

PRICE-GOUGING ENFORCEMENT DURING THE COVID-19 PANDEMIC

Since the beginning of the COVID-19 pandemic, federal and state agencies have emphasized through public statements and enforcement actions that they are on the lookout for unlawful price gouging. With ongoing shortages of personal protective equipment and surging demand for health care products, pricing in the health care industry is likely to be under intense scrutiny as the pandemic continues. This article will summarize recent statements and actions by federal and state antitrust enforcers regarding price gouging, which provide insight into customary practices for enforcement in the health care and pharmaceuticals sector.



Natalie Hayes¹
Associate, Weil, Gotshal &
Manges, LLP

DOJ is Leading Federal Efforts to Stop Price Gouging

The U.S. Department of Justice (“DOJ”) has taken the lead on price gouging at the federal level by creating the COVID-19 Price Gouging Task Force to monitor and investigate allegations of unlawful price gouging and by bringing criminal cases against alleged price gougers. The Federal Trade Commission (“FTC”), in contrast, is unlikely to take action regarding price gouging without new legislation because the FTC’s current statutory mandate may not include price gouging.²

Federal Legal Authority

The Defense Production Act of 1950 (“DPA”) allows the DOJ to bring criminal charges related to price gouging in certain circumstances. The DPA does not explicitly prohibit high prices; instead, it provides for criminal penalties against anyone who accumulates certain materials “for the purpose of resale at prices in excess of prevailing market prices”.³ Under Section 102 of the DPA, the President has broad authority to designate materials that are “scarce

materials or materials the supply of which would be threatened by” accumulation beyond reasonable demands or for the purpose of resale at excessive prices.⁴ Any person who willfully accumulates designated materials for a prohibited purpose is subject to a fine of up to \$10,000 and/or imprisonment for up to one year.⁵ The DPA does not create any related private right of action, so enforcement is solely within the purview of government enforcers.

On March 23, 2020, President Trump issued an executive order delegating his authority under Section 102 to the Secretary of Health and Human Services (“HHS”) to “prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States.”⁶ Shortly after the President issued the executive order, HHS designated 15 categories of health care items as scarce materials subject to Section 102 of the DPA, including ventilators and related materials, hydroxychloroquine, sterilization services, disinfecting devices, several types of respirators, and several types of personal protective equipment.⁷ The initial designation was effective for 120 days. On July 30, 2020, HHS extended the designation for another 120 days and designated

¹ The author is an associate in the Litigation Department at Weil, Gotshal & Manges LLP. Any views expressed are those of the author alone at the time of publication and do not necessarily reflect the views of the firm, its clients, or any other organization with which the author is affiliated.

² Letter to The Honorable Joseph Simons, Chairman, FDuring a legislative hearing, FTC Chairman Joe Simons was asked whether the FTC currently has enough authority to address price gouging. Chairman Simons responded, “no, we don’t really think that we have the authority now to do it. It is not a good fit for our current statute.” *Teleconference Forum with FTC Chairman Simons Before the Subcomm. on Consumer Prot. and Commerce of the H. Comm. on Energy & Commerce*, 116th Cong. (2020), https://www.youtube.com/watch?v=kalFV_K4G1E&feature=youtu.be.

³ Defense Production Act of 1950 §§ 102-103, 50 U.S.C. §§ 4512-3 (2018).

⁴ *Id.* at § 4512

⁵ *Id.* at § 4513.

⁶ Exec. Order No. 13910, 85 Fed. Reg. 17,001 (2020).

⁷ Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950, 85 Fed. Reg. 17592 (Mar. 25, 2020), <https://www.justice.gov/file/1264276/download>.

additional scarce materials, including certain materials used for isolation of viral genetic materials and testing, drug products recommended by the National Institutes of Health to treat COVID-19, and alcohol-based sanitizers.⁸

DOJ COVID-19 Hoarding and Price Gouging Task Force

On March 24, 2020, Attorney General William Barr created the COVID-19 Hoarding and Price Gouging Task Force within the DOJ to investigate and prosecute those who violate the DPA.⁹ The task force is led by Craig Carpenito, the U.S. Attorney for the District of New Jersey, with assistance from the Antitrust Division's Criminal Section, and is composed of experienced DOJ attorneys from around the country.¹⁰ The task force's mission is to address market manipulation, hoarding, and price gouging related to COVID-19 and to coordinate the investigation and prosecution of these activities across the U.S.¹¹ As part of this mission, the task force has created a reporting system for complaints about hoarding or price gouging of medical items through

⁸ Extension of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950, 85 Fed. Reg. 45895, <https://www.govinfo.gov/content/pkg/FR-2020-07-30/pdf/2020-16458.pdf>.

⁹ Memorandum from Att'y Gen. William Barr for Heads of Dep't Components and Law Enforcement Agencies, All U.S. Attorneys (Mar. 24, 2020), <https://www.justice.gov/file/1262776/download>.

¹⁰ *Id.*

¹¹ *Id.*

the National Center for Disaster Fraud.

U.S. Attorney Carpenito recently spoke about the DOJ's approach to investigating allegations of price gouging and acknowledged that the task force is focused on profiteering—not on high prices charged by resellers with higher-than-typical costs. Carpenito said:

When the task force sees substantially higher prices, it inquires whether the legitimate costs of the reseller are high. *If, in order to turn any profit or simply break even, the reseller must set a high resale price, even a price much higher than other transactions in the market, the fact that the reseller is not profiteering is important for us to consider.*¹²

Moreover, according to Carpenito, the task force will consider if a reseller is charging a price substantially higher than the traditional price for a product but has costs that are generally in line with costs of a traditional distributor.¹³

Federal Investigations and Enforcement Actions

The DOJ has brought at least four criminal price gouging cases since

¹² *COVID-19 Fraud: Law Enforcement's Response to Those Exploiting the Pandemic Before the S. Comm. on the Judiciary*, 116th Cong. 1 (2020) (emphasis added) (joint statement of William Hughes, Assoc. Deputy Att'y Gen., and Craig Carpenito, U.S. Att'y for the District of New Jersey).

¹³ *Id.*

HHS designated certain materials as scarce under the DPA. In April 2020, the first case was filed against Amardeep Singh for hoarding personal protective equipment in New York and reselling the equipment at a substantial markup in his retail store.¹⁴ Singh allegedly received at least 40 shipments of facemasks and 14 shipments of surgical gowns, including some that had been designated as scarce by HHS.¹⁵ Singh then allegedly sold these and other medical, disinfecting, and personal protective equipment products at prices in excess of prevailing market prices.¹⁶ These sales allegedly included sales of three-ply disposable masks at a markup of 1,328%.¹⁷ Investigators found more than 100,000 face masks, 10,000 surgical gowns, nearly 2,500 full-body isolation suits, and more than 500,000 pairs of disposable gloves during a search of Singh's warehouse and retail store on April 14, 2020.¹⁸

Shortly after bringing the case against Singh, the DOJ brought another case in New York, charging Kent Bullock and William Young Sr. with violation of the DPA by knowingly and intentionally conspiring to accumulate personal

¹⁴ Press Release, Dep't of Justice, Long Island Man Charged Under Defense Production Act with Hoarding and Price-Gouging of Scarce Personal Protective Equipment (Apr. 24, 2020), <https://www.justice.gov/usao-edny/pr/long-island-man-charged-under-defense-production-act-hoarding-and-price-gouging-scarc-0>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

protective equipment, including KN95 respirators and surgical masks for the purpose of “resale at prices in excess of prevailing market prices”.¹⁹ Bullock and Young allegedly sought to resell one million KN95 respirators in New York at a substantial markup between March and April 2020.²⁰ In at least one instance, the alleged price represented a 300% to 400% increase compared with pricing before the COVID-19 pandemic.²¹

On May 26, 2020, Richard Schirripa was arrested on charges of price gouging in the sale of N95 respirators.²² Schirripa, a pharmacist, allegedly spent \$200,000 to acquire N95 respirators for the purpose of reselling them at a substantial markup.²³ According to the DOJ, Schirripa charged \$25 per mask for N95 masks that cost him \$20 each and \$15 per mask for a

different model of N95 mask that cost him \$10 each.²⁴

Ronald Romano, a used car salesman, was also arrested on May 26 and charged with violating the DPA.²⁵ Romano allegedly attempted to acquire N95 respirators for resale to the City of New York at a 400% markup over the list price and three-ply facemasks for resale to the State of Florida at a markup of more than 500% over the manufacturer’s price.²⁶

Other DOJ Activity

In addition to the activities of the task force, many U.S. Attorneys have expressed interest in investigating price gouging, for example by calling on hospitals and other health care providers to report price gouging.²⁷

The DOJ’s recent activities and enforcement actions, including Carpenito’s testimony and statements by U.S. Attorneys, suggest that the DOJ will continue to investigate and bring enforcement actions against price gouging for the duration of the pandemic.

Key State Statutes and Recent Enforcement Actions

The DOJ is not the only enforcement agency investigating price gouging. Many states have statutes that prohibit price gouging in certain circumstances, and state attorneys general have indicated they will take action to stop price gouging during the pandemic. According to the National Conference of State Legislatures, at least 30 states have statutes addressing price gouging that may be relevant during the pandemic,²⁸ and many of these statutes include provisions regarding price gouging of medical products or supplies. Enforcement by government agencies is often critical because many of the statutes do not create a private right of action. This section will highlight statutes and recent activities relating to price gouging in four

¹⁹ Complaint and Affidavit in Support of Application for Arrest Warrants at 1, *United States v. Bulloch*, No. 20-MJ-327 (E.D.N.Y. Apr. 27, 2020), <https://www.justice.gov/usao-edny/press-release/file/1271741/download>; see also Press Release, Dep’t of Justice, Two Individuals Arrested for Conspiring to Violate the Defense Production Act (Apr. 28, 2020), <https://www.justice.gov/usao-edny/pr/two-individuals-arrested-conspiring-violate-defense-production-act> [hereinafter DOJ Press Release on DPA Violation].

²⁰ DOJ Press Release on DPA Violation, *supra* note 19.

²¹ Complaint and Affidavit in Support of Application for Arrest Warrants, *supra* note 19, at 23.

²² Press Release, Dep’t of Justice, Licensed Pharmacist Charged With Hoarding And Price Gouging Of N95 Masks In Violation Of Defense Production Act (May 26, 2020), <https://www.justice.gov/usao-sdny/pr/licensed-pharmacist-charged-hoarding-and-price-gouging-n95-masks-violation-defense>.

²³ *Id.*

²⁴ *Id.*

²⁵ Press Release, Dep’t of Justice, New Jersey Man Arrested For \$45 Million Scheme To Defraud And Price Gouge New York City During COVID-19 Pandemic (May 26, 2020), <https://www.justice.gov/usao-sdny/pr/new-jersey-man-arrested-45-million-scheme-defraud-and-price-gouge-new-york-city-during>.

²⁶ *Id.*

²⁷ See, e.g., Jay Town, U.S. Attorney for the Northern District of Alabama, Letter to Healthcare Officials (Apr. 15, 2020), <https://www.justice.gov/usao-ndal/press-release/file/1269071/download> (stating that the HHS designation of scarce items triggered “**both criminal and civil enforcement remedies that [his] office will aggressively enforce.**” (emphasis in original)); Halsey B. Frank, U.S. Attorney for the District of Maine, Letter to Maine Medical Association and Maine Hospital Association (Apr. 14, 2020), <https://www.justice.gov/usao-me/press-release/file/1268796/download>; Robert M. Duncan Jr., U.S. Attorney for the Eastern District of Kentucky, Letter to Hospital Executives (Apr. 14, 2020), <https://www.justice.gov/usao-edky/press-release/file/1268681/download>; David M.

DeVillers, U.S. Attorney for the Southern District of Ohio, Letter to Hospital Executives, (Apr. 7, 2020), <https://www.justice.gov/usao-sdoh/pr/us-attorney-devillers-sends-letter-hospital-executives-promoting-partnership-thwarting>.

²⁸ Heather Morton, *Price Gouging State Statutes*, NAT’L CONFERENCE OF STATE LEG., (Mar. 30, 2020), <https://www.ncsl.org/research/financial-services-and-commerce/price-gouging-state-statutes.aspx>.

major states: California, Florida, New York, and Texas.²⁹

California

During declared emergencies, Section 396 of the California penal code prohibits the sale of certain goods and services (including medical supplies) “for a price of more than ten percent greater than the price charged by” the same seller for the same items “immediately prior to the proclamation or declaration of emergency.”³⁰ Violations of the statute are punishable by imprisonment for up to one-year and/or a fine of up to \$10,000.³¹ Although this appears to be a clear-cut prohibition on prices above a certain level, the statute also provides an exception that permits higher prices if the seller can show the increase in price was “directly attributable to additional costs.”³² If the seller can show increased costs, then the price may be up to ten percent greater than (1) the total cost to the seller plus (2) the markup customarily applied by the seller for the same goods or services in the ordinary course immediately prior to the onset of the emergency.³³ Thus, California law considers costs

as a factor in deciding whether price gouging is unlawful, which is similar to the DOJ task force approach of considering increased costs when evaluating alleged price gouging under the DPA. However, the California statute goes further than DOJ’s policy by setting out a specific formula for determining whether a price increase is justified by a cost increase.³⁴

As drafted, Section 396 may not apply to a seller that begins offering a good or service for the first time after an emergency is declared because a new seller will not have a comparative pre-emergency price. To address this issue, California Governor Gavin Newsom issued an executive order on April 4, 2020.³⁵ Executive Order N-44-20 prohibits sellers who did not offer an item for sale before the emergency from charging a price that is 50% more than either the amount paid for the item or the cost to produce the item.³⁶ Refusing to follow or willfully neglecting to obey the executive order is punishable by imprisonment for up to six months and/or a fine of up to \$1,000.³⁷

California Attorney General Xavier Becerra has indicated that his office is on the lookout for price gouging, including price gouging of health care products, through a series of public announcements. The first announcement, on March 4, 2020, specifically identified medical supplies as a category of goods covered by California’s price gouging law.³⁸ On March 20, 2020, Becerra issued a statement calling for online platforms to take steps to stop price gouging, including price gouging of surgical masks on their platforms.³⁹ Just a few days later, Becerra issued another statement emphasizing that California’s price gouging law not only applies to retailers, but also applies to manufacturers, wholesalers, and distributors.⁴⁰ In the same statement, Becerra said

filed-against-los-angeles-county-pharmacist [hereinafter *Charges Filed Against L.A. Pharmacist*].

³⁸ Press Release, Cal. Att’y Gen. Xavier Becerra, Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities (Mar. 4, 2020), <https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>.

³⁹ Press Release, Cal. Att’y Gen. Xavier Becerra, Attorney General Becerra Calls on Online Marketplaces to Up Their Game to Combat COVID-19 Price Gouging on Their Platforms (Mar. 20, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-calls-online-marketplaces-their-game-combat-covid-19>.

⁴⁰ Press Release, Cal. Att’y Gen. Xavier Becerra, Attorney General Becerra Reminds Wholesalers and Manufacturers They are Subject to California’s Price Gouging Law (Mar. 27, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-reminds-wholesalers-and-manufacturers-they-are-subject>.

²⁹ While the issues that arise in these major states are illustrative of the types of issues that may arise under state law in other jurisdictions, this analysis should be considered a starting point for analysis of statutes in other jurisdictions and not a comprehensive summary of issues that may arise at the state level.

³⁰ CAL PENAL CODE § 396 (2019).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Cal. Exec. Order N-44-20 (2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-and-alameda-county-district-attorney-0%E2%80%99malley-announce>. The executive order also sets February 4, 2020 as the date used to determine pre-disaster prices for purposes of analyzing prices under Section 396 of the California Penal Code.

³⁶ *Id.*

³⁷ Press Release, Cal. Att’y Gen. Xavier Becerra, Attorney General Becerra: Charges Filed Against Los Angeles County Pharmacist for Price Gouging on Masks (June 18, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-charges->

“it’s imperative that we stop price gouging anywhere in the supply chain.”⁴¹

Becerra has also brought at least one criminal case related to price gouging for health care products. On June 18, 2020, Becerra’s office announced criminal charges against Katrin Golian, an independent business owner in Los Angeles, for selling KN95 respirators at a markup of more than 50%, in violation of Newsom’s April Executive Order.⁴² Becerra’s office began investigating Golian following a consumer complaint and found that Golian had purchased respirators for \$5 each, which she subsequently sold for \$10 each.⁴³ Investigators warned Golian that the prices violated the executive order, but Golian was still selling the masks for \$10 each when agents returned several days later and purchased masks while undercover.⁴⁴ Following the sales to the undercover agents, Golian was arrested.⁴⁵

Florida

Florida also has a statute prohibiting prices above a certain level, but with civil rather than criminal penalties. Florida Statute § 501.160 prohibits the sale of essential commodities during a declared state of emergency at “unconscionable prices.”⁴⁶ A price is “unconscionable”

under the statute if it (1) represents a “gross disparity” from the average price for the same product or service in the ordinary course of business 30 days before the declaration or (2) grossly exceeds the average price of the same product or service in the trade area 30 days before the declaration.⁴⁷ However, similar to California’s statute, the Florida statute provides an exception if the price is “attributable to additional costs incurred in connection with the rental or sale” of the product or service.⁴⁸ The statute provides for civil penalties of up to \$1,000 per violation and up to \$25,000 for multiple violations in the same 24-hour period.⁴⁹ The Florida statute does not create a private right of action, instead leaving enforcement to government agencies.⁵⁰

Florida Attorney General Ashley Moody activated the state’s Price Gouging Hotline on March 10, 2020,⁵¹ one day after Florida Governor Ron DeSantis issued an executive order declaring a state of emergency related to COVID-19.⁵² Moody published a list of commodities covered under §

501.160 during the COVID-19 State of Emergency, including health care products such as protective masks, personal protective equipment, and COVID-19 test kits and related medical supplies.⁵³ Moody also made clear that price gouging would be a focus for the Attorney General’s office by creating a “rapid response team ready to immediately respond to allegations of price gouging” in early March.⁵⁴

Between March 10, 2020, when the hotline was activated, and September 1, 2020, Moody’s office made more than 9,500 referrals and contacts to merchants about price gouging, issued 92 subpoenas related to price gouging investigations, and worked to deactivate 250 online posts offering items at allegedly high prices.⁵⁵ Moody’s office has also recovered more than \$1 million in COVID-19 related enforcement actions, at least some of which relate to price gouging.⁵⁶

⁴¹ *Id.*

⁴² *Charges Filed Against L.A. Pharmacist, supra* note 37.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ FLA. STAT. § 501.160 (2019).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ FLA. STAT. § 501.164 (2019).

⁵⁰ § 501.160.

⁵¹ Press Release, Fla. Att’y Gen. Ashley Moody, Attorney General Moody Activates Price Gouging Hotline (Mar. 10, 2020), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/126AC86DF86F943485258527005F9BDE> [hereinafter Moody Activates Price Gouging Hotline].

⁵² Fla. Exec. Order 20-52 (2020), [http://myfloridalegal.com/webfiles.nsf/WF/GP-EY-BMKH4K/\\$file/Virus+SOE.pdf](http://myfloridalegal.com/webfiles.nsf/WF/GP-EY-BMKH4K/$file/Virus+SOE.pdf).

⁵³ Fla. Att’y Gen. Ashley Moody, Commodities Covered Under the COVID-19 State of Emergency, (last visited June 26, 2020), [http://myfloridalegal.com/webfiles.nsf/WF/TD-GT-BN7LNS/\\$file/Commodities+Covered+Under+COVID+SOE.pdf](http://myfloridalegal.com/webfiles.nsf/WF/TD-GT-BN7LNS/$file/Commodities+Covered+Under+COVID+SOE.pdf).

⁵⁴ Moody Activates Price Gouging Hotline, *supra* note 51.

⁵⁵ Press Release, Fla. Att’y Gen. Ashley Moody, Attorney General Moody Recovers More than \$1 Million for Consumers Amid COVID-19 Pandemic (Sept. 1, 2020), <http://www.myfloridalegal.com/newsrel.nsf/newsreleases/379A2AF75B6C4390852585D60053BBD4?Open&>.

⁵⁶ *Id.*

New York

Before the COVID-19 pandemic, New York's price gouging statute prohibited the sale of "consumer goods and services vital and necessary for the health, safety and welfare of consumers" at "an unconscionably excessive price" during a market disruption.⁵⁷ The statute's definition of market disruption includes any cause of market disruption "which results in the declaration of a state of emergency by the governor."⁵⁸ Under the pre-pandemic statute, "consumer goods" meant those "used, bought or rendered primarily for personal, family or household purposes."⁵⁹ The statute also permitted defendants to rebut "a prima facie case with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods and services."⁶⁰ The penalty for violating the price gouging statute was a civil penalty of up to \$25,000 and, where appropriate, restitution.⁶¹ Much like Florida's statute, the pre-COVID New York statute did not create a private right of action. Instead, the statute left enforcement to the Attorney General.⁶²

On March 7, 2020, Governor Andrew Cuomo declared a state of

emergency related to COVID-19, providing a clear basis for enforcement under the price gouging statute.⁶³ In the press release announcing the declaration, Governor Cuomo's office rolled out a hotline and website where consumers could report price gouging.⁶⁴ Just three days later, New York Attorney General Letitia James announced the first cease-and-desist orders related to price gouging during the pandemic, which related to hand sanitizer and disinfectants being sold in New York City.⁶⁵ In the same announcement, James made clear that the Attorney General's office would "remain vigilant in ensuring [they] find and stop such unlawful activity and continue to ask the public to report suspected fraud, scams, or price gouging".⁶⁶

Within days of the COVID-19 emergency declaration, New York state legislators announced a new bill to strengthen and expand the price gouging statute.⁶⁷ The bill,

⁶³ N.Y. Exec. Order No. 202 (2020), <https://www.governor.ny.gov/news/no-202-declaring-disaster-emergency-state-new-york>.

⁶⁴ Press Release, N.Y. Gov. Andrew Cuomo, At Novel Coronavirus Briefing, Governor Cuomo Declares State of Emergency to Contain Spread of Virus (Mar. 7, 2020), <https://www.governor.ny.gov/news/novel-coronavirus-briefing-governor-cuomo-declares-state-emergency-contain-spread-virus>.

⁶⁵ Press Release, N.Y. Att'y Gen. Letitia James, AG James: Price Gouging Will Not Be Tolerated (Mar. 10, 2020), <https://ag.ny.gov/press-release/2020/ag-james-price-gouging-will-not-be-tolerated>.

⁶⁶ *Id.*

⁶⁷ Press Release, N.Y. State Sen. Brad Hoylman, Legislators Rally To Crack Down On Price Gouging After New York Declares "State

of Emergency" Due To COVID-19 (Mar. 11, 2020), <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/legislators-rally-crack-down-price-gouging-after-new-york>.

- Prohibits the sale of "goods and services vital and necessary for the health, safety and welfare of consumers *or the general public*" at an unconscionably excessive price.⁷⁰
- Defines "goods and services" to include "consumer goods and services" as covered by the previous version of the statute, "*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 and welfare of the public.*"⁷¹
- Allows a defendant to rebut a *prima facie* case by showing that

of Emergency" Due To COVID-19 (Mar. 11, 2020), <https://www.nysenate.gov/newsroom/press-releases/brad-hoylman/legislators-rally-crack-down-price-gouging-after-new-york>.

⁶⁸ Press Release, N.Y. Att'y Gen. Letitia James, Attorney General James' Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill Into Law (June 6, 2020) <https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo> [hereinafter NY Signs New Price Gouging Bill into Law].

⁶⁹ N.Y. GEN. BUS. LAW § 396-R (2020) (emphasis added to show revisions).

⁷⁰ § 396-R.

⁷¹ *Id.*

⁵⁷ N.Y. GEN. BUS. LAW § 396-R (2019) (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

“(1) *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* or (2) additional costs not within the control of the defendant were imposed on the defendant for the goods or services.”⁷²

- Provides for a civil penalty of up to \$25,000 “*per violation or three times the gross receipts for the relevant goods or services, whichever is greater*” and, where appropriate, restitution.⁷³

Upon the enactment of the revised statute, Attorney General James made clear that her office will continue to investigate and bring enforcement actions related to price gouging, stating that “New Yorkers can rest assured that our office will fight every day to ensure they are not taken advantage of during the coronavirus pandemic or any other emergency our state may face in the future.”⁷⁴ Although James’ office has not brought any enforcement actions related to health care products under the revised statute, the press release regarding the revisions noted the office has received more than 7,000 price gouging complaints and has issued more than 1,500 cease-and-desist orders.⁷⁵

Texas

⁷² *Id.*

⁷³ *Id.*

⁷⁴ NY Signs New Price Gouging Bill into Law, *supra* note 68.

⁷⁵ *Id.*

Texas addresses price gouging under its deceptive trade practices statute. For certain goods and services, the statute prohibits (1) selling or leasing at an “exorbitant or excessive price” or (2) demanding an “exorbitant or excessive price” in connection with such sales during a designated disaster period.⁷⁶ The term “exorbitant or excessive price” is not defined in the statute and there is no explicit provision providing for a defense based on cost increases. The statute enables government enforcers to seek equitable relief and civil penalties of up to \$10,000 per violation, plus an additional amount of no more than \$250,000 if the victim was over 65 years of age.⁷⁷ Unlike Florida and New York, the Texas statute also provides for a private right of action for those harmed by price gouging.⁷⁸

Texas Governor Greg Abbott declared a statewide disaster related to COVID-19 on March 13, 2020.⁷⁹ The same day, Texas Attorney General Ken Paxton said, “[m]y office will work aggressively to

⁷⁶ TEX. BUS. & COM. CODE § 17.46 (b)(27) (2019). Note that Texas also prohibits unconscionable prices for health care treatment at emergency facilities. This provision is not limited to declared emergencies and does not create any private rights of action. TEX. BUS. & COM. CODE § 17.464 (2019).

⁷⁷ The total penalty is not to exceed \$50,000. TEX. BUS. & COM. CODE § 17.47 (2019).

⁷⁸ TEX. BUS. & COM. CODE § 17.50 (2019).

⁷⁹ Press Release, Att’y Gen. Ken Paxton, AG Paxton Warns of Price Gouging as Texans Prepare to Prevent the Spread of Coronavirus (Mar. 13, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-warns-price-gouging-texans-prepare-prevent-spread-coronavirus>.

prevent disaster scams and stands ready to prosecute any price-gouger who takes advantage of those taking precautions and looking for safety and supplies.”⁸⁰ Since then, Paxton has filed one enforcement action related to price gouging of health care products.⁸¹ In that case, Paxton’s office alleges an online auction site listed face masks and N95 respirators for sale with some of the respirator masks being bid up to over \$10 per mask.⁸²

Conclusion

The DOJ and state attorneys general are likely to continue scrutinizing prices and investigating price gouging throughout the COVID-19 pandemic. Given the nature of the emergency and ongoing shortages of personal protective equipment and other medical supplies, health care pricing in particular is likely to remain in the news. When evaluating price increases on health care products during the pandemic, one factor to consider is the risk for criminal and civil liability at both the federal and state level. Because each state has its own statutes—which may or may not permit price increases that are attributable to cost increases—sellers should consider all relevant statutes and executive orders in any state where products will be sold.

⁸⁰ *Id.*

⁸¹ Press Release, Att’y Gen. Ken Paxton, AG Paxton Files Lawsuit to Halt Price Gouging at Auctions Unlimited LLC (Mar. 26, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-lawsuit-halt-price-gouging-auctions-unlimited-llc>.

⁸² *Id.*