that the Governor's supplemental emergency proclamations were facially invalid, and invalid as applied to Plaintiffs. Plaintiffs sought an order permanently enjoining Governor Ige and Hawaii Mayor Harry Kim from issuing further executive orders, or enforcing existing orders. The State argued, however, that no language prohibits supplementary or additional emergency proclamations from being issued, and that HRS Section 127A provides that the Governor or Mayor shall be the "sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency[.]" Haw. Rev. Stat. § 127A-14(c).

The court agreed with the State, finding that "the use of supplementary proclamations is lawful" and that the purpose of Hawaii's emergency powers statute "is to confer comprehensive powers to protect the public and save lives." However, the court acknowledged that the Governor's powers are not without limit. The court held that "[t]o support each successive emergency proclamation, the Governor must identify the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency. When the facts on the ground no longer justify such a determination, the Governor's emergency powers will cease." Plaintiffs did not challenge the existence or impact of the pandemic within Hawaii.

Had the Circuit Court found the Governor's supplemental emergency declarations unlawful as plaintiffs argued, Hawaii's price gouging statute may have also been declared unlawfully in effect. Hawaii's price gouging law, which is triggered upon the governor or mayor declaring a state of emergency prohibits "any increase in the selling price of any commodity, whether at the retail or wholesale level, in the area that is the subject of the proclamation or the severe weather warning." Haw. Rev. Stat. §127A-30.

As previously mentioned, the limits of emergency powers have become a hot topic during the pandemic. Businesses need to stay current with respect to changes that may result from the coming potential wave of orders being challenged and rescinded.

Michigan Supreme Court Strikes Down Governor's Emergency Powers

Are Michigan's Enhanced Price Gouging Provisions Undone?

As much of the country remains under various and often overlapping states of emergency, one Governor's powers have been limited by a state supreme court. On October 2, 2020, the Michigan Supreme Court held that Michigan Governor Gretchen Whitmer did not have authority to issue or renew COVID-related executive orders beyond April 30, 2020. The Court stated that "our decision today . . . leaves open many avenues for our Governor and Legislature to work together in a cooperative spirit and constitutional manner to respond to the COVID-19 pandemic."

Governor Whitmer has faced immense backlash from those questioning her authority to extend Michigan's coronavirus emergency declaration and issue COVID related executive orders. However the Governor has maintained that the Emergency Management Act of 1976 (EMA) and the Emergency Powers of the Governor Act of 1945 (EPGA) give her the authority to do so. In a sharp rebuke, the Michigan Supreme Court concluded that "the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law." In a written statement, Governor Whitmer stated she "vehemently disagree[s] with the court's interpretation of the Michigan Constitution. Right now, every state and the federal government have some form of declared emergency. With this decision, Michigan will become the sole outlier . . ."

Michigan's Supreme Court ruling, the full effects of which are not yet known, may have an impact on the enhanced price gouging provisions the state had in place until June 12, 2020. On March 10, 2020, the same day that she declared a state of emergency, Governor Whitmer issued Executive Order 2020-08, putting enhanced restrictions on price gouging into effect. The enhanced price gouging provisions were extended by a series of executive orders through June 12, 2020. Under the enhanced provisions, "[a] person must not resell a product in this state at a price that is grossly in excess of the purchase price at which the person acquired the product." The order further provided that "[a] person must not offer for sale or sell any product in this state at a price that is more than 20% higher than what the person offered or charged for that product as of March 9, 2020, unless the person demonstrates that the price increase is attributable to an increase in the cost of bringing the product to market or to an extraordinary discount in effect as of March 9, 2020."

Given that the Court found that Governor Whitmer lacked authority to issue COVID related executive orders beyond April 30, 2020, the question arises whether the enhanced price gouging provisions also ceased on April 30, 2020. The Court's ruling has no effect on the enhanced price gouging provisions that remained in place up until April 30, 2020. Nonetheless, Michigan consumers are not without protection. Under Michigan's Consumer Protection Act, the state defines an unfair, unconscionable, or deceptive trade practice to include "[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold." Mich. Comp. Laws §445.903(z).

The limits of emergency powers have become a hot topic during the pandemic. As the pandemic continues, businesses need to stay current with respect to changes that may result from orders being challenged and rescinded.

Price Gouging Legislation on the Horizon in States Without Laws

While the majority of states have had price gouging laws on the books since before the pandemic, widespread pandemic price gouging has led states without laws to reconsider. Some states, like Colorado, passed price gouging legislation mid-pandemic, but other states, including New Hampshire and Washington, are now playing catch up.

On March 23, 2021, New Hampshire State Senators introduced Bill 138, which aims to combat price gouging in the state. With bipartisan support, the legislation would prohibit price gouging of "necessities," including "food for human or animal consumption, potable water, pharmaceutical products including prescription medications, wearing apparel, shoes, building materials, gas and electricity for light, heat and power, ice, fuel of all kinds, and fertilizer and fertilizer ingredients, together with tools, utensils, implements, machinery, and equipment required for the actual production or manufacture of the same." The bill is similar to Maine's price gouging law, which is activated when the governor declares an "abnormal market disruption."

Other states, like Washington, have legislation under consideration that is further along. In early March, Washington's State Senate passed a bill prohibiting price gouging during a state of emergency. Advocated for by Attorney General Bob Ferguson, the bill would fine sellers that "engage in predatory price gouging" up to $25,000 per violation. The bill was drafted in response to the more than 1,300 price gouging complaints received since March 2020 regarding "critical necessities" such as health care services, medical supplies, rental housing, motel rooms, gasoline, emergency supplies, and covers future emergencies like wildfires, landslides, and earthquakes. Attorney General Ferguson stated that "price gouging impairs Washingtonians' access to necessary goods and services during an emergency. I appreciate the state senators who stepped up to block predatory price gouging and unconscionable price increases on emergency items. That said, it's disappointing that so many state senators wanted to allow businesses to dial up their profits on emergency goods and services on the backs of Washingtonians impacted by forest fires, pandemics and landslides." The bill remains under consideration in the house.

In other states, while attorneys general have stated that price gouging legislation is a priority, no legislation has been introduced yet. For example, Delaware Attorney General Kathy Jennings announced her list of legislative priorities for 2021, with outlawing unfair business practices, including price gouging, coming in at #8. Attorney General Jennings stated that "you may think it's already illegal to engage in unfair business practices; Well, in Delaware, it's not. We're only one of only six states that have not explicitly outlawed unfair business practices like coercive sales tactics, or charging for services that a consumer never requested, or price gouging. So, it's time we do it." While no legislation has been introduced, price gouging in Delaware is currently prohibited by the state's State of Emergency Declaration.

As state attorneys general continue to make price gouging enforcement a priority, it is likely that states without price gouging laws see additional legislative proposals introduced in the coming months.

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

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," including "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 businesses 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 businesses 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 Fourteenth 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, 2021, 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.

Idaho Says Pandemic Margin Boosts Are Lawful When Prices Fall

State legislatures are still continuing to enact new changes to their states' price gouging statutes. Some are expanding the scope of their laws, while others are tailoring the law or emergency orders in response to new issues that have arisen during the course of the COVID-19 pandemic. Idaho took a third tack and limited limit overbroad enforcement so that its law applied only to price increases, and not to price decreases that are deemed to be insufficient.

In November 2020, the Idaho attorney general entered into a headline-grabbing settlement agreement with three gasoline retailers following an investigation into alleged price gouging. Attorney General Wasden alleged that the retailers sold gasoline at an "exorbitant or excessive price" in violation of Idaho's price gouging statute.

The Attorney General's investigation was unique because the restitution structure it created was based on the retailers' margins. While some jurisdictions, such as the District of Columbia, use margins as a factor in analysis, the Idaho statute is silent on this point. It only referred to selling at "exorbitant or excessive prices."

According to documents from the investigation, obtained by the *Idaho Statesman*, Attorney General Wasden focused primarily on the profit margin of the gas retailers. In early 2020, as the country began responding to the pandemic, wholesale gas prices fell by approximately $1.00 between February and April. The average retail gas prices in Idaho, however, remained relatively stable, falling only $0.50 from February to April 2020. This served as the predicate for the Attorney General's investigation focusing on the gas retailers' increased profit margin, even while price was falling. The retailers responded by pointing out that they lost 50% of their fuel sales during that period. Without admitting wrongdoing, the retailers agreed to a consumer restitution structure under which the retailers earn credits for selling gas at lower profit margins.

The Idaho Legislature took issue with the settlement, and on March 17, 2021, Governor Brad Little signed SB 1041 into law, amending the state's price gouging statute. The legislation clarifies that only price *increases* are covered by the price gouging prohibition—not *price decreases* that are deemed insufficient. Second, the amendments stipulate that for the analysis of whether the price increase is "exorbitant or excessive," courts

"shall not consider any increase in the margin earned." However, courts will continue to use other factors in the analysis: i) prices from before the emergency, ii) increased costs, iii) the duration of the emergency, and iv) a newly added provision for loss of sales or volume as a result of the emergency. These amendments appear to respond directly to the concerns raised by the gas retailers—using profit margins as the benchmark and ignoring significant decreased sales. The new law would prohibit investigations predicated solely on increased profit margins, like the 2020 retail gas sales investigation.

Idaho is not alone in updating its price gouging restrictions. States, such as California, have amended their price gouging rules as they grapple with applying statutes and emergency orders to changing conditions. We expect state enforcers to continue pursuing price gouging enforcement actions. Businesses should therefore continue to evaluate the factors states use in evaluating price increases, and should adopt best practices for documenting the bases for any price increases.

The End of Price Restrictions in California… Or Merely a Step Towards Normal

One year after declaring a state of emergency in California due to COVID-19, the California governor issued a new Executive Order lifting pricing restrictions on most categories of products previously subject to California's price gouging statute. Governor Gavin Newsom's 2021 Order comes as states across the nation slowly reopen. This 2021 Executive Order marks a change for businesses in California.

Extending the State of Emergency

On March 3, 2020, Governor Newsom proclaimed a state of emergency in California, triggering the state's price gouging statute. The 2020 Executive Order detailed four categories of goods to which the pricing restrictions applied: food items, consumer goods, medical or emergency supplies and designated "scarce materials" under the Defense Production Act. The California Penal Code prohibits selling, or offering for sale, covered products at a price more than 10% greater than the price offered for that good in the 30 days prior to the declaration of an emergency.

As the 2020 Executive Order was slated to expire on March 4, 2021, it comes as no surprise that Governor Newsom issued a revised Executive Order on March 4, 2021. However, the Governor did not merely extend the status quo. Instead, Governor Newsom chose to extend the scope of the emergency declaration to fewer product categories. Under the terms of the 2021 Executive Order, the California price gouging statute continues to apply, but only as to medical supplies and emergency supplies. Under the 2021 Executive Order, price gouging prohibitions no longer apply to other categories, including food and consumer goods.

Medical and Emergency Supplies

According to the statute, emergency supplies include items such as water, blankets, soaps, diapers, and toiletries. *Medical supplies* include "prescription and nonprescription medications, bandages, gauze, isopropyl alcohol and antibacterial products." The law provides that the goods listed are merely examples, not a comprehensive inventory.

Despite lifting the price gouging restrictions for most products in California, the 2021 Executive Order is not the end of the story for businesses. The price gouging statute continues to apply to a variety of products related to the COVID-19 emergency. Business should continue to monitor the types

of products that could be considered “emergency or medical supplies.” The statutory list is not exhaustive and COVID-19-specific items are likely to remain covered under the statute for some time.

Why Lift the Restrictions and What’s Next?

The Governor’s 2021 Executive Order provides several justifications for lifting the blanket emergency declaration that has been in force for a full year. According to Governor Newsom, the protections are no longer necessary “to ensure Californians’ access to many necessary goods and services.” Instead, the Governor believes that a variety of mechanisms are sufficient to achieve the purposes underlying the statute.

During the 2019-2020 legislative session, the California Legislature amended the price gouging statute: (1) allowing the Governor to designate the applicable date of the pricing restrictions, (2) allowing the Governor to extend the duration of the prohibitions, and (3) creating a new restriction, prohibiting sellers from charging a price more than 50% of the sellers cost if the seller did not market the product before the state of emergency. According to the Governor, the Legislature’s “intent to protect residents from price gouging during states of emergency” and its recent statutory amendments provided the latitude for the 2021 Executive Order.

Looking forward, businesses should continue to monitor the COVID-19-related products that could be construed as “emergency” supplies. While many of the California pricing restrictions have been lifted by the 2021 Executive Order, the Governor was clear that, should circumstances change, these restrictions may be put back into effect.

Finally, the California statute provides for a four-year statute of limitations for bringing price gouging complaints. Businesses should continue to use best practices to evaluate the risk of a price gouging suit as price changes over the past year could continue to invoke scrutiny.

Are Long-Term Pricing Controls Here to Stay? Three Reasons the Optimists Might Be Right

The gravity of the pandemic is palpable, and seemingly constant news about it is hard to escape, with recent reports including updates on the availability of vaccines, the changing scope of various stay-at-home orders, and the perceived risks of new COVID-19 variants. But there will come a time—perhaps sooner than the pessimists predict—when this will no longer be the all-consuming story it has been for the past ten months. In this post, we address a few of the strongest reasons that most pricing restrictions may be lifted before the start of the next school year.

A Patchwork of Laws May Be Supplanted by a Robust Federal Response. In the United States, we seem to be getting some measure of control over the spread of the virus. The truer that becomes, the less emergency orders and price gouging restrictions are necessary or justifiable. As vaccinations increase, a return to normality may be in sight. Dr. Fauci, the president's chief medical adviser on COVID-19 and the country's leading expert on infectious disease, has estimated that a critical amount of the population could be vaccinated by the end of the summer.

In addition to this aggressive plan for vaccinations, in its National Strategy for the COVID-19 Response and Pandemic Preparedness, released January 21, the Biden administration committed itself to "[i]dentify and take steps to limit price gouging and promote reasonable pricing." The strategy goes on to assure the public that "the federal government will use its full powers to prevent hoarding and price gouging, including by reviewing and expanding the designated scarce materials under the DPA." It is possible that robust price gouging guidance from the federal government, coupled with meaningful increases in herd immunity, will obviate the need for the piecemeal assembly of state and local controls that have been the norm.

Unpopularity of Some State Emergency Declarations. The unpopularity of state emergency declarations could create enough pressure for local leaders to consider how long they are truly necessary. This has been a live issue for months, notably with the Michigan Supreme Court weighing in on the validity of emergency orders (and the price gouging restrictions therein). In a growing number of states, lawmakers are attempting to limit the authority of state leaders to impose emergency restrictions. Recently, lawmakers in Washington State introduced a bill that would limit the scope of the governor's emergency declaration, requiring separate emergency proclamations for each county and

mandating that any such proclamations would need to be reauthorized by the state legislature or legislative leaders after fourteen days. As we approach a full year of living under various emergency declarations, and given the anticipated relief on the horizon due to the rollout of vaccines, states may be more willing to walk back their controls.

Price Gouging Laws May Not Help As Much As Some Think. Price gouging laws can have unintended consequences. A recently published peer-reviewed article by Gavin Roberts, assistant professor of economics at Weber State, and Rik Chakraborti, assistant professor of economics at Christopher Newport University, sheds light on how price gouging laws have actually affected consumers during the early stages of the COVID-19 pandemic. Their article, published in the *Journal of Private Enterprise*, analyzed publicly available internet search data from Google Shopping Trends "to track web searches as a proxy for in-store shortages," and found notable differences between the data in states with and without price gouging laws. The research suggests, at least preliminarily, that rather than protecting consumers, price gouging laws actually "caused in-store shortages" of in-demand items like hand sanitizer and toilet paper, driving consumers to need to search for available supplies. The authors note that while "[i]t is not clear from [their] results whether total consumer welfare is increased or decreased as a result of anti-gouging laws, . . . the possibility of increased search costs is an issue that should be considered in future research[.]"

Choosing to roll back price gouging restrictions would have a very different impact today than it would have eight or ten months ago. With a few notable exceptions—for N95 masks, for example—the supply chain concerns from the early weeks of the pandemic are no longer present to the same degree. Many suppliers have been able to adapt to meet changing demands, such as providing more food to grocery stores and less to schools. At this stage, most may be less concerned about shortages and feel safer letting market forces determine prices.

A Spartan Approach to Price Gouging in Michigan

Price gouging complaints around the country have been skyrocketing, and Michigan is no exception. Between March 5, 2019, and April 14, 2019, Michigan had 80 price gouging complaints. During the same period in 2020, Michigan received 3,541 complaints–an increase of 4,326 percent. Michigan has been under a state of emergency since March 10, 2020, and remaining in effect indefinitely.

Michigan Attorney General Dana Nessel is taking allegations of price gouging seriously and has assigned a team of special agents to assist in investigating complaints. "Our objective is to make sure business owners are following the laws Michigan has in place to protect consumers, and public awareness of price gouging can offer valuable support in our efforts to keep companies honest," Nessel stated. "If that can be accomplished without legal action, then that is a path we will pursue. But if stores continue to disregard the rules and raise their prices beyond justifiable amounts, then we will hold them accountable." Nessel aims to avoid what she termed "an environment where . . . only the very wealthy can stay healthy."

Michigan's price gouging law states that "unfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade are unlawful and are defined as follows: . . . [c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold." Mich. Comp. Laws §445.903(z). A persistent and knowing violation of the statute can result in a civil fine up to $25,000. *Id.* §445.905. Michigan's law also includes a private cause of action, which allows victims to recover actual damages, or $250, whichever is greater, as well as reasonable attorneys' fees. *Id.* §445.911(2).

On March 10, 2020, the same day that she declared a state of emergency, Governor Gretchen Whitmer issued Executive Order 2020-18, taking Michigan's price gouging laws a step farther. That order was replaced with Executive Order 2020-53 on April 1, 2020. Under Executive Order 2020-53, "[a] person must not resell a product in [Michigan] at a price that is grossly in excess of the purchase price at which the person acquired the product." The executive order defines "grossly in excess" to mean selling "at a price that is more than 20% higher than what the person offered or charged for that product as of March 9, 2020" (the day before the state of emergency was issued). The executive order covers "any good, material, or consumer food item with a fair market value of less than $1,000.00, or

any emergency supply" and applies to any "individual, business, or other legal entity."

The executive order also includes an exception whereby the seller "demonstrates that the price increase is attributable to an increase in the cost of bringing the product to market or to an extraordinary discount in effect as of March 9, 2020." A willful violation of Executive Order 2020-53 is a misdemeanor. The enhanced restrictions remain in effect through May 15, 2020.

Don't Mess With Texas: Price Gouging in the Lone Star State

When it comes to price gouging in the Lone Star State, Attorney General (AG) Ken Paxton is sending a message: Don't mess with Texas. On March 26, 2020, AG Paxton accused Auctions Unlimited, a Texas auctioneer, of price gouging disinfectant wipes, hand soaps, and 750,000 N95 respirator masks. Bidding for just 16 N95 respirator masks went as high as $180—despite the owner receiving warnings from both AG Paxton and local police—before Texas authorities intervened and stopped the auction. The lawsuit seeks civil penalties of no more than $10,000 per violation, and $250,000 in the event the deception impacted anyone over 65 years of age.

Texas' Deceptive Trade Practices Act ("DTPA") prohibits price gouging during a "designated disaster period." The DTPA defines this as the earliest date at which: (1) the date the disaster occurred; (2) the date of either the proclamation or executive order of the governor declaring the disaster; or (3) the declaration of the disaster by the president of the United States, if any part of Texas is named in the federally declared disaster area. On March 13, 2020—the same day the President declared a national emergency—Governor Greg Abbott declared a state of disaster, triggering DTPA's price gouging prohibition. Governor Abbott renewed his March 13 declaration on April 12, 2020. DTPA's prohibition will remain in effect indefinitely under the president's national emergency declaration, which currently has no end date.

Section 17.46(27) of the DTPA states that it is a false, misleading, or deceptive act or practice to take advantage of a disaster declared by the governor, government code, or president by:

- Selling or leasing fuel, food, medicine, lodging, building materials, construction tools or another necessity at an exorbitant or excessive price; or
- Demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity.

While Texas' DTPA does not define what constitutes an exorbitant or excessive price, AG Abbott has stated that price gouging laws apply to "any person or entity selling necessities . . . [and] includes those who supply retailers." Unlike many state price gouging statutes, the DTPA does not contain an exception for increased costs. The DTPA also contains a

private right of action in which injured buyers can sue to recover not only actual damages but treble damages if the violation was knowing or intentional.

This is not the first time AG Paxton has taken an aggressive approach to protect consumers from price gouging. After Hurricane Harvey, AG Paxton stated “[p]rice gouging is something that no Texan should be confronted with when there’s a declared disaster.” Following the hurricane, the AOG settled, among others, with 48 businesses accused of charging exorbitant or excessive prices for gasoline, resulting in a total of $166,592 in civil restitution.

The Texas Office of the AG has received more than 5,500 complaints related to coronavirus price gouging since the March 13th state-of-disaster declaration. As AG Abbott stated on March 21, “[n]o one is exempt from price gouging laws in Texas, and those who violate the Texas Deceptive Trade Practices Act will be met with the full force of the law.”

Florida Man Fined For… Price Gouging?

In the past month, Florida's attorney general has received thousands of complaints about price gouging across the state. As a result, Florida is taking action. Attorney General (AG) Ashley Moody has issued dozens of subpoenas to third-party sellers on Amazon and secured thousands in refunds for consumers. The AG's office has also been working with online platforms to deactivate price gouging accounts and has created a "Rapid Response Team" focused on price gouging. Florida is, and promises to remain, active on price gouging enforcement.

Florida's price gouging law was designed to prevent massive price increases during times of emergency. Like many other states, Florida does not set a specific benchmark for what constitutes price gouging. However, unlike other states, Florida has an active enforcement history. Historically, Florida's AGs have paid special attention to price gouging in order to protect consumers during and after hurricane season.

The Governor activated Florida's price gouging rules on March 9, 2020 by declaring a state of emergency. The restrictions remain in effect until May 8th, unless extended.

Florida Price Gouging Basics

Florida's price gouging law covers the rental or sale of essential commodities during an emergency. The law defines commodities, but not what makes them essential. Commodities include a broad arrange of things: "[A]ny goods, services, materials, merchandise, supplies, equipment, resources, or other articles of commerce . . . necessary for consumption or use as a direct result of the emergency." In practice, the current AG has focused her efforts on face masks, hand sanitizers, and disinfectants. However, the law applies to much more, and specifically lists "food, water, ice, chemicals, petroleum products, and lumber." Fla. Stat. § 501.160(1)(a).

Importantly, the law covers supply-chain sales in addition to retail sales. Florida's statue applies to any person (or her or his agent or employees) that rents, sells, or offers to sell "essential commodities" within the area covered by the emergency declaration. However, the law includes an exception for supply-chain sellers of raw or processed food products. Fla. Stat. § 501.160(5).

Like many states, Florida does not set a specific benchmark, instead prohibiting "unconscionable prices." Fla. Stat. § 501.160. Prices are prima facie unconscionable if:

1. There is a "gross disparity" between the sale or offer price now and the average sale or offer price of the commodity in the 30 days immediately before the state of emergency; or
2. The current price "grossly exceeds the average price at which the same or similar commodity was readily obtainable in the trade area during the 30 days immediately prior" to the emergency.

Both of these definitions pose new questions, i.e., what counts as a "gross disparity" and when does one price "grossly exceed" another? The statute does not define either term. Prior cases indicate enforcers are often looking for increases of 50% or more, though lower price increases could be unconscionable in different scenarios.

Like other states with price gouging rules, Florida includes an exception for increased costs. Florida's rule exempts "increase[s] in the amount charged [that are] attributable to additional costs incurred in connection with the rental or sale of the commodity or rental or lease of any dwelling unit or self-storage facility, or regional, national, or international market trends." Fla. Stat. § 501.160(1)(b)1. This exception comports with the principle that sellers should not be punished for higher prices due to increased costs elsewhere. However, this common increased costs exception also means that when investigators ask retailers why their prices jumped, their first answer will often be, "my suppliers are charging me more."

Notably, Florida's exception for increased costs includes "regional, national, or international market trends." Some sellers have argued this language covers index-based pricing, however, this may only be true where an increase in the index price actually increases the seller's costs. As a result, sellers at all levels of the supply chain, and even those pricing based on an index, may consider tracking their costs and prices in the period immediately before the activation of the pricing prohibitions, along with documenting the bases for any pricing movements.

Penalties & Enforcement

Florida's hurricane-prone climate has led to a history of active price gouging enforcement. For example, in 2004, the Governor created a Hurricane Task Force responsible for investigating price gouging during the hurricane season. The task force brought numerous civil cases against hotels, construction companies, and individuals, and recovered thousands in restitution and penalties.

In Florida, price gouging carries a $1,000 penalty for each violation, up to $25,000 for a 24-hour period. Fla. Stat. § 501.164. Florida has no private right of action for price gouging, so cases must be brought by the AG or Department of Legal Affairs. Fla. Stat. § 501.160(8). The statute also makes it a misdemeanor to sell products during a state of emergency without a business tax receipt. Fla. Stat. § 501.160(9).

Florida's active enforcement can be expected to continue in the weeks and months ahead. Look to Proskauer on Price Gouging for more information on these and other price gouging developments nationwide.

$79.99 For Hand Sanitizer? New York AG Says Not While In My Hands

Amid the COVID-19 pandemic, New York Attorney General Letitia James has stated her office will be aggressive in prosecuting price gouging. On March 10, 2020, AG James stated, "we will not tolerate schemes or frauds designed to turn large profits by exploiting people's health concerns." The NY Office of Attorney General ("OAG") is tasked with enforcing New York General Business Law Section 396-r, which prohibits parties from selling or offering certain goods or services at an unconscionably excessive price during an abnormal disruption in the market.

New York triggered its price gouging statute—Section 396-r—on January 31, 2020, when the U.S. Secretary of Health and Human Services declared a national public health emergency. The statute applies to "consumer goods and services vital and necessary for the health, safety and welfare of consumers." The law defines consumer goods and services to mean those "used, bought or rendered primarily for personal, family or household purposes." New York's statute covers a broad range of parties in the supply chain. Section 396-r *applies to all parties in the chain of distribution, including any: manufacturer, supplier, wholesaler, distributor or retail seller* of consumer goods or services or both. The law also applies to "repairs made by any party within the chain of distribution of consumer goods on an emergency basis as a result of such abnormal disruption of the market." N.Y. Gen. Bus. Code § 396-r(2).

What constitutes unconscionably excessive pricing under Section 396-r is a question of law. Section 396-r(3) states that courts look at the following factors to determine whether a price is unconscionably excessive:

- The amount of the excess in price is unconscionably extreme;
- There was an exercise of unfair leverage or unconscionable means; or
- A combination of:
    - The amount charged represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market; or

- The amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area.

A party accused of price gouging under Section 396-r may rebut evidence of unconscionably excessive pricing with evidence that the increase was attributable to costs imposed on the defendant that were outside of its control. N.Y. Gen. Bus. Code § 396-r(3)(b)(ii).

The New York Attorney General is taking a vigilant approach to enforcement, possibly because there have been numerous complaints about alleged price gouging and the statute does not provide a private right of enforcement. On March 9, the OAG issued a cease-and-desist order after it confirmed that a Midtown Manhattan hardware store was charging customers $79.99 for 1200mL of hand sanitizer. Another cease-and-desist order was issued the same day to a grocery store in Queens after charging $14.99 for a 19oz bottle of disinfectant spray. Those found in violation of Section 396-r can face a fine of up to $25,000, as well as injunctive relief.

New York City Emergency Rule

New York City is also taking the matter into its own hands. On March 16, 2020, the NYC Department of Consumer and Worker Protection ("DCWP") enacted an emergency rule, making price gouging illegal for any household or personal good or service that is needed to prevent or limit the spread or treatment of COVID-19. The emergency rule makes it illegal to increase the price of covered goods and services by 10 percent or more. The rule provides an exception for situations where the price increase is a result of an increase in the cost of supplying the good. Proof of such must be provided to DCWP.

Examples of covered personal or household goods include:

- Cleaning products
- Diagnostic products and services
- Disinfectants (wipes, liquids, sprays)
- Face masks
- Gloves
- Hand sanitizer

- Medicines
- Paper towels
- Rubbing alcohol
- Soap
- Tissues

DCWP is actively inspecting stores and says those found in violation face a fine of up to $500 per item or service. The city is currently seeking up to $37,500 in fines from an Upper East Side pharmacy for “knowingly increasing the price of face masks.” As of March 25, 2020, the city has issued more than 1,000 violations related to coronavirus price gouging. The rule is in effect for 60 days, with the option of extending once for an additional 60 days. See also our summary of enforcement in CA for relevant updates with respect to that state’s efforts combat price gouging.

California's Crackdown on the Price Gouging Gold Rush

In early March, California Attorney General Xavier Becerra issued a consumer alert on price gouging. Two weeks later, police in San Diego arrested eight people for price gouging. The same week, investigations by Sacramento authorities prompted new warnings from local authorities. Since then, both the Governor and Attorney General have indicated price gouging will remain top of mind. Typically, price gouging laws extend for short periods—weeks or a month—but we now know that California price gouging rules will remain in effect through September.

California has a price gouging statute designed to prevent sellers at all points in the supply chain from implementing certain price increases during a statewide or national emergency. Unlike most states, however, California's law includes a hard cap for price increases on covered products—10%. California constitutes almost one-seventh of the nation's economy and therefore has an outsized impact on the legal rules throughout the U.S. Significantly, California's law sets one of the most stringent benchmarks in the nation, and because of the state's importance in the national economy, this provides a useful benchmark for companies in their nationwide compliance efforts.

California Price Gouging Basics

Like most price gouging laws, California's law, Cal. Penal Code § 396, moves into effect "[u]pon the proclamation of a state of emergency" declared by the president, governor, county, or city. The law is intended "to protect citizens for excessive and unjustified increases in the prices charged during or shortly after a declared state of emergency." California declared a state of emergency on March 4, 2020.

The law has two different periods—30-day prohibitions and 180-day prohibitions. The primary 30-day prohibition, part (b), declares:

> It is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency.

The other 30-day rules cover hotel and motel rates (part (d)), rents (part (e)), and evictions (part (f)). The 180-day period, part (c), applies to contractors and those offering "reconstruction services." Each of these prohibitions can be extended if "deemed necessary to protect the lives, property or welfare of the citizens." Cal. Pen. Code § 396(g). On April 3, 2020, Governor Newsom extended the period for all goods subject to part (b) through September 4, 2020. Below is a table of relevant dates as of publication:

County	**Price Gouging in place until:**
Mendocino	12/31/2020 (extended via Executive Order N-22-19)
Napa	12/31/2020 (extended via Executive Order N-22-19)
Santa Barbara	12/31/2020 (extended via Executive Order N-22-19)
Sonoma	12/31/2020 (extended via Executive Order N-22-19)
Butte	12/31/2020 (extended via Executive Order N-22-19)
Los Angeles	12/31/2020 (extended via Executive Order N-22-19)
Ventura	12/31/2020 (extended via Executive Order N-22-19)
Riverside due to fires	4/9/2020 (for emergency cleanup, repair, or reconstruction per Penal Code Section 396, subdivsion (c))
Statewide due to fire weather conditions	4/25/2020 (for emergency cleanup, repair, or reconstruction per Penal Code Section 396, subdivsion (c))
Statewide due to the Coronavirus	9/4/2020 (for all prohibitions in subdivision (b), per Proclamation of a State of Emergency dated 3/4/20, and extended via Executive Order N-44-20)

How Does The Price Cap Work?

California's 10% cap is one of the most stringent caps in the nation. But this benchmark begs the question: 10% of what baseline price? Part (b) of the law specifies the cap as: "10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency." Cal. Pen. Code § 396(b). The law specifies businesses can use "the price at which [they] usually sell the item," if they were "offering an item for sale at a reduced price immediately" before the emergency. Cal. Pen. Code § 396(l).

Governor Newsom's April 3rd Executive Order, N-44-20, modified this baseline rule slightly. For a subset of products, the Governor provided a specific look-back to February 4, 2020. As a result, the relevant date for assessing the 10% increase will be earlier for some goods than others. This rule applies to food items, consumer goods, medical or emergency supplies, and materials designated as scarce or threatened materials under the Defense Production Act. The first three groups are defined terms in the statute. For the fourth, the Department of Health and Human Services issued listing, among other things, N95 face masks, surgical gowns, ventilators, and other medical supplies.

The Governor also imposed an additional restriction for the goods listed in his order: restrictions on new sellers. Governor Newsom ordered that sellers who did not offer a product for sale on February 4, 2020, may not sell or offer to sell that product for more than 50% of the amount that person paid for the item, or the total cost of producing and selling the item, whichever is greater. This means that some new sellers of goods will likely be able to offer goods at higher prices than those charged by current sellers.

Like most states, California also includes an exception for increased costs. Price increases over 10% are not unlawful if the seller can prove the increase was:

> directly attributable to additional costs imposed on it by the supplier of the goods, directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency or local emergency, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business

immediately prior to the onset of the state of emergency or local emergency.

Cal. Pen. Code § 396(b). This standard gives some leeway for sellers to establish what their usual price is. This may be easy for some sellers with set markups. However, sellers with more nuanced pricing may have to calculate averages or other baselines like those used in other states' price gouging rules.

This exception does not specifically exclude price increases tied to an index. Consider an individual seller that prices its product using a common index. If the index price suddenly jumps, but the seller's costs do not, the price gouging exception may not apply. Sellers using automatic index-based-pricing mechanisms may unwittingly stumble into a price gouging violation without consciously taking steps to increase prices. As a result, companies should consider monitoring the prices in any contract that sues an index-based-price mechanism, and measuring any price changes against California's (and other states') price gouging statutes.

Also, the Governor's Order specified that it is not a violation to sell products to the state at terms the state deems acceptable.

Penalties & Enforcement

California's statute includes civil and criminal penalties for price gouging. The Attorney General will likely reserve criminal penalties for the most egregious cases, but price gouging is technically a misdemeanor, and it comes with a fine of up to $10,000 and no more than one year in jail. Cal. Pen. Code § 396(h). It also comes with civil penalties. Violations of California's price gouging law are also considered "an unlawful business practice and an act of unfair competition" under California Bus. & Prof. Code § 17200, et seq. and Cal. Pen. Code § 396(i). California's unfair competition laws state victims of price gouging can seek injunctions. The Attorney General, district attorneys, county counsel, or cities can also seek their own injunctions, restitution, and civil penalties of up to $5,000 per violation.

The penalties can add up quickly. Governor Newsom specified that each sale is a separate offense. Similarly, each instance in which an item is offered for sale, is also a separate offense. This interpretation applies to both the criminal and civil penalties, each of which is already cumulative.

See also our summary of enforcement in NY for relevant updates with respect to that state's efforts combat price gouging.

Duration of Price Gouging Laws

Are Long-Term Pricing Controls Here to Stay? Three Reasons the Pessimists Might Be Right

In some ways, it feels like the country is moving into another phase of how we experience the COVID-19 pandemic. With two vaccines in distribution, and more vaccine approvals possible, the pandemic could very well be effectively managed much sooner than experts initially feared. Given the light the end of the tunnel, it is worth renewing talk of how long state and federal price gouging restrictions could remain in place. Emergency declarations and their attendant price restrictions could continue longer than some might hope. In this post, we unpack a few of the strongest indications that these restrictions could endure until the end of the calendar year or beyond.

Appeal of Long Term Emergency Powers. An emergency declaration can—and often does—last indefinitely. States had many good reasons for issuing emergency declarations as part of their response to the pandemic. Having unlocked sweeping powers to respond to the COVID-19 virus, however, it remains to be seen how quickly states will be ready to scale back. When it comes to price gouging, many local actors may have a hard time foregoing enforcement actions and practices that, just weeks or months earlier, they had advocated for as necessary to protect their constituents. It is entirely possible that, rather than scaling those powers back as soon as possible, states may be more interested in maintaining some crisis powers to respond to potential resurgences of the virus, prepare for future emergencies, or keep them on hand as part of a necessary “new normal.”

The COVID-19 pandemic was declared a national emergency on March 13, 2020. That declaration expires after one year unless renewed by the President, though it may also be terminated at any time by the President or by joint resolution of Congress. At this time, it appears likely that it will be renewed for another year. While Congress could rescind a renewed executive emergency declaration through a simple majority vote, that seems unlikely.

Vaccination Pacing Suggests a Longer Timeline. It is impossible to predict when a critical amount of the population will be willing and able to get vaccinated. We do know that vaccinations have rolled out more slowly than some had hoped, with about one-third of the anticipated 20 million doses actually distributed by January 1. Recent reported estimates indicate that a return to some form of "normalcy" is not expected before the fall. It is not yet clear whether mutations could, to any extent, delay that process or curb the effectiveness of the two currently-approved vaccines. In the meantime, it is unlikely that most emergency declarations—and their accompanying pricing restrictions—would be allowed to expire.

Even After the Pandemic Abates, Other Disasters May Persist. Dozens of states of emergencies are ongoing, including but not limited to those related to the COVID-19 pandemic. At the federal level, according to an October 2020 Congressional Research Service report, there are currently 37 national emergencies in effect, including one dating back to the Carter era. At the local level, in addition to the pandemic-related states of emergencies in effect in nearly all states, there may be concurrent and overlapping states of emergencies. States have emergency declarations in place that respond to a variety of ongoing challenges, ranging from social issues like the opioid epidemic to natural disasters like hurricanes and wildfires. Even after states allow their pandemic emergency declarations to expire, at least some of these other emergencies will likely persist. Since the specifics of goods and services covered varies widely, any price gouging restrictions that could remain in place due to other emergencies may apply to more limited goods or services. Still, many businesses could continue to find their products subject to price restrictions, albeit with different baseline dates and prices.

Time will tell whether this somewhat pessimistic perspective on the long horizon for price gouging restrictions will be proven true. Stay tuned—next week, we will discuss why these restrictions could potentially be turned off sooner than the some predict.

Price Gouging Laws and Overlapping States of Emergency

Most price gouging laws have been in effect throughout the country since early March due to the pandemic. As hurricane season gets underway, businesses should be aware that new states of emergency may be declared, overlapping with current pandemic states of emergency. New states of emergency may trigger price gouging laws that cover a variety of goods not currently covered under those related to COVID-19.

While some price gouging laws cover a wide range of goods and services, many laws are narrower, focusing on the type of emergency. For example, Florida's price gouging law states that it is unlawful "to rent or sell or offer to rent or sell at an unconscionable price within the area for which the state of emergency is declared, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is *necessary for consumption or use as a direct result of the emergency*." Fla. Stat. § 501.160 (emphasis added). Florida has been under a state of emergency related to the pandemic since March 9, 2020, but on July 31, 2020, Governor Ron DeSantis declared another state of emergency for multiple east coast counties due to Hurricane Isaias.

The effect of an overlapping state of emergency means that new goods and services may be covered under Florida's price gouging laws, separate and apart from commodities related to the health crisis. According to Florida Attorney General Ashley Moody, "[e]ssential commodities for each event may differ." While some essential commodities are already covered under the pandemic related state of emergency, additional goods and services related to preparing and recovering from the storm will be covered under the July 31, 2020, emergency declaration.

Similarly, North Carolina declared a state of emergency on July 31, 2020, due to Hurricane Isaias. According to North Carolina Attorney General Josh Stein, "North Carolina's price gouging law is already in effect because of the coronavirus, but it applies to hurricanes as well." North Carolina's price gouging law prohibits any person from selling or renting goods or services which are "consumed or used as a direct result of an emergency or which are consumed or used to preserve, protect, or sustain life, health, safety, or economic well-being of persons or their property with the knowledge and intent to charge a price that is unreasonably excessive under the circumstances." N.C. Gen. Stat. §75-38. Like Florida, North Carolina's law may cover additional goods or services specifically related to preparing and recovering from the hurricane.

There have also been a variety of states of emergency in effect throughout the pandemic completely unrelated to COVID-19. For example, some West Virginia counties were under a state of emergency in mid-June due to flooding. West Virginia's price gouging law, among other items, covers "goods for emergency cleanup" and "emergency supplies," which likely differ from the goods covered under the pandemic state of emergency. One Tennessee county was similarly under a state of emergency for flooding in July. Tennessee's price gouging law, among other items, covers "emergency supplies," which again, likely differ in the event of a flood.

Price gouging related to the public health crisis has been the focus of Attorneys General enforcement actions and private litigation in recent months, but a variety of natural disasters can lead to increased scrutiny around price gouging as well. Businesses should keep these short term emergencies in mind when pricing products that may be covered by a state price gouging law. Further, businesses should also be aware that with a new state of emergency unrelated to the pandemic potentially comes a new baseline price for certain products. See our blog post on How to Calculate a Baseline Reference Price for Price Gouging Compliance for more details.

Price Gouging Laws Expected to Remain in Effect Through the End of the Year

In response to the public health crisis caused by COVID-19, states of emergencies were declared across the nation in order to implement emergency response plans and halt the spread of the virus. Generally, state governors have the power to declare states of emergency, by issuing executive orders which outline the duration of the declaration and the conditions that brought about the order.

Since March 2020, all fifty states have declared states of emergencies. As a result of the declarations, price gouging laws have been triggered nationwide. As previously discussed, although the emergency declarations began at roughly the same time, states are likely to allow them to expire at very different times.

To date, no state appears to have let their emergency declarations expire, or even lapse (though the manner in which some of the renewals were implemented may leave open the possibility of a different interpretation). Practically speaking, that means that for the purposes of calculating baseline prices, the pricing considerations that were implicated when these declarations were first implemented in early March, are very likely the same considerations that will be used today.

While many states have repeatedly extended their declarations as the pandemic continues, more than a dozen states, issued a state of emergency for an *indefinite period of time*.

Two states, Missouri and South Dakota, have provisionally set December 30, 2020 as their end dates. South Dakota set that date in late May, and Missouri made a similar decision in early June.

Shorter term, some states of emergencies are currently expected to expire in October (District of Columbia) and early September (Alabama, Connecticut, Florida, Kansas, New York, Oregon, and Pennsylvania), and many other states are due to expire at various points in August.

The continued pattern of renewals over the past several months, however, gives reason to doubt whether the current expiration dates will be maintained. We have seen that, in states that set shorter time frames for the effectiveness of their declarations, the relevant states of emergencies have been repeatedly renewed and extended. In Oklahoma, for example, the emergency declaration has been renewed more than in any other

state—now nearly twenty times. While their current end date is August 9, 2020, given the pattern of renewals in Oklahoma, it seems unlikely that deadline will hold.

As the pandemic continues to pose a threat to communities in various states, governors likely will continue to renew states of emergencies with no clear end in sight. Businesses should remain aware of the span of these states of emergency, as violating price gouging laws can bring about serious penalties.

When Will It End? Price Gouging Restrictions Remain in Place for Uncertain Period

The pandemic has demonstrated that price gouging laws are not only written in an ambiguous manner, but are ambiguous as to whether they are in effect or not. A recurring problem faced by businesses is that some states are not widely circulating information about whether their price gouging laws are still active, when they expire, or whether they've already expired. As a result, law abiding businesses may find it difficult to find accurate, publicly available information about price gouging law end dates.

Some commentators have categorically stated—potentially incorrectly—that certain price gouging laws have expired. For example, some say that Kentucky's price gouging law expired on April 21, 2020. By statute, Kentucky's price gouging law is in effect for fifteen days after notification of the price gouging law going into effect. After the fifteen days expire, the Governor may renew the provisions up to "three additional fifteen (15) day periods if necessary to protect the lives, property, or welfare of the citizens". Ky. Rev. Stat. §367.374(2). Despite what the statute says, the Governor continued to extend the price gouging law, and on May 21, 2020, issued an executive order stating that the price gouging laws shall remain in effect for the duration of Kentucky's state of emergency. However, it is unclear whether the Governor has the authority to extend price gouging laws beyond the length laid out by statute. Other state Governors, who have extended price gouging laws beyond the scope of the respective state statute, may also find the legality of the extensions questioned.

Further, while it appears Tennessee's price gouging law may have expired—as some have indicated—the Tennessee's Office of the Attorney General, Division of Consumer Affairs has not provided clarity on the question. In early June, the Division said the statute is still in effect. In early July, the Division stated that while they're happy to take any consumer complaints, they are unable to answer whether the price gouging statute is still in effect.

Also noteworthy, when the Wisconsin Bureau of Consumer Protection was recently asked whether there is still an abnormal market disruption, the Bureau stated that they are still accepting price gouging complaints, but have "no idea" when the abnormal market disruption will end. One day later, the Wisconsin Department of Agriculture, Trade and Consumer Protection released a statement stating "Governor Tony Evers approved ending the declared period of abnormal economic disruption, allowing

sellers to resume sale of consumer goods and services without the restrictions outlined in Wisconsin's price gouging statutes."

Businesses making efforts to comply with the law need to know the law in order to comply. The lack of clarity is not only poor policy, but it is bad government. A state's consumer protection agency should be able to give businesses a simple yes or no answer as to whether a price gouging law remains in effect.

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