

## NY Attorney General Accuses Major Egg Producer of Price Gouging During the Pandemic

AUGUST 24, 2020

In the wake of the COVID-19 pandemic, Attorneys General from numerous states have been actively investigating potential instances of price gouging by sellers. On August 11, New York Attorney General Letitia James filed a [lawsuit](#) accusing Hillandale Farms, a major Pennsylvania egg producer, of taking advantage of consumers by illegally hiking prices during the crisis. According to the complaint, Hillandale raised prices for eggs by as much as 400% after the pandemic hit New York, and allegedly earned at least \$4,000,000 in illegal profits as a result.

This case and others like it should serve as a warning to sellers that as the nation and its economy slowly emerge from the pandemic, inquiries into potential price gouging abuses during the crisis may just be getting started.

### Price Gouging Generally

Federal law does not currently define “price gouging,” although it can be prosecuted under the Defense Production Act in certain limited circumstances.

Although most states have dedicated price gouging statutes, they vary significantly in terms of products and sellers covered, prohibited price increases, and available defenses. While the precise definition of price gouging differs from state to state, its elements generally include:

- 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.

Virtually all state price gouging laws take effect when a state or federal state of emergency is declared. Some states’ laws, such as [New York’s](#), are more broadly triggered by “any abnormal disruption of the market for consumer goods.”

Most or all of the state price gouging laws provide a defense that protects price increases that result from increased costs or up-stream prices.

## New York's Recent Price Gouging Amendment

In response to increased incidents of price gouging in the wake of the COVID-19 pandemic, Governor Andrew Cuomo of New York signed an [amendment](#) to the state's existing price gouging law ([N.Y. General Business Law § 396-r](#)) on June 6, 2020. This amendment expands the scope of covered goods, which previously included only "consumer goods and services" "used, bought or rendered primarily for personal, family or household purposes." As amended, the scope now includes "essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease, and" "any other essential goods and services used to promote the health or welfare of the public."

Notably, the amended law also expands the scope of the statutory exception or defense. Originally, a defendant could rebut prima facie evidence of price gouging by showing that "additional costs not within the control of the defendant were imposed on the defendant for the goods or services." Now, defendants alternatively can show that "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."

The New York amendment also expands potential penalties for price gouging. Under the original statute, the possible penalties included restitution and civil penalties "*not to exceed twenty-five thousand dollars.*" The amended civil penalties are now capped at the greater of either (a) twenty-five thousand dollars per violation, or (b) three times the gross receipts for the relevant goods or services.

## The New York Case

The enforcement action against Hillandale will serve as an important test as it is one of the very first cases filed by the NY AG's office under the state's amended statute. This case comes on the heels of other cases against egg producers and distributors filed by Attorneys General in California and Texas.<sup>[1]</sup>

In the [complaint](#), the AG reveals that the case against Hillandale originated from "an extensive investigation into the pricing practices of retail grocery stores, wholesale food distributors, and egg producers."<sup>[2]</sup> This investigation revealed that between January and March 2020, Hillandale sold eggs at wholesale to one particular retailer at prices ranging from \$0.59 to \$1.10 per dozen. As the pandemic evolved into an unprecedented public health crisis in March 2020, Hillandale allegedly increased its wholesale prices repeatedly, reaching \$2.93 per dozen. During the same period of time, the prices Hillandale charged to a major grocery store allegedly jumped from roughly \$0.85 to as high as \$3.15 per dozen.<sup>[3]</sup> Hillandale also allegedly hiked the prices it charged the U.S. Military Academy at West Point from \$0.84 to \$3.15 per dozen.<sup>[4]</sup>

The complaint also includes allegations that Hillandale's pricing is completely untethered from its input costs. According to the AG, these prices are set according to an index published by a market research firm, and have "nothing to do with cost or overhead." Described as a feedback loop, the index price is based on reports of consumer demand from Hillandale and other producers.<sup>[5]</sup> These allegations seem to be an attempt by the AG to undercut any potential defense that the price increases followed increased costs or overhead.

In response to the allegations, Hillandale officials have [said](#) that its pricing practices have remained consistent for years. This raises an interesting question about the reach of the price gouging laws: what defenses are available for sellers whose pricing is based mainly on market demand, rather than on cost. The question is further complicated in this case because, as the AG alleges, Hillandale is a vertically integrated producer, which implies that it is significantly less likely to face significant increases in its operational costs.<sup>[6]</sup>

New York's price gouging law clearly would prohibit a seller from imposing abnormal price increases to take advantage of an emergency driven spike in demand. But the NY AG's theory suggests that the law also requires

sellers in markets with demand-driven pricing to deviate from industry norms and artificially suppress prices that otherwise would rise proportionally to demand.

For more information on price gouging, please see Winston's recent [webinar](#) on the topic.

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[1] Will Wright, [New York Accuses Egg Producer of Price Gouging in Pandemic](#), NY Times (Aug. 11, 2020).

[2] [Verified Petition](#) ¶ 5, New York v. Hillandale Farms, et al., (Aug. 11, 2010).

[3] [Id.](#) ¶¶ 32 - 44.

[4] [Id.](#)

[5] [Id.](#) ¶¶ 45-51.

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[6] [Verified Petition](#) ¶ 19.

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