



Coronavirus: US State AGs ramp up efforts to combat price gouging

ANTITRUST AND COMPETITION: NOVEL ISSUES IN A POST-CORONAVIRUS WORLD

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State Attorneys General throughout the country are vigorously enforcing state unfair trade practice and price gouging statutes against those alleged to be taking advantage of consumers during the COVID-19 pandemic. Sellers – particularly those who sell goods over state lines – are alerted that some states and localities consider price increases of 10 percent or less over pre-emergency prices to constitute price gouging.

Before the COVID-19 pandemic, some states had pre-existing statutes that prohibited price gouging after the declaration of certain types of emergencies by national, state, or local officials. California's statute, for example, generally establishes a 10 percent threshold: an increase in prices of 10 percent across a variety of goods and services following the declaration of a state of emergency may constitute price gouging as a matter of law. See California Penal Code Section 396, which can be found online – http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=396&lawCode=PEN. New York's statute prohibits charging consumers prices that are "unconscionably excessive" during a declared emergency but does not provide a quantitative threshold for what constitutes price gouging—instead leaving the determination to the court. See New York General

Business Law Section 396-r, which can be found online in the database at <http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>.

Some states with more general statutes – either laws specific to price gouging or general consumer protection statutes – have seen those statutes made more stringent by governors and local officials issuing emergency orders in connection with the COVID-19 pandemic. In Delaware, for example, the governor issued an emergency declaration on March 12, 2020, stating: “No entity doing business in this state shall engage in price gouging as a result of this public health emergency, which shall mean an excessive price increase of goods or services offered for sale beyond the sale price in the usual course of business immediately prior to the date of this state of emergency, unless the increase is attributable to additional costs imposed on the supplier of such goods or services, such price not to increase more than 10% from the cost customarily applied in the usual course of business prior to this state of emergency.” The Delaware emergency declaration can be found at https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/State-of-Emergency_03122020.pdf. The Delaware emergency declaration further stated that a breach of these standards would violate the consumer fraud provisions of the Delaware Code. Willful violation of the consumer fraud provisions of the Delaware Code can be punished by fines up to \$10,000 per violation.

In Delaware and other jurisdictions without specific price-gouging statutes, executive orders may specify that price increases over a certain threshold are deemed prohibited by a state’s more general consumer protection statutes.

Sellers are reminded that some governors are permitted – by statute, as part of their emergency declarations – to forbid *any* price increases for certain goods and services after the declaration of an emergency. At least one state governor has used such general language in an emergency order during the COVID-19 pandemic. The governor of Rhode Island issued an executive order on March 9, 2020, forbidding (among other things) price increases for “personal protective equipment, including masks and gloves, hand sanitizer, soap, bleach or other household disinfectant . . .” The Rhode Island governor’s order can be found at <http://www.governor.ri.gov/documents/orders/Executive-Order-20-02.pdf>.

Local authorities are also using their power to address price gouging. For example, on March 17, 2020, the New York City Department of Consumer and Worker Protection announced an emergency rule prohibiting price increases of 10 percent or more with respect to goods and services that are either reasonably believed by a consumer, or marketed by a merchant, to aid in the diagnosis or monitoring of symptoms of COVID-19, preventing the spread of the disease, or treating the disease. The announcement can be found online at <https://www1.nyc.gov/site/dca/media/pr031720-DCWP-Emergency-Rule-Price-Gouging-Illegal.page>.

Sellers are encouraged to review carefully the declarations, orders, and statutes referred to in this post, as they contain important details regarding duration, calculation, and implementation. Some state and local rules applicable to price gouging carry criminal sanctions. Sellers may also note that, in addition to enforcement by State Attorneys General, enforcement activities are being conducted by a variety of other law enforcement and regulatory agencies.

Finally, sellers should also be aware that Attorneys General in states into which products are being shipped have expressed their strong concern with price gouging by companies that are shipping goods to their residents.

The takeaway: price increases of 10 percent or less can trigger price gouging penalties in some jurisdictions, and that price gouging and consumer protection statutes are being vigorously enforced – and in some cases modified by emergency order – during the COVID-19 pandemic.

If you have questions regarding these issues, please contact either of the authors or your DLA Piper relationship partner.

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