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Expert Analysis

Anti-Price-Gouging Enforcement In the Age of COVID-19

By **Karen Hoffman Lent** And **Kenneth Schwartz**

After the Center for Disease Control confirmed the earliest cases of COVID-19 in the United States, consumers flocked to retailers in droves to stock up on goods such as hand sanitizer, face masks, toilet paper, bottled water, and other essentials in anticipation of the impending outbreak. By early March 2020, reports emerged of retailers and third-party sellers on platforms like Amazon capitalizing on consumer fears by drastically increasing prices on these items hundreds of percentage points beyond their suggested retail price. Other reports have emerged of commentators noting the opportunity for pharmaceutical companies to raise drug prices. These reports have generated significant concern among state and federal officials across the country about price-gouging practices amidst the ongoing COVID-19 emergency.

At present, there is no federal statute specifically designed to combat price gouging. But at least 34 states and the District of Columbia have enacted dedicated anti-price-gouging (APG) statutes or regulations that prohibit excessive price increases on certain categories of goods and services upon the occurrence of a triggering event, typically a declared state of emergency. Several other states enforce prohibitions on price gouging through general consumer-protection statutes that forbid unfair or deceptive trade practices.

As the COVID-19 outbreak continues, state attorneys general will vigorously enforce these statutes, and both brick-and-mortar retailers and online marketplaces are likely to face continued scrutiny. Federal regulators and lawmakers appear primed to police price gouging with similar urgency despite the lack of dedicated APG tools at their disposal. Indeed, officials at all levels of government have taken significant steps to curb gouging practices over the past month.

Anti-Price-Gouging Enforcement Mechanisms

States police price gouging through dedicated APG statutes and consumer-protection statutes. APG statutes create price ceilings for certain goods and services during emergencies. In some states, they operate in tandem with consumer-protection statutes by defining excessive price increases as per se "unfair" or "deceptive" trade practices. In others, they operate independently.

State APG statutes vary in several respects. First, they differ regarding the goods and services they protect. Several APG statutes are narrow in scope and only guard against excessive price increases on defined categories of goods such as "fuel" or "petroleum products." See, e.g., Ind. Code §4-6-9.1-2 (2020). Others are more broad, protecting an array of "essential" or "necessary" goods and services in a semi-catch-all manner and providing non-exhaustive lists of covered goods and services. See, e.g., Or. Rev Stat. §401.960 (2020). Still others display more breadth, covering "all goods and services." E.g., Miss. Code Ann. §75-24-25 (2019).

Second, the manner in which price ceilings are set in APG statutes range from precise calculations to amorphous analyses. Many APG statutes set defined ceilings of between 10 percent, e.g., Cal. Pen. Code §396 (2020), and 25 percent, e.g., Kan. Stat. Ann. §50-6,106 (2019), above pre-emergency prices. Others generally prohibit "unconscionable" increases above pre-emergency prices. E.g., Fla. Stat. §501.160 (2020). In many states, these ceilings remain active for a period after the triggering

KAREN HOFFMAN LENT *and* KENNETH SCHWARTZ *are partners at Skadden, Arps, Slate, Meagher & Flom.* MICHAEL A. LANCI, *an associate at the firm, assisted in the preparation of this column.*

event at issue. Importantly, most state APG statutes include "increased-cost" provisions that allow merchants to pass higher input costs along to consumers.

Finally, the penalties allowed under APG statutes vary, with some states able to pursue criminal penalties on price gougers that include substantial prison time. See, e.g., Okla. Stat. tit. 15 §§761.1, 777.4-777.5 (2019) (maximum ten years imprisonment). All states with APG statutes can pursue substantial civil penalties. See, e.g., N.Y. Gen. Bus. Law §396-r (McKinney 2019) (up to $25,000 per violation).

Some states without APG laws police price gouging under the authority of consumer-protection statutes that broadly prohibit unfair, unconscionable, or deceptive acts and practices. For example, after the September 11th attacks, Ohio pursued claims under the Ohio Consumer Sales Practices Act against 28 gas stations that charged excessive prices. See Cale Wren Davis, An Analysis of the Enactment of Anti-Price Gouging Laws 97-98 (Jan. 2008) (unpublished M.S. thesis; Montana State University).

In contrast to the wealth of APG laws among the states, the federal government's toolkit to combat price gouging is limited. The federal government can monitor price-gouging practices through the National Center for Disaster Fraud, but prior to the COVID-19 outbreak, enforcement was largely limited to coordinating with state and local authorities. Commentators past and present have questioned whether the Federal Trade Commission (FTC) can use its authority under §5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce," to combat price gouging. However, as explained below, the FTC has declined to exercise any potential authority to police price gouging pursuant to §5.

Emergence Of Anti-Price-Gouging Laws

Most states with APG statutes enacted them in the wake of crises that resulted in widespread consumer complaints of price hikes. New York, for example, passed the country's first APG law in 1979 after record cold winter temperatures led to high heating costs for millions of residents. See Davis, supra, at 35. Similarly, a number of states passed APG laws following the September 11th attacks and Hurricane Katrina, which led to rising prices at the gas pump in 2001 and 2005, respectively. See id. at 23-24, 32-34.

High gas prices following Hurricane Katrina triggered a national dialogue on price-gouging regulation. Shortly after Katrina, 42 states announced investigations into gas pricing, with nine states ultimately charging retailers with price gouging. Fed. Trade Comm'n, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases 192-94 (2006). Congress meanwhile directed the FTC to investigate whether post-Katrina gas-price increases resulted from market manipulation or price-gouging practices, see id. at i, and drafted APG bills.

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In 2006, the FTC issued a report that identified several instances of price gouging among oil refiners. Id. at 153-54. But it also concluded these firms behaved competitively by increasing output and shipping supplies to high-priced areas. Id. at ix. Consequently, the FTC cautioned lawmakers against enacting federal APG legislation, citing concerns that markets would function inefficiently without pricing signals, leading to worse shortages and further harm to consumers. Id. at 196. The FTC stressed the sufficiency of the antitrust laws in ensuring competitive, pro-consumer prices, emphasizing "our competition-based economy generally allows a seller . . . to set prices as it chooses, and relies on market forces—rather than government intervention—to determine the prices a seller can seek." Id. at 184-89, 196.

Price Gouging Back Into Focus

Widespread reports of price gouging following the COVID-19 outbreak have brought price-gouging regulation back into focus. At the state level, dozens of attorneys general have warned retailers not to engage in price gouging or have otherwise cautioned consumers to be wary of such practices. They have developed web portals and phone hotlines dedicated solely to policing predatory practices, which have already generated thousands of complaints among consumers. Reese Dunklin & Justin Pritchard, *$10 Toilet Paper? Coronavirus Gouging Complaints Surge in US*, AP News (March 19, 2020).

Several state attorneys general have already initiated enforcement proceedings against perceived offenders under the authority of APG statutes. On March 17, for example, Michigan Attorney General Dana Nessel issued a cease and desist letter to Menards, the third-largest home improvement chain in the United States, after receiving 18 complaints from consumers about face masks, bleach, and other products being sold at high prices. Press Release, Mich. Att'y Gen., AG Nessel Sends Cease and Desist Letter to Menards for Price-Gouging (March 17, 2020).

Officials in states without APG statutes have also taken steps to curb price gouging. Washington Attorney General Bob Ferguson, for example, stated his office would be "investigating price gouging in the wake of the COVID-19 public health emergency," citing the state's general Consumer Protection Act. Steve Kiggins, *Washington AG Investigating Coronavirus-Related Price Gouging*, Q13 Fox (March 4, 2020).

State governors have similarly classified COVID-19 price gouging as a violation of consumer-protection laws or have prohibited the practice via emergency declarations and executive orders. See, e.g., Ariz. Exec. Order No. 2020-07 (March 11, 2020). In some states (e.g., Maryland), legislatures have included APG measures as part of emergency laws to manage the COVID-19 crisis.

At the federal level, congressional officials have issued calls to action in the name of combatting price gouging. The earliest such efforts took aim at Amazon, with Sen. Edward Markey of Massachusetts asking CEO Jeff Bezos about the steps his company is taking to prevent price gouging by third-party sellers, noting Amazon has a "particular responsibility to guard against" the practice. Letter from Sen. Edward J. Markey, U.S. Senate, to Jeff Bezos, CEO, Amazon (March 4, 2020). Amazon retorted that it is "aggressively" enforcing its fair-pricing policy, removing hundreds of thousands of postings and suspending thousands of seller accounts. Annie Palmer, *Amazon Removes Hundreds of Thousands of High-Priced Offers Amid Coronavirus Price Gouging*, CNBC (March 6, 2020).

Congressional leaders have also urged the FTC to act, with some in the Senate imploring the FTC "to employ the full extent of its authority under Section 5" to combat price gouging and seize the opportunity "to explore the limits of [its] consumer protection authority." Letter from Sen. Amy Klobuchar et al., U.S. Senate, to Joseph J. Simons, Chairman, Fed. Trade Comm'n (March 27, 2020). On March 23, President Trump signed an executive order intended to curb price gouging by prohibiting the hoarding of scarce necessary resources pursuant to §102 of the Defense Production Act and authorizing Attorney General William Barr to pursue violators.

Key Takeaways

State and federal officials have already begun taking sweeping measures to combat price gouging during the COVID-19 pandemic. They will continue to exercise these measures into the future and will likely expand the scope of their APG enforcement authority going forward. At the state level, states with APG statutes will vigorously enforce them, monitoring consumer portals and hotlines closely and pursuing claims against small retailers and national chains alike, perhaps even going further up the supply chain. States without such statutes will similarly monitor price gouging, with the goal of initiating enforcement actions through consumer-protection statutes, implementing new emergency measures, or developing dedicated APG legislation, as has occurred following past crises.

At the federal level, Congress will continue to question whether to include price-gouging enforcement in COVID-19 relief legislation, even as the DOJ begins investigating claims of misconduct. The DOJ will work closely with state authorities to fight price gouging. As the national dialogue on APG enforcement continues to trend, Congress may pursue hearings on the topic and call on the FTC to investigate whether further action is warranted as it did after Katrina.

One looming question is whether the FTC will answer the call of lawmakers to use its §5 authority to combat price gouging. Although the FTC has yet to comment on price-gouging practices, FTC Chairman Joseph Simons has warned firms that the FTC "will not tolerate businesses seeking to take advantage of consumers' concerns and fears regarding coronavirus disease, exigent circumstances, or financial distress." Press Release, Fed. Trade Comm'n, Statement from FTC Chairman Joe Simons Regarding Consumer Protection (March 26, 2020).

At minimum, the FTC will almost certainly consider and heavily scrutinize price-gouging practices against the backdrop of competition. Indeed, to the extent that higher prices are reflective not only of predation but also of coordinated conduct or monopolization, the FTC will be investigating claims vigorously. As the FTC stressed in its post-Katrina report, ensuring competitive, pro-consumer prices is the role of our free-market political economy and the antitrust laws.

These contours of APG enforcement raise additional questions about the actors that could draw antitrust scrutiny as regulators consider these pricing practices alongside practices they typically consider when analyzing coordinated conduct or monopolization claims. Large chains and wholesalers that sell "necessities" and pharmaceutical companies, particularly those that sell or market drugs used to treat COVID-19, are among the kinds of firms that should exercise heightened caution in setting even competitive prices.

Similarly, companies that operate marketplaces for third-party sellers like Amazon, eBay, and Walmart—which have already drawn scrutiny due to widespread reports of price gouging by third-party sellers—could draw further scrutiny if they fail to respond to consumer complaints by removing postings and suspending seller accounts when necessary. Weak institutional responses by these firms could fuel additional calls from officials like Sen. Elizabeth Warren who seek to limit them by prohibiting them from selling on their platforms.

Ultimately, APG regulation will remain a hot topic as the COVID-19 pandemic draws on, with officials at all levels of government ramping up enforcement efforts until this crisis is resolved.