

Panel Summary: Antitrust Counseling on Competitor Collaborations and Price Gouging during COVID-19

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On April 1, 2020, the ABA Antitrust Law Section's Pricing Conduct and Consumer Protection Committees co-sponsored a panel discussion of price gouging, other consumer protection issues, and competitor collaborations in the context of COVID-19. Moderator Celeste Saravia (Cornerstone Research) led a discussion between panelists Patricia Conners (Florida Office of the Attorney General), Thomas Dillickrath (Sheppard Mullin), Jon Roellke (Morgan Lewis) and Ian Simmons (O'Melveny) on these issues.

Price Gouging

The discussion began with a question on how price gouging can be distinguished from normal price increases in the face of supply constraints during an emergency. Mr. Dillickrath noted that while federal law does not define price gouging, the general principle of state price gouging laws is to impose a societal constraint on price increases during an emergency event such as a hurricane or other disaster. So far during the COVID-19 pandemic, there has been some federal involvement against price gouging. For example, the Hoarding Prevention Executive Order that was recently implemented is intended to prevent businesses and individuals from stockpiling medically necessary equipment, particularly with the intention to resell at higher than currently prevailing prices.¹ In addition, Chairman Jerold Nadler of the House Judiciary Committee and the chairs of three other House Committees sent a letter to the FTC urging action to protect consumers from price gouging during the COVID-19 pandemic.² In principle, the FTC could bring a price gouging claim under the *Unfair and Deceptive Acts or Practices Act* given its broad

scope, but that such an unprecedented extension of the FTC's authority is unlikely in practice.

Instead, Mr. Dillickrath explained, price gouging actions will likely primarily be brought by the states, many of which do not specify a definition of price gouging, but instead adopt a sort of "know-it-when-we-see-it" approach. One exception, as Mr. Simmons noted, is California's price gouging statute, under which a price increase of more than 10% after a declared state of emergency can raise an inference of price gouging, unless it can be shown that costs similarly increased and/or markups remained near their pre-emergency level. California's statute is perhaps the strictest state price gouging law in the sense that it offers a specific threshold, covers a broad set of products, and applies criminal penalties.

Ms. Conners discussed how the states approach price gouging laws based on her experience and what Florida Office of the Attorney General has been doing during the COVID-19 pandemic. Florida has extensive experience in bringing price gouging actions due to the frequency of hurricane-related states of emergency. At least thirty-six states, the District of Columbia, and some U.S. territories have price gouging laws. During the COVID-19 pandemic, some states without price gouging laws, such as Maryland and Minnesota, have issued executive orders to allow price gouging actions relevant to the current emergency.

The wide variation in state laws during a national state of emergency will likely pose some challenges to transparency regarding what constitutes an illegal price increase. States vary from a broad application to many commodities (California) to more specific laws related to a few essential

¹ See U.S. Department of Health and Human Services, "HHS Implements President Trump's Hoarding Prevention Executive Order," <https://www.hhs.gov/about/news/2020/03/25/hhs-implements-president-trumps-hoarding-prevention-executive-order.html>.

² See Judiciary.house.gov, "Nadler, Pallone, Cicilline, & Schakowsky Call on FTC to Protect Americans from Price Gouging During COVID-19 Health Crisis," <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2878>, accessed April 2, 2020.

commodities. A few states (notably California, New Jersey, and Pennsylvania) have specific limits on price increases, while most refer to a broader notion of an “unconscionable price,” or gross disparity between the pre- and post-emergency price. A third type of restriction adopted in Georgia, Connecticut, and Louisiana consists of a ban on price gouging. States also vary in whether price gouging restrictions apply just to end retailers, or whether wholesalers and other upstream businesses are subject to the restrictions. However, price increases above the level that might trigger an enforcement action are generally defensible across states if the seller can show that it was passing on a price increase from higher up the supply chain.

Dr. Saravia asked Ms. Conners to comment on the letters that 33 state AGs sent to Facebook, Amazon, eBay, Craigslist, and Walmart asking them to take action to prevent price gouging.³ So far, platforms such as Amazon and eBay have been partnering with state AGs to detect and remove third-party sellers who engage in price gouging or who make false health claims about their products related to the pandemic. Amazon has removed violating third-party sellers and referred more than 40 third-party entities with egregious price increases to the Florida AG alone. eBay has taken one of the more aggressive approaches, banning sales of medically necessary items such as masks and listings that mention COVID-19. It also offers a reporting tool for site users to report price gouging.

The states, in turn, have been contacting these third-party sellers to stop the conduct and obtain refunds for consumers when possible. Ms. Conners noted that the current emergency will likely pose some unique enforcement challenges compared with more common emergencies such as natural disasters. For instance, because some COVID-19-related medical supplies (e.g., testing kits), may not have existed 30 days before a state declared a state of emergency, enforcers will have to go to more effort to establish what a fair price for

the product would have been during the state of emergency.

Other Consumer Protection Issues Related to COVID-19

The panel then turned to a discussion of other consumer protection issues that are likely to arise in the COVID-19 pandemic. Ms. Conners stated that, because many retailers are quickly running out of certain products, the Florida Office of the Attorney General has been working with retailers who offer sales and promotions to provide appropriate caveats regarding “raincheck policies” to avoid consumer complaints. Florida has also seen a wide range of scams, including false product claims, identity theft, and charity scams, particularly targeted at seniors. One notable enforcement action in Florida has been against Norwegian Cruise Lines concerning its potentially misleading claims about the safety of cruises during the pandemic.⁴ Norwegian Cruise Lines is now cooperating with the Florida Office of the Attorney General.

Dr. Saravia asked Mr. Dillickrath, who previously worked at the FTC, to comment on what the FTC is currently doing, and what more it could do to protect consumers. He explained that the FTC has been proactive in creating a consumer info website about common scams, sending warning letters to sellers of unapproved products making unproven health claims, and monitoring social media and the online marketplace. The FTC has also made efforts to educate consumers, particularly seniors, about scams tailored to the COVID-19 pandemic. Mr. Dillickrath expects the FTC to bring lawsuits associated with scams and false claims as the crisis continues.

Competitor Collaborations

Dr. Saravia then asked the panel for comment on the March 24 joint statement by the FTC and DOJ calling for cooperation among agencies, states, and

³ See New York Times, “Price Gouging Complaints Surge Amid Coronavirus Pandemic,” <https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html>.

⁴ See Law360, “Fla. AG Probes Norwegian Cruise’s COVID-19 ‘One-Liners,’” <https://www.law360.com/articles/1256202>.

businesses.⁵ The statement invited businesses to collaborate for the public interest in ways that do not violate the antitrust laws, but affirmed that the agencies would bring enforcement actions if there were evidence of collaboration to restrain trade.

Mr. Roellke noted that in jurisdictions around the globe, we have competition regulators recognize the importance of competitor collaborations that might, absent the crisis, be subject to antitrust scrutiny, particularly with respect to collaborations needed to address medical and food supply shortages. However, agencies have made it clear in the past that a time of crisis does not create a blanket immunity from the antitrust laws: collaborations should remain restricted to those that will reasonably benefit consumers. For example, he contrasted communications between competitors about work-from-home and safety policies, which would likely be permissible, from communications regarding employee wages and benefits or how they were planning to price their goods or services during the pandemic. The former type of communications might allow businesses to determine more quickly which policies are effective and fair, but the latter would could “spillover” into communications unrelated to the emergency and continue to be subject to antitrust review. Mr. Roellke emphasized that businesses should make every effort to minimize these types of “spillover” communications even as they collaborate in the public interest.

Dr. Saravia asked Mr. Simmons to comment on guidelines for acceptable communications for businesses during the COVID-19 pandemic based on his experience advising clients on competitor collaborations. He suggested that businesses seeking expedited review of a collaboration during the COVID-19 pandemic should focus their attention on how the collaboration will benefit consumers (by increasing output, reducing price, or creating quality improvements) relative to a “but-for” world in which the proposed collaborators instead acted independently. He gave the example of two

medical mask producers sharing their equipment so that one producer with a larger supply of the raw materials could take advantage of the idle machines of the other. Because the effect of this collaboration would be an increase in the supply of medical masks, it would yield a clear welfare benefit. In practice, states will have to use prosecutorial discretion in determining after the fact whether collaborations were indeed intended to produce a welfare benefit or were opportunistic attempts at collusion.

Dr. Saravia asked Mr. Dillickrath to comment on the feasibility of the 7-day review period for business collaborations during the pandemic offered by the FTC and the DOJ in their joint statement.⁶ Despite concerns that this process would become delayed due to a large volume of review requests, the DOJ and FTC have so far been responding quickly, and the process has been transparent. He stated that he does not think the joint statement indicated a heightened level of scrutiny on collaborations compared to pre-crisis collaborations, so he would counsel clients to seek a review only in cases that would have appeared to be in a grey area prior to the COVID-19 pandemic. He predicts that agencies will take a pragmatic approach to their review of COVID-19 collaborations where there appears to be an efficiency. Ms. Conners added that, particularly in situations that involve local markets, businesses would be wise to proactively inform state AGs about their planned collaborations in order to facilitate a swift review process and provide certainty.

About the Author



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The views expressed in this article are solely those of the author, who is responsible for the content, and do not necessarily represent the views of Cornerstone Research.

⁵ See Antitrust Division of the Department of Justice and Bureau of Competition of the Federal Trade Commission, “Joint Antitrust Statement Regarding COVID-19,”

https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

⁶ *Id.*