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ARTICLE

# Minimizing Risk at the Antitrust/Price-Gouging Intersection After COVID-19

JUNE 4, 2020

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While challenges to high prices set collusively have always been an enforcement priority of the antitrust agencies, the past decade has arguably produced more debate about the effects of low, rather than high, prices when set unilaterally. A clear focus throughout the last decade has been the shuttering of brick and mortar competitors unable to keep step with low prices enabled by the digital economy, the leveraging of big data, and algorithmic pricing.

With the rise of digital gatekeepers competing with participants on the very platforms they created, competitors have raised concerns about predatory prices allegedly used to drive out competitors and recoup lost profits later on; zero-priced products and self-preferential treatment used to enable monopoly leveraging across secondary markets; and artificially low prices subsidized with monopoly profits arbitraged from other markets in order to erect insurmountable barriers to entry in more nascent product markets.

The great irony is that the same competitors that have been scrutinized for predatorily low-priced products over the past decade are now the subject of numerous price-gouging complaints. Some may argue we are now seeing the recoupment predicted in past years, but this fails to explain the prevalence of price increases among small third-party sellers partaking in price increases alongside digital giants. Many price-gouging complaints are legitimate and can expose both platform operators and market participants alike to significant exposure. Platform and market operators thus now must grapple with how best to address complaints asserted against competitors without drawing antitrust scrutiny. Market participants likewise must ensure they are pricing competitively while navigating a patchwork of price-gouging laws and new policies that may restrain their sales regardless of whether they actually violate these laws.

This article seeks to provide guidance to minimize legal risks at the intersection of the antitrust and price-gouging laws. While seeking to minimize price-gouging exposure, in-house counsel should take precautions not to increase antitrust risks with unevenly enforced price-gouging policies, particularly where marketplace operators compete alongside third-party sellers. Market participants should further take a fresh look at their pricing practices in anticipation of a new era of price-setting scrutiny.

Whereas price stratification or discrimination were frequently dismissed as byproducts of more efficient digital pricing mechanisms in recent years, the current pandemic shows signs of increased political will to better understand how algorithmic pricing may result in more dramatic and widespread upswings regardless of any potentially off-setting efficiencies in less turbulent times. While absurd algorithmic increases like the $23 million listing for a biology textbook on Amazon may have been laughed off in the past as a "perfect storm of competitiveness," even inadvertent price increases may have more serious implications for companies going forward.

## State AGs Are Asking Platforms to Scrutinize Competitors' Prices

On March 25, 2020, 33 state attorneys general sent letters to the CEOs of several prominent digital platforms and online retailers to tell them they "Must Stop Site Price Gouging by Online Sellers." For decades, antitrust jurisprudence has recognized that even courts are ill-equipped to regulate prices. In 2009, for example, the Supreme Court questioned whether a judge or a jury could even "determine a 'fair price.'" *Pac. Bell Tel. Co. v. link Line Commc'ns., Inc.*, 555 U.S. 438, 454 (2009). Yet the state AGs are now effectively asking online platforms to do just that even though some of these companies compete alongside the same purported price gougers they are being asked to monitor and refer to enforcement authorities for prosecution. Specifically, the AG letters ask online platforms and retailers to "creat[e] and enforc[e] strong policies that prevent sellers from deviating in any significant way from the price the product was sold at prior to the onset of the emergency" by "look[ing] at the prices historically set by the seller in question, as well as other sellers of the same or similar products, to identify and eliminate price gouging."

While extraordinary times may call for extraordinary measures, the AG letters further ask platforms to trigger these "price gouging protections independent of, or prior to an emergency declaration" when "your system detects pricing spikes generally" or when there are "conditions that could lead to price gouging like pending weather events or future possible health emergencies." They further request the platforms to create and maintain a "fair pricing" page or portal where consumers can report price gouging incidents by providing the name of the vendor, the item for sale, the price, and the state of residence of the complainant. Platforms are then encouraged to use this information to freeze or remove price gougers from the platform and to facilitate referrals for enforcement or prosecution.

## Policing Competitors' Pricing Raises Antitrust Risks

Asking platforms to monitor, police, and freeze competitors' pricing raises significant antitrust risks. Platform participants could understandably be concerned that the operator's interference with its pricing and actions taken to freeze sales may be motivated by a desire to shift sales over to competitive products sold by either the platform operator itself or by others with more lucrative or preferential sales and advertising contracts with the platform. Moreover, strict price comparison policies fail adequately to account for valid price increases that are justified by supply disruptions and increased costs, which may enable the continued sale of scarce necessities. For companies that find the requested protocols too burdensome or risky, they are likely simply to ban scarce essentials entirely from their sites, which either reduces the supply of essential items or shifts them to a more concentrated number of sellers to which some consumers may not have access.

As the Federal Trade Commission reported in 2006 when it rejected calls for a federal price gouging statute after Hurricane Katrina, "it can be very difficult to determine the extent to which price increases are greater than 'necessary.' Our examination . . . of state price gouging statutes and enforcement efforts indicates that the offense of price gouging is difficult to define . . . Ultimately, the lack of consensus on which conduct should be prohibited could . . . leave businesses with little guidance on how to comply and would run counter to consumers' best interest."

Significant differences across state price-gouging statutes and executive orders continue to abound today. While most generally make it illegal after a state of emergency declaration to raise prices excessively on necessities like food, medical and emergency supplies, and gasoline, significant variations across state laws suggest that automated compliance with rough-cut rules is likely to reduce output of necessities sold at justifiably increased prices at the very time access to essential products is needed most. State price-gouging laws, for example, vary significantly as to what products and services are covered, ranging from specifically enumerated products such as just fuel, to broad but undefined categories like "pharmaceuticals," to virtually all products and services, to vague catch-alls like "necessities" or "essential commodities." See, e.g., Ind. Code § 4-6-9.1-2; Vt. Stat. tit. 9 § 2461d; Idaho Code § 48-603(19); S.C. Code § 39-5-145; Or. Rev. Stat. § 401.960.

Price-gouging laws also vary as to when price gouging prohibitions are triggered or remain in place, such as just for the duration of the state of emergency or for some time thereafter. See, e.g., Ga. Code § 10-1-393.4(a); Conn. Gen. Stat. § 42-230; N.J. Stat. § 56:8-109. Temporal limitations on price-gouging prohibitions make the request to freeze price spikes "independent of" a declaration of emergency particularly problematic. There are also variations as to whom in the distribution chain is covered. While most state laws target retailers selling directly to consumers, some state laws instead apply to the whole distribution chain such that manufacturers, wholesalers, and distributors may also be liable for price gouging. Compare 73 Pa. Stat. § 232.4, with Or. Rev. Stat. § 401.965(2).

Perhaps most problematic in terms of creating workable monitoring solutions that do not produce false positives, state price-gouging laws also vary dramatically as to how much a price needs to go up in order to constitute price gouging. For example, California's statute defines gouging as a price increase of more than 10% of the seller's price immediately prior to the emergency declaration; Pennsylvania's statute defines gouging as a price increase of 20% or more above the average price during the last seven days immediately prior to the declared state of emergency; and Kansas defines price gouging as charging prices grossly in excess of that charged the business day prior to the disaster but provides that a 25% price increase is prima facie evidence of gross excess. See Cal. Penal Code § 396; 73 Pa. Stat. § 232.4(b); Kan. Stat. 50-6,106(b). Other states, however, have even more vague thresholds like "unconscionable" price increases or a "gross disparity" between prices before and after the triggering event, and other states simply ban price increases bluntly or generally ban "price gouging" without any guidance as to triggering thresholds. See, e.g., Conn. Gen. Stat. § 42-230; Fla. Stat. § 501.160; Ga. Code § 10-1-393.4; La. Rev. Stat. § 29:732.

It is also worth noting that although most state price-gouging statutes characterize offenses as civil, fines are typically assessed per violation, which can add up to substantial sums. See, e.g., 815 Ill. Comp. Stat. 505/7 (up to $50,000 per violation); Iowa Code §§ 714.16-714.16A (up to $40,000 per violation); N.Y. Gen. Bus. Law § 396-r (up to $25,000 per violation); Tex. Bus. & Com. § 17.47(c) (up to $10,000 per violation plus up to $250,000 if targeted consumer is 65 or older). And while some states with criminal price-gouging statutes categorize the offense as a misdemeanor, some state statutes do expose those found guilty of price-gouging to imprisonment, with as much as up to 21-years imprisonment "at hard labor" in Louisiana if the violation results in someone's death. La. Rev. Stat. § 14:329.7.

## How to Minimize Risk

Despite all of the variations across state laws, platform operators now find themselves asked to monitor competitors' pricing for compliance with conflicting laws, and platforms and competitors alike need to ensure they do not inadvertently violate these laws. As pointed out in the AG letters requesting monitoring, "independent third-party organizations and journalists have documented many examples of price-gouging" since the World Health Organization declared a global health emergency on January 30. While it is unfortunately true that many of these instances were intentional abuses, more dramatic upswings may be occurring inadvertently online as a result of the use of pricing algorithms that can ratchet prices up or down based on prices posted by competitors. Using an algorithm, however, is not a defense to price gouging. Accordingly, merchants using them should consider implementing other pricing strategies when a state of emergency is declared or setting limits on permissible increases to reduce exposure in anticipation of increased price scrutiny.

Politicians have recently called for increased price controls and price-gouging investigations. For instance, Elizabeth Warren stated she was introducing a bill to "protect consumers now and during any future crisis by setting tougher rules of the road and enhancing enforcement against predatory price gouging." Numerous other federal lawmakers have likewise proposed new legislation. See S. 3574; H.R. 6450; H.R. 6457; H.R. 6472. Given the current focus on price increases, in-house counsel should take a hard look at their company's pricing practices in anticipation of potentially heightened scrutiny. For example, while there may have been a lack of political will in past years to tackle the thorny issues relating to algorithmic pricing absent evidence of outright coordination between sellers, today there is a very different political climate.

To ensure compliance with price-gouging laws, first and foremost, in-house counsel should assess what laws apply to the company's sales. Most companies will be subject to more than one state law as most states now have price-gouging statutes or executive orders in place. If the company sells medical supplies or provides related services, such as disinfecting and sterilization services, in-house counsel should also assess whether they must comply with the more limited Hoarding Prevention Executive Order signed by President Donald Trump on March 23, 2020. In-house counsel should assess past price increases implemented leading up to the pandemic to evaluate exposure and should inform individuals responsible for setting prices of the potential risks triggered by price increases during the state of emergency, which for the first time in U.S. history extends to all 50 states and the District of Columbia.

However, unlike online pricing policies that will be unable to take underlying cost increases into account, most state statutes do contain exceptions where the seller is justified in raising prices to account for increased costs or where profit margins have stayed the same. See, e.g., Cal. Penal Code § 396 (price increase not unlawful if "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" where other conditions are met). Indeed, companies may have legitimate cost increases during the pandemic, for example, as a result of:

- Suppliers increasing the price of inputs that need to be passed on
- The need to find a new supplier when a prior one runs out of inventory or goes out of business
- Increased labor costs as a result of extended hours with overtime pay
- Loss of economies of scale as a result of reopening at lower capacity or with partial staff
- The need to redesign a work space so employees can stay six feet apart
- The need to supply masks, PPE, or other new supplies to your workforce
- The need to increase expenses or services like cleaning or testing employees for Covid-19

If price increases are due in whole or part to legitimate cost increases, in-house counsel should document the cost increases and how they relate to the increases in price. Of course, price increases should be commensurate with cost increases to minimize exposure. In-house counsel should also maintain records of the average price of affected products for as many as 30 days before the declaration of emergency, depending on the applicable state laws; throughout the emergency; and, in some cases, even after the emergency. Especially if sales are online, companies may be able to use automated tools and artificial intelligence to help record prices to ensure the company is prepared for a knock on the door by a state AG or to use in response to being frozen or kicked off of a digital platform.

If your company operates a digital platform or other marketplace with third-party sellers, whether online or brick and mortar, in-house counsel should consider instituting a policy for monitoring and preventing price gouging by others on your site or in your store to protect against state price-gouging, negligence, and unjust enrichment claims. Under the *Colgate* doctrine, companies are ordinarily free to choose with whom to do business and may set up a unilateral policy providing criteria that, if met, would be grounds to end the relationship. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.").

Given the substantial variation across price-gouging law, it would likely be too challenging simply to state that the company would not do business with companies violating price-gouging laws. In-house counsel should take the nature of the business into consideration to assess whether a certain threshold price increase or increases over a specified amount of time would be appropriate to trigger a warning, a suspension, and ultimately termination. Companies may be familiar with this type of policy in connection with "minimum advertised price" policies, known as

MAP policies. This would be a similar type of policy, but rather than warning of cutting off a relationship for lower prices, this would be a "max" policy pursuant to which companies would be warned for price increases over a specified amount and time period. Such a policy would arguably be more procompetitive than MAP policies because the likely effect would be to lower, rather than raise, prices.

However, in-house counsel should consider how best to take into account price increases that are commensurate with legitimate cost increases so as not to interfere unnecessarily with competitive market dynamics. Courts have long held under the antitrust laws that a merchant may ordinarily charge as high a rate as the market will bear so long as that rate is set unilaterally. There may be a procompetitive reason for a price that is purportedly too high, such as enabling innovation through the recoupment of R&D costs that are not reflected in the price of the inputs themselves. Accordingly, policies should be flexible enough to account for legitimate differences in price across products as well as legitimate fluctuations in price, particularly when price-gouging prohibitions are not triggered under state law.

While the state AGs suggest monitoring at times that are independent of a state of emergency, in-house counsel need to carefully consider the antitrust risk this may pose to their particular business. In designing and implementing any type of *Colgate* policy, especially one that relates to price, it is critical to implement a policy on a strictly unilateral basis without input from platform or marketplace participants. Communications with platform or marketplace participants could otherwise expose the company to allegations of a group boycott or even price fixing by participants who believe the company is not enforcing price-gouging policies fairly. Thus, employees should be trained, for example, not to engage in any discussions with platform or marketplace participants asking if a price increase could be approved in advance or discussions requesting the enforcement of the policy against other participants. When creating price-gouging policies, platform and marketplace operators should also take into consideration whether they could be considered to have a dominant market share such that freezing or eliminating sales could be viewed as an exclusionary act in support of a monopolization claim.

These precautions are particularly critical where those operating platforms or marketplaces are also selling products in competition with those they now need to monitor for price-gouging policy compliance. Accordingly, at a minimum, any such policy must be:

- Designed and implemented on a strictly unilateral basis
- Set forth in a clear manner with easy to follow triggers and subsequent penalties
- Communicated in advance to platform or marketplace participants
- Enforced consistently and fairly across the board
- Tailored to the unique risks faced by potentially dominant market participants

Depending on the business, in-house counsel should also take into account and plan for ways that participants may be expected to try to circumvent the policy, for example, by re-listing old products as new ones or by bundling products together to evade comparison to pre-state of emergency pricing.

Given the risk of treble damages and the enormous costs associated with antitrust litigation, as well as the heightened antitrust risks associated with policies relating to prices, in-house counsel asked to implement price-gouging policies need to appreciate how well-intended efforts to minimize price-gouging risk may inadvertently raise antitrust risks. Even though low prices typically benefit consumers, there remains a tension between antitrust precedent protecting the freedom to set high prices and the emerging patchwork of state price-gouging laws curtailing that freedom. While the focus on price-gouging now is at its height, past disasters have taught that the ramifications of crisis cartels and related litigations are likely to live on for years after declarations of emergency have been lifted and price-gouging claims have been resolved.

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