

## US Outlook: Top Questions For Businesses Concerned About COVID-19 and Price Gouging

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The COVID-19 epidemic has led to panic buying, including the alarming image of empty shelves at local grocery stores and supermarkets. There has been a surging demand, and a corresponding depressed supply, for certain products including hand sanitizers, face masks, and toilet paper. This in turn has led to sharp increases in prices. Against this backdrop, the U.S. Attorney General and Attorneys General of states including California, New York and Washington have announced their intent to take action against unfair price gouging. Businesses should accordingly be cautious of running afoul of state laws prohibiting “price gouging”—i.e., significantly increasing the price for certain goods and services during a state of emergency or disaster.

The precise contours of price gouging laws vary state-by-state. Generally speaking, price gouging laws are triggered by a state of emergency (like that declared by President Trump and many Governors in response to pandemic-level incidences of COVID-19). These statutes typically prohibit selling goods like commodities, fuel, and food with “unconscionable” or “excessive” price increases. Often, there is a presumption that, in the face of a triggering event, a price increase of greater than 10% constitutes price gouging. While most historical examples of price gouging have involved natural disasters like hurricanes, earthquakes, and fires, the statutory prohibitions against price gouging may also apply to the current COVID-19 outbreak.

The following article seeks to address some of the common issues businesses are likely to face relating to price gouging as a result of the novel Coronavirus. Although these issues are likely to be fact- and state-specific, we focus primarily on the laws of New York and California as examples of the considerations raised by price gouging laws generally.

## 1. Where is price gouging prohibited?

Historically, price gouging has not been prohibited under federal law. However, U.S. Attorney General William Barr recently announced his intent to pursue price gouging and hoarding of critical medical supplies following a March 23, 2020 Executive Order issued by President Trump.<sup>1</sup> Moreover, the Department of Justice announced its intention to monitor suspicious pricing behavior in the wake of the COVID-19 outbreak, such as potential price fixing or bid rigging of public health products including face masks, respirators, and diagnostics.<sup>2</sup>

Price gouging has typically been policed at the state level. Currently, at least 34 states and the District of Columbia have laws or regulations prohibiting price gouging. Other states, such as Maryland and Washington, have introduced legislation to prohibit price gouging in the wake of the COVID-19 outbreak.<sup>3</sup>

States’ price gouging laws vary in scope and effect. For example, Indiana’s statute only applies to fuel sales, while Connecticut’s statute appears to prohibit any price increase of any retail goods. Notwithstanding these variations, however, California and New York are generally representative of the main approaches to price gouging laws across the country. This article therefore primarily discusses those two states’ laws to demonstrate the main issues raised by price gouging laws.

In **California**, California Penal Code § 396 imposes a presumption that after a state of emergency has been declared, selling certain goods and services for “a price of more than 10 percent greater than the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency” is unlawful. Section 396(b) lists a broad range of consumer goods and related services to which it applies.<sup>4</sup>

In **New York**, General Business Law Section 396-r prohibits “goods and services vital and necessary for the health, safety and welfare of consumers” from being sold at “unconscionably excessive price[s]” following a state of emergency or other abnormal market disruption.<sup>5</sup>

Unlike California’s Section 396, New York’s Section 396-r does not define a precise universe of goods and services to which it applies. Nor does Section 396-r set a numerical threshold beyond which a price increase is prohibited (as discussed in response to Question 3, this is a question reserved in New York for the courts).

In New York, an amendment to Section 396-r (Senate Bill S7932) has been proposed to specifically address the COVID-19 outbreak.<sup>6</sup> The proposed Bill would modify Section 396-r in two meaningful ways.

*First*, S7932 would clarify that, during “public health emergencies,” price gouging prohibitions specifically apply to “consumer medical supplies,” which includes items like “hand sanitizer,” “medical or surgical masks,” “tissues,” and “over-the-counter medications.” Notably, however, New York Attorney General Letitia James is already investigating enforcement action against price increases for similar goods, including hand sanitizer and disinfectant spray, under New York’s current price gouging law.<sup>7</sup>

*Second*, this Bill would clarify that price increases of greater than 10% after a triggering event presumptively constitute price gouging. S7932 is therefore focused on creating a bright-line rule, similar to that in California, such that both businesses and the public are “on notice that a price increase of more than 10% during a declared public health emergency carries a presumption of being unconscionably excessive, and therefore illicit price gouging.”<sup>8</sup>

## 2. When is price gouging prohibited?

In most states, prohibitions on price gouging are only applicable following a triggering event, such as a natural disaster. The current outbreak of COVID-19, and corresponding declarations of emergencies issued by President Trump and many state and local officials, will trigger most if not all price gouging statutes.

In **New York**, for example, Section 396-r is triggered by “abnormal disruption of the market.” Such disruptions are defined to include, *inter alia*, “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.” Governor Cuomo declared a state of emergency on March 7, triggering the prohibition on price gouging in New York.<sup>9</sup>

Similarly, in **California**, Section 396(b) is triggered by proclamation of a state of emergency by the President of the United States, Governor of California, or by an authorized local government officer. Governor Newsom declared a state of emergency on March 4, triggering the prohibition on price gouging in California.<sup>10</sup>

### 3. What price increases are prohibited?

Most price gouging statutes do not prohibit *all* increases on prices of covered goods or services during an emergency. As noted, New York and California exemplify the two most common approaches states employ.

In **New York**, Section 396-r prohibits “unconscionably excessive” pricing. Section 396-r specifies that “whether a price is unconscionably excessive is a question of law for the court,” but does list factors for a court to consider in answering that question. These factors include whether “the amount of the excess in price is unconscionably extreme,” whether “there was an exercise of unfair leverage or unconscionable means,” or “a combination of both factors.”

Under this Section, a *prima facie* case of price gouging exists where:

- the increased price “represents a gross disparity between the price of the goods or services which were the subject of the transaction and their value measured by the price at which such consumer goods or services were sold or offered for sale by the merchant in the usual course of business immediately prior to the onset of the abnormal disruption of the market;” or
- the increased price “grossly exceeded the price at which the same or similar goods or services were readily obtainable by other consumers in the trade areas.”<sup>11</sup>

However, a defendant may rebut a *prima facie* case of price gouging “with evidence that additional costs not within the control of the defendant were imposed on the defendant for the goods or services.” This defense is discussed in response to Question 8 below.

As the New York Court of Appeals has held, “[a] showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness.” *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 698, 525 N.E.2d 692, 530 N.Y.S.2d 46 (1988).

A review of New York cases on price gouging confirms that courts look to the amount of the price increase, the manner in which the price increase was achieved, or both:

- In *People v. Chazy Hardware, Inc.*, 176 Misc 2d 960, 964–65 (Sup. Ct. Clinton Cty. 1998), the court found that an increase in a merchant’s ordinary markup above its costs from between 19% and 26%, to between 59% and 93%, was unconscionably excessive.

- In *People v. Beach Boys Equip. Co., Inc.*, 273 AD2d 850, 851 (4th Dep’t 2000), the court found that even if a 100% increase on generators were due to an increase in the merchants’ costs, “even a small increase in price may be unconscionably excessive under General Business Law § 396-r if the excess was obtained through unconscionable means, which was the case here.” (internal quotations and citations omitted). These “unconscionable means” included evidence that merchant’s purchase of generators at increased price, which the merchant raised as a defense to price gouging “was not an arm’s length transaction.” *Id.*
- In *People v. Wever Petroleum, Inc.*, 14 Misc 3d 491, 495 (Sup. Ct. Alb. Cty. 2006), the court focused primarily on the “gross disparity between a \$0.83 per gallon mark-up pre-Hurricane Katrina and a \$0.97, \$1.08 or \$1.43 [per gallon] mark-up post Hurricane Katrina,” and noted that the defendant gas station operator had “failed to rebut the inference that the price increases were attributable to respondent’s use of the leverage provided by the market disruption and were therefore unconscionably excessive.”
- In *People v. My Serv. Ctr., Inc.*, 14 Misc 3d 1217(A) (Sup. Ct. West. Cty. 2007), the court focused on the fact that defendant “hiked its retail price 7–10 times above its conceded ‘normal’ 8–10 cent per gallon profit margin” in finding that it had engaged in price gouging.

In **California**, Section 396(b) sets out a more straightforward metric: if a merchant raises prices more than 10% from what they previously charged, such a price increase is presumptively illegal. New Jersey and Washington D.C. have similar price gouging prohibitions, and, as discussed, New York Senate Bill S7932 would adopt this framework in New York in cases of public health emergencies.

Like in New York, it is a defense in California to show that a challenged price increase was itself “directly attributable to additional costs imposed on it by the supplier of the goods, or directly attributable to additional costs for labor or materials used to provide the services.”<sup>12</sup>

#### 4. Who can sue for price gouging?

Price gouging laws vary in terms of whether they afford a private right of action or can only be pursued by the government.

In **New York**, Section 396-r permits only the state Attorney General to bring actions: “[w]here a violation of this section is alleged to have occurred, the attorney general may...”.<sup>13</sup> New York courts have thus far not interpreted this Section to allow for a private right of action.<sup>14</sup>

**California’s** Section 396(b) permits the Attorney General or local district attorneys to enforce its prohibitions. In addition, Section 396(i) makes price gouging an “unlawful business practice and an act of unfair competition,” in violation of California Business and

Professions Code 17200, which provides for a private right of action. Private litigants can therefore pursue gouging claims in California.

## 5. Who can be held liable for price gouging?

In **New York**, Section 396-r on its face applies to “all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller.”

In **California**, Section 396(b) applies to any “person, contractor, business, or other entity” that “sell[s] or offer[s] to sell” any goods or services covered by the statute. There is some ambiguity as to whether California’s statute would apply to entities like wholesalers or distributors.<sup>15</sup>

Other states, such as **Florida**, have industry-specific exemptions from their price gouging laws: “This section shall not apply to sales by growers, producers, or processors of raw or processed food products, except for retail sales of such products to the ultimate consumer within the area of the declared state of emergency.”<sup>16</sup>

Additionally, while online marketplaces like Amazon or eBay have received attention for alleged instances of price gouging on their platforms, it is an open question whether such companies can be found liable for price gouging by third party sellers’ pricing decisions.

We expect that this question of liability will largely depend on the jurisdiction—including as to who falls within a state’s definition of “seller.” For example, in *Oberdorf v. Amazon.com, Inc.*, the Court of Appeals for the Third Circuit found that Amazon was a seller for the purposes of Pennsylvania product liability law for a product sold by a third-party seller on Amazon’s marketplace, in part because of the degree of control Amazon exercised over its marketplace.<sup>17</sup> In *Fox v. Amazon.com, Inc.*, however, the Court of Appeals for the Sixth Circuit found that Amazon did not engage in “a sufficient exercise of control to be deemed a ‘seller’” under Tennessee law.<sup>18</sup>

Notably, when 33 State Attorneys General wrote to Amazon CEO Jeff Bezos on March 25, 2020, in order to urge Amazon to take steps to protect consumers from price gouging through the platform, they framed their demand as “an ethical obligation” and civic duty, rather than as a legal duty.<sup>19</sup> This restrained language, however, could simply reflect a desire to get as many Attorneys General on board as possible. Individual State Attorneys General could take a more expansive view of their own state’s price gouging laws.

## 6. What are the potential penalties for price gouging?

In **New York**, price gouging is punishable by up to \$25,000 per violation, which on the face of the statute applies to each sale, and restitution payments to consumers. Restitution payments for consumers that file complaints with New York’s Attorney General are also available.

In **California**, price gouging is punishable by up to \$10,000 per violation, which on the face of the statute applies to each sale, restitution, and in cases brought by the Attorney General or local district attorneys, up to one year in jail.

## 7. What products are covered by price gouging prohibitions?

Each state's price gouging statute identifies the goods and services covered by the law.

In **New York**, Section 396-r applies to "consumer goods and services vital and necessary for the health, safety and welfare of consumers." Historically, cases brought in New York have been focused on increases in the price of gasoline and generators.<sup>20</sup> New York's Attorney General, however, is reportedly currently pursuing price gouging charges related to consumer health goods, such as hand sanitizers and disinfectant products.

If confronted with the question of whether certain goods or services are covered by Section 396-r, we expect courts would focus on whether such items are "vital and necessary for the health, safety, and welfare of consumers." This would appear to exclude certain products, such as face masks, from the scope of Section 396-r. According to New York's Attorney General, "[b]ecause the Centers for Disease Control (CDC) and the Surgeon General do not recommend face masks as necessary for the general public, we do not believe that the state price gouging law currently applies to the sale of face masks to consumers."<sup>21</sup> Price gouging of face masks and other goods is, however, prohibited under a New York City emergency rule.<sup>22</sup>

A business that wants to avoid the potential uncertainty of litigation and any negative public attention associated with allegations of price gouging during the ongoing global health crisis would be wise to presume that items like surgical masks and hand sanitizer are covered by Section 396-r (and similar state laws).

In **California**, Section 396(b) sets out a long and detailed list of covered items. Its scope is therefore far more certain. The specifically enumerated items covered by Section 396(b) include:

- consumer food items or goods;
- goods or services used for emergency cleanup;
- emergency supplies such as water, flashlights, radios, batteries, candles, blankets, soaps, diapers, temporary shelters, tape, toiletries, plywood, nails, and hammers;
- medical supplies such as prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products;
- home heating oil;
- building materials such as lumber, construction tools, windows, and anything else used in the building or rebuilding of property;

- housing;
- transportation;
- freight and storage services;
- gasoline or other motor fuels.<sup>23</sup>

## 8. What defenses are available for challenged price increases?

In most states, including both **New York** and **California**, it is a defense to alleged price gouging that the price increase was due to an increase in certain costs. Below are the relevant provisions of New York’s and California’s statutes:

STATE	DEFENSE TO PRICE GOUGING
California (Cal. Penal Code § 396)	(b) . . . However, a greater price increase is not unlawful if that person can prove that the <u>increase in price was directly attributable to additional costs imposed on it by the supplier of the goods</u> , or directly attributable to <u>additional costs for labor or materials used to provide the services</u> , during the state of emergency or local emergency, and the price is no more than 10 percent greater than the total of the cost to the seller <u>plus the markup customarily applied by the seller for that good</u> or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.
New York (General Business Law § 396-r)	3(b)(ii) . . . A defendant may rebut a prima facie case with evidence that <u>additional costs not within the control of the defendant</u> were imposed on the defendant for the goods or services.

While there is some ambiguity as to what type of costs will be accepted by courts in defending a price increase, it is clear that, in the first instance, the focus must primarily be on costs. Businesses that increase prices solely in response to changes in demand for their goods, or in order to increase their typical profitability, will have a greater difficulty justifying their price increases under the price gouging laws.

For some businesses, this may be an easy distinction: a retailer that simply passes through a price increase charged by its supplier likely has not engaged in price gouging. For other businesses, however, identifying increases in pricing may be a more complex issue.

Some New York courts have addressed defenses arguing that increased prices were not price gouging because they were due to costs other than the direct cost of goods sold. For example, defendants have identified increases in labor and transportation costs as well as business risk as justifications for price increases. While our review of the case law demonstrates that most of these defenses were ultimately rejected, the courts reason for doing so was based on the defendants’ lack of proof rather than fundamental disagreement with the premise that the costs would justify a price increase:

- ***People v. Two Wheel Corp.*, 71 N.Y.2d 693, 700 (1988)**: The defendants “contended that the price increases were justified by increased freight and labor costs and various business risks associated with the sales, such as the possibility that customers might cancel their orders if power were restored before the generators were delivered, leaving respondents with a large inventory. ... [Defendants’] conclusory assertions in this regard were insufficient to raise a triable issue of fact, because they failed to demonstrate to what extent those costs justified the price increases.”
- ***People v. Wever Petroleum, Inc.*, 14 Misc. 3d 491, 495 (Sup. Ct. Alb. Cty. 2006)**: “While Wever did raise prices in accordance with an increase in ExxonMobil’s base cost, Wever’s increase far exceeded the needed increase for Wever to maintain a similar pre-Hurricane profit or to generate the required revenue to purchase gasoline from ExxonMobil the next business day and were unconscionably excessive.”

This suggests that whatever defense or justification a company raises, conclusory assertions that the crisis led to increased costs will be insufficient to avoid liability.

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<sup>1</sup> Makini Brice, Sarah N. Lynch, *U.S. Launches Probes as Trump Bans Hoarding, Price Gouging to Combat Coronavirus*, Reuters, Mar. 23, 2020, <https://www.reuters.com/article/us-health-coronavirus-usa-order/u-s-launches-probes-as-trump-bans-hoarding-price-gouging-to-combat-coronavirus-idUSKBN21A3Q8>.

<sup>2</sup> U.S. Dept. of Justice, Office of Public Affairs, *Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products*, Mar. 9, 2020, <https://www.justice.gov/opa/pr/justice-department-cautions-business-community-against-violating-antitrust-laws-manufacturing>.

<sup>3</sup> Maryland General Assembly Senate Bill 1080, *COVID-19 Public Health Emergency Protection Act of 2020*, available at <http://mgaleg.maryland.gov/2020RS/bills/sb/sb1080E.pdf>; Washington State Legislature Senate Bill 6699, *Concerning Economic Acts and Practices During a Time of Disaster*, available at <http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/6699.pdf?q=20200325133251>.

<sup>4</sup> Cal. Penal Code § 396, available at [http://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=396&lawCode=PEN](http://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=396&lawCode=PEN).

<sup>5</sup> N.Y. Gen. Bus. Law § 396-r, available at <https://www.nysenate.gov/legislation/laws/GBS/396-R>.

<sup>6</sup> N.Y. Senate, Bill S7932, 2019-20 Sess. (2020), available at <https://www.nysenate.gov/legislation/bills/2019/s7932>.

<sup>7</sup> N.Y. Attorney General Letitia 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>.

<sup>8</sup> N.Y. Senate, Bill S7932, 2019-20 Sess. (2020), available at <https://www.nysenate.gov/legislation/bills/2019/s7932>.

<sup>9</sup> N.Y. Exec. Order No. 202, *Declaring a Disaster Emergency in the State of New York*, Mar. 7, 2020, available at [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO\\_202.pdf](https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.pdf).

<sup>10</sup> Cal. Exec. Order, *Proclamation of a State of Emergency*, Mar. 4, 2020, available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

<sup>11</sup> N.Y. Gen. Bus. Law § 396-r(3)(b).

<sup>12</sup> Cal. Penal Code § 396(b).

<sup>13</sup> N.Y. Gen. Bus. Law § 396-r(4).

<sup>14</sup> See, e.g., *Americana Petroleum Corp. v. Northville Indus. Corp.*, 200 A.D.2d 646, 648, 606 N.Y.S.2d 906, 908 (1994) (“[The] statute expressly provides that only the Attorney General may bring actions.”).

<sup>15</sup> See David R. Baker, *Anti-Gouging Laws Don't Cut Gas Prices*, SFGate, May 10, 2006, <https://www.sfgate.com/news/article/Anti-gouging-laws-don-t-cut-gas-prices-State-2497341.php> (“More than 1,150 complaints reached the California attorney general's office within the law's 30-day window. The office picked roughly 50 that contained precise details on prices at specific gas stations, then interviewed those station owners and examined their books. The result? No prosecutions. ... The experience illustrates what [California Attorney General] Lockyer considers a major problem with California's anti-gouging law. Not only is it linked to a specific situation -- a disaster -- it mainly targets small business owners, not larger companies. He'd prefer that the law look at both. ‘The current law allows us to investigate the corner gas station but not the refinery,’ Lockyer said. ‘And what we've seen multiple times, especially this year, is a very large run-up in refinery (profit) margins.’”).

<sup>16</sup> Fla. Stat. Ann. § 501.160(5) (West).

<sup>17</sup> *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153 (3d Cir.). This decision was vacated when motion for re-hearing by the Court of Appeals *en banc* was granted in August 2019. *Oberdorf v. Amazon.com Inc.*, 936 F.3d 182, 183 (3d Cir. 2019).

<sup>18</sup> *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019).

<sup>19</sup> Letter from State, District and Territory Attorneys General to Jeff Bezos, Mar. 25, 2020, available at <https://www.attorneygeneral.gov/wp-content/uploads/2020/03/Amazon.pdf>.

<sup>20</sup> See, e.g., *People ex rel. Spitzer v. Wever Petroleum, Inc.*, 14 Misc. 3d 491, 827 N.Y.S.2d 813 (Sup. Ct. Alb. Cty. 2006); *People v. Chazy Hardware, Inc.*, 176 Misc 2d 960 (Sup. Ct. Clinton Cty. 1998); *In People v. Beach Boys Equip. Co., Inc.*, 273 AD2d 850 (4th Dep't 2000).

<sup>21</sup> Office of the N.Y. Attorney General, *Price Gouging Complaint Form*, <https://formsnym.ag.ny.gov/OAGOnlineSubmissionForm/faces/OAGPGCHome>.

<sup>22</sup> New York City Consumer Affairs, *Price Gouging is Illegal* <https://www1.nyc.gov/site/dca/media/Face-Masks-in-Short-Supply-Due-to-COVID-19.page>

<sup>23</sup> Other states' laws and regulations cover a more limited range of goods and services, applying only to unconscionable prices for petroleum products (Massachusetts), petroleum and heating fuel (Vermont), or consumer fuel, food, pharmaceuticals, and water (Idaho). See 940 Mass. Code Regs. 3.18; Mass. Gen. Laws Ann. ch. 93A, § 2 (West); Vt. Stat. Ann. tit. 9, § 2461d (West); Idaho Code Ann. § 48-603 (West).