

Price Gouging Investigations Are Ramping Up—What Your Business Needs to Know

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Crisis can create opportunity for business, but not all those opportunities are legal. Shortly after Superstorm Sandy slammed the Northeast, we in the offices of the New York and New Jersey Attorneys General warned businesses about the perils of price gouging. Dozens of legal complaints against local, national, and international companies followed. Now, with the current COVID-19 crisis in full swing, those same warnings are being circulated by regulators across the country. We know from experience that these same regulators currently are busy serving investigative demands and preparing complaints against alleged violators.

Here is a practical guide to help your company avoid legal trouble, along with accompanying and potentially irreparable brand and reputational damage, for potential price gouging.

New York's Price Gouging Laws

Under New York's General Business Law, "[d]uring any abnormal disruption of the market for consumer goods and services vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both" for an "unconscionably excessive price." N.Y. Gen. Bus. Law § 396-r. The law applies to all phases of the consumer goods life cycle, from manufacture to retail sale, and also includes services. *Ibid.* The phrase "abnormal disruption of the market" includes "any change in the market, whether actual or imminently threatened, resulting from," among other things, "national or local emergency, or other cause of an abnormal disruption of the market which results in the declaration of a state of emergency by the governor." *Ibid.*

New York law does not specifically define what constitutes an unconscionably excessive

price. However, it states that a price may be unconscionably excessive if (1) the amount charged represents a "gross disparity" between the price of the goods or services that were sold or offered for sale "immediately prior to" the state of emergency, or (2) "the amount charged grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade area." *Ibid.* The statute provides that individuals may provide evidence that their higher prices were justified by increased costs beyond their control. *Ibid.*

The New York State Attorney General will bring civil enforcement actions against violators. Enforcement actions may seek injunctive relief to prohibit further gouging activity, and they may obtain restitution for gouging victims. Violators also face a civil penalty of up to \$25,000. N.Y. Gen. Bus. Law § 396-r.

New Jersey's Price Gouging Laws

Under a provision of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-107 et seq., "excessive price increases" are prohibited during a declared state of emergency by the Governor and for 30 days after the termination of the state of emergency. The Governor may issue an executive order to extend the period during which this prohibition remains in force.

A price increase is excessive if the new price "exceeds by **more than 10 percent** the price at which the good or service was sold or offered for sale by the seller in the usual course of business immediately prior to the state of emergency." N.J.S.A. 56:8-108.

An exception exists if the increase is "attributable to additional costs imposed by the seller's supplier or other costs of providing the good or service during the state of emergency." *Ibid.* In those instances, the increase is excessive if it "represents an increase

of more than 10 percent in the amount of markup from cost, compared to the markup customarily applied by the seller in the usual course of business immediately prior to the state of emergency." *Ibid.*

The price gouging rules apply to any merchandise (1) "which is consumed or used as a direct result of an emergency" or (2) "which is consumed or used to preserve, protect, or sustain the life, health, safety, or comfort of persons or their property." N.J.S.A. 56:8-109.

Persons who violate the price gouging law may be fined up to \$10,000 for the first offense and \$20,000 for any subsequent offense. N.J.S.A. 56:8-13. Each individual sale of merchandise is considered a separate and distinct event.

Expect Stiff Enforcement of These Rules

We lived through this firsthand in the wake of Superstorm Sandy. The New Jersey Division of Consumer Affairs reviewed more than 2,000 consumer complaints of price gouging, investigated approximately 200 businesses for alleged violations, and then filed 27 separate lawsuits against

businesses that had illegally raised their prices. Those 27 cases were settled for more than \$1 million in civil penalties, cost reimbursements to the state, and restitution to customers. The New Jersey Division of Criminal Justice also filed more than 120 separate criminal cases against Sandy fraudsters and profiteers.

While the brick-and-mortar devastation of the COVID-19 pandemic will be less than that inflicted by Superstorm Sandy, the overall economic fallout and business disruption will be far worse. Therefore, we predict larger-scale enforcement efforts by states in response to price gouging concerns. In the event you believe certain activity at your company may have run afoul of price gouging prohibitions, quick action to stop it and to prevent future potential violations will be a mitigating factor in any enforcement proceeding.

To see our prior alerts and other material related to the pandemic, please visit the [Coronavirus/COVID-19: Facts, Insights & Resources](#) page of our website by clicking [here](#).

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