Turning the Mitten on Your Map into a Boxing Glove Against Gougers

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Introduction

As COVID-19 spreads across the country, those of us working in consumer protection are now confronting the scourge of those seeking to profit from the upheaval through price gouging.

From the onset of the public emergency, the Michigan Attorney General’s Office aimed for a prompt and powerful response to misconduct in the market for consumer goods. With the earliest reports of price gouging, we were concerned about a situation that could deteriorate if left unchecked. In the introduction to his 2000 book *The Tipping Point*, columnist and author Malcolm Gladwell presciently observed: “Ideas and products and messages and behaviors spread just like viruses do.” Applying Gladwell’s premise to the present dynamic, people and businesses seeing an out-of-control market are more likely to engage in price gouging than they would be under ordinary conditions.

Our experiences and observations in this evolving response are shared here in hopes that they may be useful to those engaged in similar efforts in this pandemic, as well as for future emergencies of other kinds. In advancing our perspective, we do not pretend to have all the answers—our work is still in its early stages. Like many states, we are scrambling to understand what has happened in the egg market, and whether consumers complaining about increased meat prices have a legitimate beef. But we have learned some things, and have had some early successes, and I am honored to be invited to write upon the subject.

I. The executive branch’s two big sticks

In Michigan, we sought to tackle the price gouging problems with a multi-faceted approach. This started with identifying, and quickly invoking, what we saw as the most applicable provisions of our state’s Consumer Protection Act. The Act defines unfair trade practices to include:

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(z) Charging the consumer a price that is grossly in excess of the price at which similar property or services are sold.

(aa) Causing coercion and duress as the result of the time and nature of a sales presentation.\[2\]

Even before a public emergency was declared, we invoked these provisions against a hardware store that was breaking up multi-packs of N-95 face masks and subsequently selling them in sandwich bags at an elevated price. Then, after our governor declared a public emergency, we invoked them again against a popular Midwest home-supplies chain, sending a notice of intended action that included an affidavit from a consumer detailing how the store was doubling the prices of bleach and other cleaning products while he was shopping. The consumer was able to document the price increase with his receipt, which showed both the newly-elevated price, and the original price at which the consumer ultimately was able to purchase the item (a price-reduction accomplished at the register through self-advocacy, at the prompting of a store employee).\[3\]

Many states have laws, triggered by a declaration of emergency, that operate to limit price increases on consumer goods and services during the emergency, and sometimes for a short period after that declaration is lifted. Such laws often reference a base pricing date or period immediately preceding the emergency declaration to use for price comparison purposes. Although a package of bills is pending in Michigan that would accomplish this, we do not currently have such laws. So, our governor’s pandemic response included an executive order on price gouging to augment the tools that already exist under our state’s Consumer Protection Act. The governor put into place measures to guard against price gouging during the public emergency, by using pricing as it existed the day before the emergency declaration as a reference point:

[I]f 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.

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[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.\[4\]

As is customary in consumer protection laws across the country, the word “person” was defined to include both individuals and businesses of all kinds.


Meanwhile, Michigan Attorney General Dana Nessel re-branded our consumer protection hotline into a price gouging hotline and greatly increased the hours that our intake staff were available to receive calls during the early weeks of Michigan’s public health emergency. Although our traditional practice had been to dig more deeply only into written complaints, the attorney general instructed that calls be given equal importance. A campaign was launched online and through the media to help the public understand that our office wanted to know about price gouging. As this article is being written, we are approaching nearly 4,000 consumer price-gouging complaints since the public health emergency began.

II. Unraveling the problem

Attorney General Nessel then made several special agents from our office’s criminal divisions available to the Corporate Oversight Division for consumer protection assignments. As we did not previously have investigators for this kind of civil work, a new protocol was established: An attorney triages the complaints. Some complaints—particularly those that are well-documented, or which raise unique legal issues—are assigned directly to a consumer protection attorney for a witness interview and work-up.

Other credible complaints are referred to the investigative team, which formsulates responses. Sometimes, this involves paying visits to stores to make documented purchases, just as consumers do. Following the shopping experience, the special agents introduce themselves and interview owners or managers to learn more about the cause of abnormal prices. In other instances—such as where the stores were more distant, or the alleged gouging less clear—the investigators call the stores, explain the consumer complaint, and ask the appropriate questions. Consistent with the executive order, the investigators strive to get documentation about the product pricing on March 9th. Regardless of whether the investigators find sufficient evidence of gouging on which our office can take action, these activities promote fair and legal pricing by reinforcing the idea that consumers who file complaints are taken seriously.

One complication we have experienced stems from the market crunch on several items that the public is eager to obtain: masks, gloves, hand sanitizers, and the like. Unable to offer their familiar brands, some stores have resorted to offering alternative products to try to meet customer needs. This means that the store has no pricing data from March 9th to use as a price comparison. Similarly, we have seen numerous instances where stores or entrepreneurs who never sold such products before the public emergency have now entered the market for the first time.

When Governor Whitmer extended the executive order related to price gouging in mid-April, she expanded the restrictions to address this issue. Specifically, the restrictions were broadened to encompass any person in the supply chain, rather than simply a person re-selling a good acquired from a retailer. Under Executive Order 2020-53:
A person must not resell a product in this state at a price that is grossly in excess of the purchase price at which the person acquired the product.[5]

Thus, a Michigan retailer that is utilizing a new supply chain for a product that it was not selling on March 9th is restricted from charging consumers a price grossly in excess of its acquisition costs.

Despite these challenges, our investigators have identified gouging on a variety of products—including face masks, hand sanitizers, bottled water, cleaning products, and toilet paper—that are the subject of current and future actions. Among these items, proving price gouging of toilet paper has proven to be the most challenging. Early in the public emergency, there were many news stories about stores running out of toilet paper, and we were receiving many consumer complaints about price gouging for that product. Our investigators, many who are former police officers, were called upon to try to figure out just who was—and who was not—putting the squeeze on consumers as they were buying Charmin. As they rolled out into stores, they quickly learned there are many questions to ask: questions related to brand names, the number of layers (i.e., one-ply, two-ply, etc.), the number of rolls in a package, and the size of the rolls in a package (i.e., single, double, mega, super-mega, etc.).[6] As consumers often do not draw such distinctions when making complaints, our hardened special agents were called upon to invoke their softer sides in follow-up interviews. What became clear was that you cannot determine that there was gouging based solely on the amount a consumer spent on toilet paper. Indeed, consistent with the unnecessary panic-buying that has happened with this product, there were at least two instances where our investigators determined that the reason the consumers had been charged more than $100 for toilet paper was because they had purchased more than $100 worth of fairly-priced toilet paper.

III. Welcome to the jungle

Some of the most egregious examples of price gouging take place cloaked by the anonymity afforded by the Internet. There, a seller does not have to look a panicked buyer in the eye when telling him that face masks can be had for $225, plus nearly $40 for shipping. And the seller is not even required to attach his own name and public reputation to his unlawful conduct. By combining a lack of personal interaction with fake names, third-party sellers using online marketplaces have become a band of Shuns & Poses.

From the outset, we have strived to make the attorney general’s presence felt in the online marketplaces. Our investigators have made sample purchases and have reached out to people attempting to use Facebook and Craigslist as vehicles for profiteering. Our office has also captured numerous screen shots for use in current and future enforcement activities related to other online marketplaces. We are taking a two-pronged approach to the online marketplaces:

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(1) working to assist Michigan consumers who have been gouged by sellers in any state; and (2) working to protect consumers across the globe from gougers located in Michigan.

One of our early targets was an eBay seller identified as price gouging on N-95s that he repackaged in sandwich bags after breaking up larger packs.7 We commenced our action believing he was a small-scale operator, but soon learned that he had purchased approximately $20,000 worth of N-95s as part of this effort. This target turned out to be a white-collar executive and a family man. He had taken days off work to focus on his apparently more lucrative gouging activities. By the time we interrupted his sales, he had already made back his investment and pocketed more than $6,000 in profits. He ended up donating the balance of his inventory and disgorging his profits through a settlement with our office.

We have also gotten assistance in our enforcement efforts from Amazon. As a means of enforcing its own Marketplace Fair Pricing Policy, Amazon identified a group of third-party sellers of concern, i.e., those third-party sellers who grossly inflated the prices of coronavirus-related consumer products sold on the Amazon marketplace. To assist us in carrying out our consumer protection enforcement functions, Amazon provided this office with a list of those third-party sellers that are based in Michigan, along with the sales data for each. We have used that data to issue three notices of intended action so far and sent one to an Amazon third-party seller in Kentucky that exploited a Michigan consumer in the sale of hand sanitizer.8

IV. Wow, thanks for reading this

The press releases linked in the footnotes to this article include links to the enforcement letters discussed. It is my goal that something in this discussion has opened a new horizon for other attorney general enforcement efforts. If not, hopefully I at least earned a smile (or an exaggerated groan) somewhere along the way.

We are in for a challenging year. By sharing information and ideas, we can help each other shoulder the load. There is a great deal of uncertainty out there from both a health and economic perspective for consumers. Our role as consumer protection advocates affords us a uniquely important opportunity to show how government can be effective for the people.

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