



PRICE GOUGING CONCERNS IN THE COVID-19 ERA

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Federal and state authorities are focusing on alleged price gouging on the sales of medical supplies, equipment and related materials during this pandemic. To this end, on March 9, the Department of Justice (DOJ) announced its “intention to hold accountable anyone who violates the antitrust laws of the United States in connection with the manufacturing, distribution or sale of public health products such as face masks, respirators and diagnostics.” Click [here](#) to review the DOJ’s full announcement.

Since the DOJ’s price gouging announcement, now almost three weeks ago, many of the medical supplies and equipment necessary to combat the spread of the COVID-19 virus, including face masks and screens, hand sanitizer, gloves and even respirators, have become difficult, or even impossible, to find in some areas of the country, especially those hit hardest by the virus. This shortage is expected to continue, and likely worsen, before it gets better.

As with any crisis, the DOJ, State Attorneys General and other state authorities will look to make very public examples of those viewed as engaging in what is considered illegal price fixing or collusive conduct. In the words of Attorney General William Barr, the DOJ “stands ready to make sure that bad actors do not take advantage of emergency response efforts, health care providers or the American people during this crucial time.” The DOJ is expected to commit significant resources to this effort, and to do so in an intentionally public and full-throated way. In fact, the federal government created the Procurement Collusion Strike Force (PCSF) for this exact purpose. Operating under the supervision of the Antitrust Division, the PCSF is working in close coordination with state and other federal authorities

throughout the country to [investigate and prosecute](#) what it determines to be price gouging and collusion. The PCSF was created in November 2019, and the Northern District of Texas is one of the 13 districts partnered with the PCSF. The ongoing pandemic will likely create cases that occupy the PCSF for years to come.

This renewed focus has already resulted in investigations all across the country. While none have been made public at the federal level, various states (including Texas) have taken action against individuals suspected of price gouging. In Texas alone, the Attorney General's Office received over 3,200 complaints of price gouging scams as of last Friday. On March 26th, the Texas Attorney General's Office filed a [lawsuit](#) against Auctions Unlimited under the Texas Deceptive Trade Practices Act. The lawsuit alleges that Auctions Unlimited was selling boxes of 16 face masks for upwards of \$180 a box. Generally, these boxes cost \$10-\$20 each.

In Texas, individuals and corporations should be aware of § 17.46(b) of the Texas Deceptive Trade Practices-Consumer Protection Act. This section of the DTPA provides that it is a false or deceptive act or practice to take advantage of a disaster declared by the Governor under Chapter 418, Government Code, or by the President by:

1. Selling or leasing fuel, food, medicine, lodging, building materials, construction tools, or another necessity at an exorbitant or excessive price; or
2. Demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools, or another necessity.[1]

While we have not seen specific guidance at the federal level, some states have identified what constitutes "exorbitant or excessive pricing" in their states. [Here](#) is a summary of some state price gouging statutes and regulations. For instance, New Jersey has stated a ten percent (10%) price increase during an emergency would be unlawful under most circumstances. In stark contrast, in Pennsylvania there is an assumption that a twenty percent (20%) increase is unlawful. As this unparalleled pandemic continues, we expect to see more guidance in the coming weeks as investigations continue to unfold.

Furthermore, last week President Trump signed an executive order making it a crime for individuals to hoard necessary supplies during this time of emergency. While no cases have been identified yet, Attorney General Barr indicated the Justice Department has already launched investigations into people who are hoarding supplies and price gouging. The executive order allows the president to designate some items as "scarce," but no specific items have been identified, yet. Investigations are clearly underway and only expected to ramp up further during the ongoing crisis.

Individuals and businesses should always be mindful of the requirements of the antitrust laws and ensuring that their conduct does not run afoul of them. But this is especially the case at a time such as this, when the government spotlight will focus more intently on perceived illegal conduct than at other times. And that concern is even more acute for those purchasing and selling products for the health care industry, especially those relevant to treating and preventing COVID-19.

But for those in the health care industry and selling related products to health care providers, what does “being aware” look like in practice? First, numerous red flags have been identified by the government that it believes are suggestive of price gouging and collusion. The presence of these red flags, be it any or all of them, could drive the government to commence an investigation and possibly bring charges. These red flags include the following:

- If a small group of vendors control a large share of the market;
- Similarity in proposals or applications from various vendors, including language used, addresses provided, similar last-minute changes or any unusual similarities that appear the two proposals came from the same vendor;
- Developing patterns among competing vendors, such as: competing vendors rotating as the award winner; routine competing vendors winning the same or similar amounts of work; one vendor always winning, regardless of competition; or, as compared to prior awards, a smaller amount of vendors submit proposals for the current award;
- Any indications that vendors worked together rather than competed for the award.

Second, take steps to ensure that your business practices, including your product sales, are geared to avoid those red flags and are otherwise consistent with the antitrust laws, namely, they do not suggest collusive conduct or, especially in a time of crisis and short supply such as now, price gouging or illegal profiteering. Those steps, while non-exhaustive and inapplicable to some, include the following:

- Avoid profit margins that are excessive for your industry or the products you are selling;
- Attempt to align your profit margins during this crisis with those you've made in the past;
- Ensure that your entire transaction – your product purchase costs, any related transit costs, all communications involved in the transaction and your product sale and profit – is fully documented, meaning that you can demonstrate your costs and profits if called upon;
- Do not coordinate with other industry participants in agreeing on or otherwise setting prices;
- Do not “take turns” with other industry participants to win bids;
- If you are required to pay higher-than-usual prices for products that you will later sell, be sure to document those higher prices;
- Where possible, be transparent with your purchasers, especially when you are paying higher prices to your sources that will then be passed on to your purchasers;
- Be aware of guidance issued by any states in which you do business regarding the percentage of profit that may be considered unlawful or otherwise excessive.



Finally, work with experienced counsel who can advise you regarding the antitrust laws as they relate to your particular products and their sales. They can give you guidance regarding the sometimes hidden pitfalls relating to price fixing, collusion and gouging, which is especially important at a time of increased scrutiny such as now. The antitrust laws are complex, highly nuanced and not always intuitive – even to experienced industry participants. Competent regulatory counsel can provide invaluable guidance in navigating the complex waters of antitrust regulation and enforcement.

If you have questions or would like to discuss further, please contact Jeff Ansley, Arianna Goodman or Katherine Devlin.

[1] If a consumer prevails after filing a lawsuit under § 17.46(b) of the DTPA, a variety of remedies are provided under § 17.50. In all cases, a consumer can recover the amount of economic damages found by the trier of fact. In situations where the individual or corporation found to be in violation of the DTPA acted knowingly or intentionally, additional damages may be rewarded. Finally, a court can award any other relief deemed proper, and a consumer that prevails shall be awarded court costs and attorneys' fees.