

WEBINAR

Price Gouging in the Age of COVID-19: How Much Is That Hand Sanitizer In The Window?

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Roadmap

Recent Focus

New Focus on Price Gouging in Wake of Pandemic

Definitions & Comparisons

What is Price Gouging Under Federal and State Law?

Enforcement & Litigation

Current Enforcement Efforts and Recently-Filed Private Actions

Best Practices

How Companies, Including Online Retailers, Can Minimize Risks

The New Focus on Price Gouging During COVID-19

No Express Federal Prohibition

Generally, a merchant may charge “as high a rate as the market will bear” so long as that rate is set unilaterally.

FTC Releases Report on its Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases

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FOR RELEASE

May 22, 2006

“The antitrust laws are not designed to prevent prices from increasing; rather, they are designed to prevent firms from using market power to raise prices artificially.”

“Calls for antitrust enforcement against price gouging are in essence a call for action against unilateral pricing behavior.”

Potential Avenues Under U.S. Federal Law

FTC Act § 5

- Prohibits “unfair methods of competition” and “unfair or deceptive acts or practices”

Sherman Act § 2

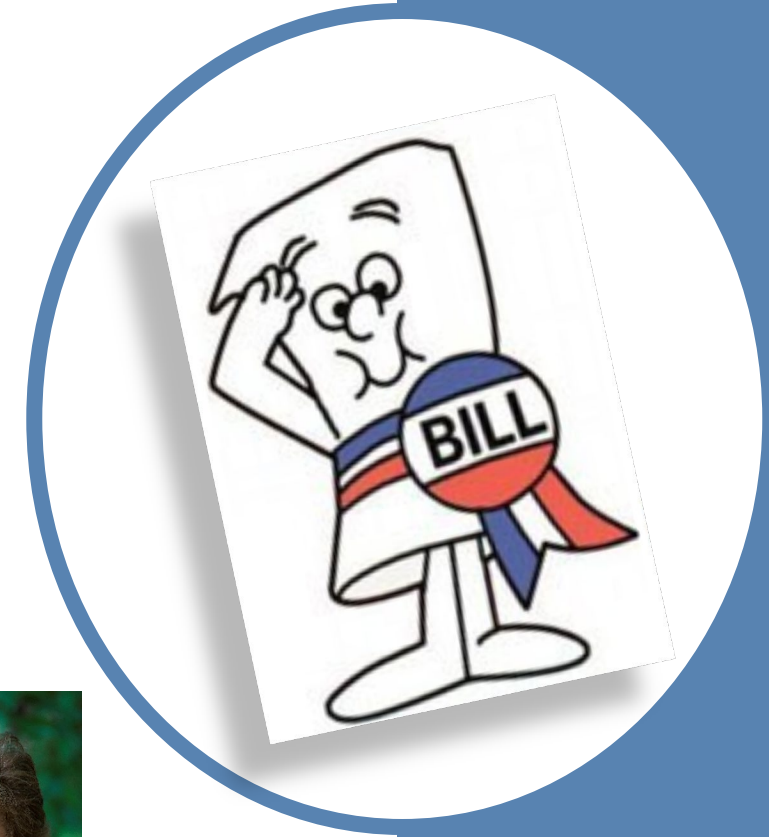
- Prohibits improper uses of monopoly power



Proposed Federal Legislation

Recent bills are very similar to state anti-price gouging laws.

- Most vest enforcement in the FTC
- Different thresholds for what will qualify as price gouging and varying penalties



The Man With 17,700 Bottles of Hand Sanitizer Just Donated Them

A Tennessee man had planned to sell his stockpile at marked-up prices online. Now he is under investigation for price gouging.



Matt Colvin, a Tennessee man who stockpiled hand sanitizer and wipes, says he has donated what he bought. He faces an investigation on price-gouging charges. Doug Strickland for The New York Times



From the beginning of this pandemic we've seen too many instances of retailers taking advantage of this dire situation and charging exorbitant prices for critical medical supplies. By banning price gouging on personal protective equipment, we are helping to ensure our health care workers - who have been working tirelessly to save lives at great personal danger to themselves - and the public have access to these supplies, while holding these unscrupulous retailers accountable for attempting to capitalize on the fear of others.



- New York Governor Andrew Cuomo

What is Price Gouging?



General Definition in Patchwork of State Laws

- The sale or offer for sale;
- Of essential goods or services;
- At an unfair or unreasonable price;
- Following some emergency or other demand or supply shock.

Which participants in the supply chain are covered?

Virtually all states prohibit price gouging by those who sell to ultimate consumers.



- Many state laws cover all parties within the chain of distribution
 - New York: extends to all parties “within the chain of distribution”
 - California: all sellers, including manufacturers, wholesalers, distributors, and retailers
 - Delaware: all “entities” doing business in the state during the public health emergency

- Some carve out sellers at higher levels of distribution chain
 - Florida: carves out non-consumer sales of “raw or processed food products”
 - Georgia: only applies to retail sales of goods / services “identified by the governor in the declaration of the state of emergency”
 - Idaho: explicitly limited to “selling or offering to sell to the ultimate consumer”

What products/services are covered?

Most laws cover sale of goods deemed “necessary” or “essential” in relation to the crisis.



California: consumer food items, emergency cleanup supplies & services, medical supplies, home heating oil, building materials, housing (including temporary or rental lodging), transportation / freight / storage services, gasoline / fuels

Florida: any essential commodity necessary for consumption or use as a direct result of the emergency, including rental goods

Expansive:

- Delaware: any goods or services offered for sale

Limited:

- Vermont / Illinois: petroleum and heating products only

When is the prohibition in effect?

Virtually all state price gouging laws take effect when a state or federal state of emergency is declared but vary as to the duration of the price-gouging prohibitions.



- In most states, the price-gouging prohibitions will automatically remain in effect for a period of time ranging from 30 to 60 days after the state of emergency is declared.
 - California: 30 days (180 days for cleanup, reconstruction, repair work)
- State laws generally allow the governor to declare renewal periods to extend the duration of the restrictions.
- Limitation periods for price-gouging claims vary dramatically (1 year to 6 years after discovery).

What is an unfair price?

Most states use metric to determine what is an “unreasonable” or “unfair” price.

Variation in (1) defined timeframe for determining baseline price;
(2) whose price is used to calculate baseline (individual seller or average market price);
and (3) the threshold price increase allowed.

- Pre-event time period
 - Most use 30 days
 - Varies from 7 days - 90 days
- Particular seller’s price
 - Kentucky, New Jersey, Oregon, Wisconsin
- Market price
 - DC, Pennsylvania, Mississippi

- Threshold price increase
 - 10% is typical (e.g., California, Kentucky, DC)
 - 15% (Wisconsin, Oregon)
 - 20% (Pennsylvania)
 - 25% (Alabama, Kansas)

- Case-by-case with no specified threshold
 - Texas: “exorbitant or excessive price”
 - South Carolina / Florida: “gross disparity”
 - North Carolina: “unreasonably excessive under the circumstances”

What defenses are allowed?

Cost increases justify price increases.



- Increases in supply / materials costs or labor costs may be passed on, with typical mark-up
- Additional exceptions / exemptions
 - California and Arkansas: Look to usual price if seller was selling item at a reduced price immediately before emergency
 - California: “seasonal adjustments” in hotel/motel rates allowed
 - Alaska: allows fuel price changes caused by normal market supply and demand fluctuations
 - Florida: doesn’t apply to price increases (1) approved by a state agency or (2) imposed by up-stream food producers
 - Maine: “necessities” excludes certain healthcare services

Who enforces and what are potential penalties?

Most states provide some combination of (i) injunctive relief, and (ii) civil penalties, which vary by state. State AGs enforce and some states allow private lawsuits.



- Variation in potential penalties per violation
 - California: \$2,500
 - New York: greater of \$25,000 or three times the value of gross receipts
 - Texas: \$10,000 per violation (up to \$250,000 if the affected consumers are elderly)
- Criminal penalties
 - California: misdemeanor up to 1 year in jail and up to \$10,000 fine
 - Mississippi: if value exceeds \$500, then felony with 1–5 years in prison and up to \$5,000 fine

Federal Focus on Scarce Medical Supplies

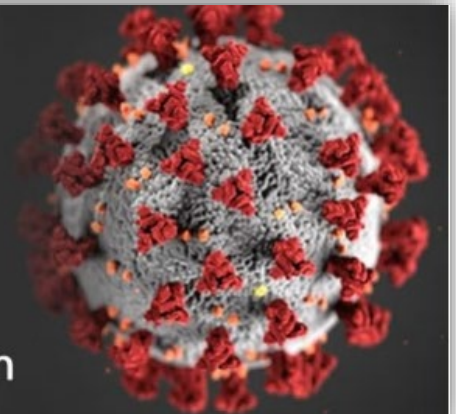


Executive Order 13910 of March 23, 2020

Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19

**REPORT HOARDING
& PRICE GOUGING**

Contact the National Center for
Disaster Fraud Hotline:
866-720-5721 or
[Justice.gov/DisasterComplaintForm](https://www.justice.gov/DisasterComplaintForm)



Federal Enforcement Under DPA

FOR IMMEDIATE RELEASE

Friday, April 24, 2020

Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment

Defendant's Retail Store in Plainview Sold "COVID-19 Essentials," Including Face Masks, Face Shields, Surgical Gowns and Disinfecting Products, at Inflated Prices

A criminal complaint was filed today in federal court in Central Islip charging Amardeep Singh with violating the Defense Production Act of 1950 by hoarding personal protective equipment ("PPE") at a warehouse in Brentwood, New York, amid the COVID-19 pandemic, and price-gouging customers of his retail store in Plainview, New York. If convicted, Singh faces up to one year in prison.

FOR IMMEDIATE RELEASE

Tuesday, April 28, 2020

Two Individuals Arrested for Conspiring to Violate the Defense Production Act

Defendants Allegedly Conspired to Inflate the Sale Price of Scarce Respirator Masks to Enrich Themselves

A criminal complaint was unsealed today in federal court in Brooklyn charging Kent Bulloch and William Young, Sr., with conspiracy to violate the Defense Production Act by seeking to resell one million KN95 protective masks in New York City at a 50 percent mark-up. Bulloch, an attorney, was arrested Monday night in California and will make his initial appearance via teleconference in federal court in San Francisco and Young will appear via teleconference in federal court in Phoenix.

Man Charged With Conning NYC In \$45M Face Mask Scheme

By *Rachel O'Brien*

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Law360 (May 26, 2020, 5:43 PM EDT) -- A New Jersey used car salesman has been arrested and charged with running a \$45 million scheme at the height of the fight against COVID-19, attempting to sell price-gouged N95 face masks to New York City, an order he had no way of fulfilling, prosecutors said Tuesday in New York federal court.

Ronald Romano, using his company in Manalapan, New Jersey, attempted to get New York City to pay a more than 400% markup on the list price of 7 million 3M brand face masks beginning in late March, a violation of the Defense Production Act,

Recent Private Litigation and State Enforcement

Redmond v. Albertson Cos., Inc.

No. 3:20-cv-03692-JSC (N.D. Cal. filed June 3, 2020)



- Putative class action by purchasers of allegedly price gouged consumer goods, including toilet paper
 - Named plaintiff allegedly paid \$18.99 for a specific brand of toilet paper “normally priced at \$10–11” prior to California Governor’s declaration of emergency
- Defendant owns supermarket chains
- Alleges violation of California’s Unfair Competition Law (UCL) on behalf of putative CA class
 - Seeks restitution, injunctive relief, and attorney’s fees and costs
- Alleges “negligence *per se*” on behalf of putative nationwide class
 - Mentions other states’ price gouging laws
 - Seeks compensatory damages & equitable and declaratory relief

Fraser et al. v. Cal-Maine Foods, Inc. et al.

No. 3:20-cv-02733-AGT (N.D. Cal. filed Apr. 20, 2020)

- Putative CA class of consumers who purchased eggs claim violations of California's UCL and its anti-price gouging statute
 - Defendants are producers, wholesalers, and retailers (brick-and-mortar and online sellers)
 - Alleges egg prices **nearly tripled** after the CA Governor's emergency declaration
 - Seeks: (i) a permanent injunction under the Penal Code; and (ii) restitution under the UCL
-
- Tracks similar lawsuit filed by Texas AG against largest seller of eggs in Texas



Price Gouging and Trademark Law: 3M Actions

Analysis

To Tackle COVID Price Gouging, 3M Turns To Trademark Law

By *Bill Donahue*

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Law360 (April 14, 2020, 5:07 PM EDT) -- Price gouging on face masks during a pandemic is pretty crummy behavior, but it's not illegal.

3M, the country's largest producer of crucial

3M Continues Blitz With 4 More Price-Gouging Cases

By *Bill Donahue*

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Law360 (May 1, 2020, 3:21 PM EDT) -- 3M Company filed four more federal trademark lawsuits Thursday against companies that it claims

increased prices, bringing the total to 10. The lawsuits are part of 3M's effort to combat price gouging during the coronavirus pandemic.

3M Wins Its First NY Injunction Over COVID-19 Price-Gouging

By *Frank G. Runyeon*

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Law360, New York (May 4, 2020, 6:10 PM EDT) -- A Manhattan federal judge on Monday granted 3M a preliminary injunction against a New Jersey outfit accused of violating federal trademark law and grossly inflating the price of N95 protective masks amid the COVID-19 pandemic.



McQueen et al. v. Amazon.com, Inc.

No. 4:20-cv-02782 (N.D. Cal. filed Apr. 21, 2020)



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18 *the Proposed Class*

19 UNITED STATES DISTRICT COURT
20 NORTHERN DISTRICT OF CALIFORNIA
21 OAKLAND/SAN FRANCISCO DIVISION

MARY McQUEEN and VICTORIA BALLINGER,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

AMAZON.COM, INC., a Delaware corporation,
Defendant.

No.

CLASS ACTION COMPLAINT FOR
VIOLATION OF CALIFORNIA'S UNFAIR
COMPETITION LAW, UNJUST
ENRICHMENT, AND NEGLIGENCE

JURY TRIAL DEMANDED

State AG Letters to Online Platforms

- State AGs are requiring platform operators to police third-party listings
 - Failure might give rise to price gouging, negligence, and unjust enrichment claims
- But beware the Sherman Act
 - Section 1: Price discussions where the platform competes directly with a third party
 - Section 2: De-listings may be used to shift sales to the platform's own listings or listings with more lucrative sales and advertising contracts



March 25, 2020

Jeff Bezos, Founder/CEO
Amazon HQ
410 Terry Ave. N
Seattle WA 98109-5210

Dear Mr. Bezos,

We write in our capacity as the top law enforcement officers for our respective states. We want the business community and American consumers to know that we endeavor to balance the twin imperatives of commerce and consumer protection in the marketplace. And, while we appreciate reports of the efforts made by platforms and online retailers to crack down on price gouging as the American community faces an unprecedented public health crisis, we are calling on you to do more at a time that requires national unity. That is why we are reaching out to you and other platforms and online retailers directly to address this problem.

As COVID-19 spreads throughout the country, it is especially important unscrupulous sellers do not take advantage of Americans by selling products at unconscionable prices. Unfortunately, independent third-party organizations and journalists have documented many examples of price-gouging of items people need to protect themselves since the World Health Organization declared a global health emergency on January 30. For example:¹

- On Amazon, U.S. PIRG Education Fund found that more than half of hand sanitizers and facemasks available spiked by at least 50% compared to the average price. One in six products sold directly by Amazon saw similar price spikes.

¹ See, e.g., Tiffany, Kaitlin, *The Hand-Sanitizer Hawkers Aren't Sorry*, THE ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/health/archive/2020/03/hand-sanitizer-online-sales-ebay-craigslist-price-surge/607750/>; Whalen, Jeanne et al., *Purell prices are spiking on Amazon, as sanitizer speculation becomes a cottage industry*, THE WASHINGTON POST (Mar. 4, 2020), <https://www.washingtonpost.com/business/2020/03/04/purell-hand-sanitizer-prices-coronavirus/>; and Price Gouging on Amazon During the Coronavirus Outbreak, U.S. PIRG EDUCATION FUND (Mar. 11, 2020), <https://ospirg.org/reports/orp/price-gouging-amazon-during-coronavirus-outbreak>.

Best Practices for Minimizing Risks

Best Practices: Avoiding Price Gouging Risks

- Note products/services on which enforcers focus
- Consider profit margins pre- and post-emergency
- Document legitimate business reasons for cost increases, e.g.:
 - Increased cost of inputs
 - Efforts to find new suppliers
 - Increased labor costs or extended hours with overtime pay
 - Loss of economies of scale
 - The need to adjust or redesign work space
 - Personal protective equipment for employees
 - New costs from disinfecting services or testing employees for COVID-19
- Maintain these justifications as easily accessible business records



Best Practices for Online Marketplaces

- Policies to combat price gouging by third-party marketplace participants should:
 - Be designed and implemented on a strictly unilateral basis
 - Set forth in clear terms with easy-to-follow triggers and penalties
 - Be communicated in advance to all participants
 - Be enforced consistently and fairly across the board
 - Be tailored to the unique risks faced by potentially dominant market participants
 - Allow policymakers to revisit the policy regularly
- Be nimble! Third parties may try to circumvent policies by re-listing or bundling
- Reject invitations to “crisis cartels”



Questions?

Attorney Biographies



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Neely Agin focuses her practice on antitrust and competition matters. She has steered hundreds of transactions through the U.S. and global merger control review process and regularly represents clients in merger and other antitrust investigations by the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), and state attorneys general, as well as in Hart-Scott-Rodino (HSR) matters. Neely uses her deep experience to counsel clients on a variety of antitrust issues, including distribution restrictions, the formation and operation of joint ventures, trade association activities, information exchanges, and pricing practices. She also advises clients in developing, implementing, and enforcing global antitrust compliance programs.

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Jeffrey Amato handles complex multi-forum disputes, principally in the areas of international cartel litigation, class actions, arbitration, and government investigations. Jeffrey also has experience in white collar criminal defense, including representing defendants in federal and state courts at the trial, appellate, and post-conviction levels. His experience includes counseling clients with respect to navigating compliance with statutory, regulatory, and ethical obligations relating to government contracts. During his career in private and public practice, Jeffrey has been involved in legal disputes concerning a wide range of issues in federal, state, administrative, and arbitral forums, each contributing to his proficiency in new substantive areas of the law and diverse business sectors.

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Susannah Torpey has experience representing major U.S. and multinational corporations in litigation and government investigations involving a wide array of federal and state antitrust issues, including monopolization, price fixing, wage fixing, no-poach agreements, group boycotts, exclusive dealing, tying, price discrimination, unfair competition, anticompetitive product redesign, and mixed issues of antitrust and intellectual property law relating to Fair, Reasonable, and Non-Discriminatory (FRAND) obligations, standard-setting, patent licensing, patent misuse, and fraud on the United States Patent and Trademark Office (PTO). Susannah also counsels international and U.S. businesses regarding the minimization of antitrust risk and evaluates board and other corporate activities for antitrust compliance. She has been repeatedly recognized as a “SuperLawyer,” “Top Woman Attorney,” and as a “Star” in Antitrust and Litigation for obtaining critical wins for her clients, whether at trial on behalf of plaintiffs or by winning complete dismissals on behalf of defendants.

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Patrick Opdyke has experience representing major U.S. and multinational corporations in litigation and government investigations involving a wide array of federal and state antitrust issues, including monopolization, price fixing, wage fixing, no-poach agreements, tying, price discrimination, unfair competition, anticompetitive product redesign, and mixed issues of antitrust and intellectual property law relating to Fair, Reasonable, and Non-Discriminatory (FRAND) obligations, standard-setting, patent licensing, and patent misuse. He has represented and counseled clients in a variety of industries, including in high-tech; IoT; wireless connectivity (2G, 3G, 4G); semiconductors; computer products; patent aggregation and licensing; pharmaceuticals; steel products and fabrication; food products and distribution; and financial services.

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