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SPOTLIGHT

COVID-19 Brings Price-Gouging Litigation to California

By Shook Associate Matt Williams

California often serves as an incubator for litigation that thereafter sweeps across the country. This phenomenon may hold true for newly minted COVID-19-based price-gouging lawsuits. Indeed, California has quickly become the epicenter of price-gouging enforcement and class action litigation. Food producers, distributors, retailers and online marketplaces such as Amazon have become the targets of price-gouging actions.

Importantly, there is currently no federal price-gouging law, meaning that companies must navigate 50 different state laws. California's price-gouging statute provides that "consumer food items or goods" cannot be sold for 10% more than the price advertised immediately before a declared state of emergency. The statute provides an exception for price increases if the seller can prove it was "directly attributable" to costs imposed by up-chain suppliers or increases in labor and material costs during the emergency. Violations are prosecuted by the California Attorney General and local district attorneys, with penalties including jail time, fines up to $10,000, and civil penalties of up to $2,500 for each violation. While there is no private right of action in the statute, it provides that a price-gouging violation automatically constitutes an unfair business practice under California's wide-ranging consumer-protection laws. Oddly, while the statute has been on the books since 1994, there is almost no case law interpreting its contours. The COVID-19 pandemic has inspired

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the first generation of lawsuits premised on California's price-gouging law, and may provide an insight into what businesses can expect to see in other states.

On the law enforcement side, California's Attorney General Xavier Becerra's office announced price-gouging charges against Apna Bazar and its owner for illegally raising the price of essential food items above 10% during a declared emergency. According to the announcement, price increases at this grocery store in Pleasanton, California, ranged from 25% to 306% for items including onions, ginger, green beans, instant noodles, tea, peppers, pomegranates and yams. An inspector's declaration attached to the criminal complaint noted that law enforcement became aware of potential price gouging through social media posts. Although the business owner was invited to submit documentary justification for the apparent price increases, he apparently ignored these requests. The Apna Bazar case is the only criminal price-gouging complaint made public thus far in California, but it demonstrates the kind of behavior that may expose a business to criminal liability.

On the civil litigation side, a variety of lawsuits have already been filed. For example, one California complaint alleges price gouging of eggs by two dozen defendants at every level of the supply chain, from egg farms to wholesalers and major retailers (including Whole Foods, Amazon and Trader Joe's). The plaintiffs claim that egg prices have risen more than 180% during the COVID-19 pandemic in violation of Penal Code section 396 and California's Unfair Competition Law. They seek to represent a massive class of "[a]ll consumers who purchased eggs in the state of California that were sold, distributed, produced, or handled by any of the defendants" since the governor's emergency declaration on March 4. A similar putative class action has been filed against many of the same defendants alleging price gouging of eggs in Texas.

Another class action complaint has been filed against Amazon in the Northern District of California seeking to hold the company liable for third-party sellers' potentially unlawful price increases of food and face masks sold on the platform. With continued instability in consumer supply chains and the consequent heightened demand for certain consumer products, more suits are likely coming. These COVID-era cases will present the first opportunities for courts to consider the application of California's price-gouging law to private litigation and will serve as examples of the kinds of cases that businesses may see in other states.

Finally, these California cases demonstrate the measures that businesses can take to minimize their exposure to price-gouging claims and enforcement actions. First, businesses should document the reasons for price increases. Second, price increases should last only as long as necessary to cover increased

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Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility

acquisition, labor or supply costs. Third, a business should make sure that the price increases do not violate the statutory or common law levels for such increases under the particular state's jurisprudence. Finally, a business should assess whether the price increase involves a product or service that is covered under California's statute as an essential good or service or by other states' corresponding price-gouging laws. It is crucial that companies in the food and beverage space follow these and other best practices during this time of heightened scrutiny.

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