

# Renewed Price-Gouging Compliance Efforts Could Be Crucial

**Law360** on **September 16, 2022**

Two significant developments in New York signal that law-abiding businesses should continue to invest in price-gouging compliance efforts.

Even as inflation, fuel costs and supply chain issues force businesses across all industries to raise prices on goods and services, price-gouging compliance must remain front and center.

Price-gouging laws historically are designed to temporarily prevent local price increases in reaction to emergencies such as severe storms, wildfires and flooding, etc. Still though, the federal government, and several states, continue to have active states of emergency related to the COVID-19 pandemic.

New York's price-gouging statute imposes civil penalties on sellers of essential goods charging unconscionably excessive prices during an abnormal disruption of the market. New York's General Business Law Section 396-r, provides that

[d]uring any abnormal disruption of the market for consumer goods ... vital and necessary for the health, safety and welfare of consumers, no party within the chain of distribution of such consumer goods ... shall sell or offer to sell any such goods ... for an amount which represents an unconscionably excessive price.

Section 396-r includes an exception that a defendant

may rebut a prima facie case with evidence that (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.

In August, New York State Attorney General Letitia James filed a petition to compel Tyson Foods Corp. to comply with a subpoena in connection with ongoing price-gouging investigations by the state.

Shortly after, New York's First Judicial Department of the Appellate Division reversed and remanded the dismissal of one of the bellwether price-gouging cases from the early days of the COVID-19 pandemic.

These two developments serve as a reminder that price-gouging compliance remains an ongoing priority.

### **Tyson's Price-Gouging Subpoena**

The subpoena issued by New York's AG requests information relating to prices, dates of sale, purchasers, costs and profit margin for Tyson's meat products sold in New York from Dec. 1, 2019, through April 2022.

In the petition, the New York AG alleges that Tyson partially complied with the subpoena, but later refused to provide additional information on the grounds that the company's sales in New York were interstate sales during the relevant period, and thus not covered by New York's price-gouging law.

Tyson appears to be relying on a dormant commerce clause argument against the application of New York's price-gouging law — that because Tyson's sales occurred out-of-state, New York's price-gouging law violated the dormant commerce clause by attempting to directly regulate the prices charged in those transactions.

A similar argument resulted in a federal circuit court striking down a price-gouging law in Maryland. The U.S. Court of Appeals for the Fourth Circuit upheld the decision in 2018, finding in *Association for Accessible Medicines v. Frosh* that "[a] state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, or has that 'practical effect,' regardless of the legislature's intent."<sup>[1]</sup>

Despite defenses Tyson may raise or ultimately succeed on, the petition and ongoing investigation serves as a warning that price-gouging compliance continues to remain an area of focus for government regulators and enforcement agencies even two and a half years after the onset of the COVID-19 pandemic.

New York previously lifted its COVID-19 state of emergency over a year ago, on June 24, 2021. However, on Dec. 26, 2021, the governor declared a second state of emergency in reaction to the emergence of new COVID-19 variants, which expired on Sept. 12, 2022.

### **New York v. Quality King Distributors Reversal**

In the early days of the pandemic, the New York AG filed a lawsuit against a wholesale grocery distributor — Quality King Distributors Inc.— and its CEO for price-gouging.

The lawsuit alleged that between January 2020 and April 2020, Quality King raised the price of Lysol when its costs had not increased, "dramatically boost[ing] its gross profit margins for Lysol Spray, almost quintupling them over its pre-crisis margins." [2] Quality King sold 46,104 cans of Lysol during the time in question. According to the complaint,

each time one of these cans of Lysol was sold at retail for an inflated price — and each time a person bought any other Lysol product whose price Quality King had inflated — Quality King's price-gouging caused injury to a consumer. [3]

The case was dismissed in September 2020 on the basis that the pricing was found not to be unconscionable, as required by the state price-gouging law, and served as a bellwether for price-gouging enforcement related to the COVID-19 pandemic. Last month, that decision was reversed.

A four-judge panel in New York's First Judicial Department of the Appellate Division ruled that the state did make a prima facie case that Quality King engaged in price-gouging activities, by establishing the claim's three elements. [4]

In assessing the requirements of the statute, the appellate court found that the AG showed the requisite "abnormal disruption of the market" due to the "public health crisis stemming from a unique virus," and, crucially, applied an earlier "onset date" for the market disruption.

The court also found that Lysol was "vital and necessary for the health, safety and welfare of consumers," regardless of the "extent to which COVID-19 was transmittable from a surface," or the extent to which the product was ultimately "effective in eliminating or meaningfully limiting any such potential transmission."

Finally, the court found that the AG made a prima facie case that Lysol had been sold at "unconscionably excessive prices on at least several occasions."

The appellate court found that as the state law "proscribes any instance of price-gouging; the AG need not demonstrate a uniform price-gouging practice for liability to attach." It considered and rejected constitutional challenges that the statute is unconstitutionally vague, among other arguments.

The court explained that the absence of a "quantitative metric for ascertaining whether a given price is unconscionably excessive or unconscionably extreme (or whether a given disparity between two prices is gross) ... does not affect the statute's constitutionality."<sup>[5]</sup>

When state price-gouging laws were activated in the spring of 2020, there was uncertainty, even among enforcers, as to what behaviors would be covered.

This reversal reminds that the interpretation and application of pricing restrictions continues, even in an inflationary environment, and that compliance and risk management must continue to remain at the forefront of business planning.

*Reproduced with permission. Originally published September 16 2022, "Renewed Price-Gouging Compliance Efforts Could Be Crucial," [Law360](#).*

---

[1] Ass'n for Accessible Medicines Frsh, 887 F.3d 664, 668 (4th Cir. 2018).

[2] Complaint, New York Quality King Distributors, Inc., N.Y. County, Supreme Court (May 27, 2020).

[3] Id.

[4] New York Quality King Distributors, Inc., N.Y. First Judicial Department, Appellate Division (Aug. 23, 2022).

[5] Id.

#### [Related Professionals](#)

---

- **John R. Ingrassia**  
Partner
- **Kelly Landers Hawthorne**

Associate

- **Timothy E. Burroughs**

Associate