

CLIENT ALERT

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PRICE GOUGING DURING THE COVID-19 CRISIS

by L. Pahl Zinn and Jared A. Christensen

Price Gouging During The Covid-19 Crisis The ongoing COVID-19 crisis has stunned the world in unimaginable ways, presenting unforeseen challenges for businesses of all sizes and in all industries. In order to cope with these challenges, and in an effort to remain flexible throughout these uncertain times, many businesses have begun to expand, or transition, into the production and sale of different products. Specifically, products that have seen an increase in demand because of COVID-19, such as certain cleaning products, hand sanitizers, and protective masks. What many view as both a prudent and socially conscious business decision, however, also presents consumer protection risks. While businesses take steps to adapt, one thing is certain, compliance with rapidly changing executive action and state consumer protection laws cannot be quarantined.

Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.*, and Michigan Executive Order 2020-8

Michigan, like many other states, had taken steps to combat price gouging, long before this current crisis. The MCPA, enacted prior to the COVID-19 crisis, considers “[c]harging the consumer a price that is grossly in excess of the price at which similar property or services are sold” to be an unfair trade practice, subject to both private claims and enforcement by the state Attorney General. MCL 445.903(1)(z); 445.911; 445.905-906. “Causing coercion and duress as the result of the time and nature of a sales presentation” is also an unfair trade practice pursuant to the MCPA. MCL 445.903(1)(aa).

In addition, Michigan’s Governor, like that of many other states, has issued an executive order specifically combating price gouging during the ongoing crisis. On March 15, 2020, Michigan’s Governor signed Executive Order 2020-8, which temporarily imposes enhanced restrictions on the excess pricing of goods, materials, emergency supplies, and consumer food items.

Executive Order 2020-8 provides: “[b]eginning March 16, 2020...and continuing until April 13, 2020...if a person has acquired any product from a retailer, the person must not resell that product in this state at a price that is grossly in excess of the purchase price at which the person acquired the product.” Throughout that same time, “a person must not offer for sale or sell any product in this state at a price that is more than 20% higher than what the person offered or charged for that product as of March 9, 2020, unless the person demonstrates that the price increase is attributable to an increase in the cost of bringing the product to market.”

Michigan’s Attorney General has been quick to act issuing notices of intended actions in response to consumer complaints about price gouging. Using the MCPA as the statutory enforcement mechanism, Michigan’s AG

is going after those businesses who are looking to make a quick buck by excessively increasing prices on products in high demand.

Executive Action across the United States

Michigan is not an outlier; rather, many state governors have taken similar executive action to combat price gouging. Currently, all 50 states, including the District of Columbia, have declared a state of emergency for purposes of combatting the crisis and many of these governors have enacted similar executive orders to combat price gouging or have existing legislation in place to the same effect. Some examples include [Arizona](#), California, Florida, [Kentucky](#), Tennessee, Texas, Virginia and the District of Columbia. Other states that do not have pre-existing price gouging laws likely have broad consumer protection statutes under which price gouging may be prosecuted.

Typically, anti-price gouging laws prohibit the pricing of products “grossly in excess” of what would generally be charged. “Grossly in excess” is by no means subject to mathematical calculation. As a result, certain states in their executive orders have given an appropriate limitation on price increases, which provide some general guidance: “grossly in excess” is anywhere between a 10-20% increase in price than what was being charged for a product before the COVID-19 crisis.

What Can Businesses Do?

These turbulent times coupled with vague consumer protection laws present unique challenges for businesses; namely those who have not previously sold a specific product and those who are transitioning to selling new goods and services now in high demand. For those new business entrants, it is important to consistently and thoroughly benchmark prices of competing products in order to lessen the risk of being accused of price gouging.

For example, in Michigan, under Executive Order 2020-8, businesses who transition to production and sale of a new product would be smart to survey prices as of March 9, 2020, if possible. Every attempt should be made to survey a wide range of sellers in order to get the largest possible cross-section of prices. Once a benchmark number is reached, the business should determine if any price increase exceeds 20%.

If it proves difficult to benchmark prices as of March 9, 2020, a business should look to current prices for competing products. It is possible that the surveyed competitors may have already increased their prices by some percentage, so any increase based upon a benchmark of current prices should be approached with caution.

Conclusion

While the ongoing COVID-19 crisis plagues businesses with a myriad of legal and other issues, one area in which businesses may be able to remain flexible and profitable is the expansion or transition into production and

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sales of new products. Businesses who go this route must be aware of the ongoing restrictions upon price increases and the limitations put in place by their state executives. Legal counsel must be prepared to advise their clients on the current state of any restrictions enacted in their jurisdiction, as well as guide them through the benchmarking and price-setting process, so as to better serve their clients in this uncertain time.

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FOR MORE INFORMATION CONTACT:



L. Pahl Zinn is a Member in Dickinson Wright's Detroit office. He can be reached at 313-223-3705 or pzinn@dickinsonwright.com.



Jared A. Christensen is an Associate in Dickinson Wright's Detroit office. He can be reached at 313-223-3477 or jchristensen@dickinsonwright.com.