

Price Gouging and the Pandemic: An Economic Perspective

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During declared states of emergency, sellers that raise prices may face allegations of price gouging, leading to civil suits, state enforcement actions, and even federal enforcement actions. The current state of emergency is no exception: the coronavirus pandemic has already begun to generate price-gouging complaints, such as allegations that retailers and retailer platforms charged excessive prices for a range of items, including face masks, toilet paper, and cleaning products.^[i] Grocery retailers and egg producers have been targeted by a California class action alleging illegal price gouging related to egg prices after a state of emergency was declared.^[ii] Although federal agencies have begun undertaking enforcement actions related to price gouging and hoarding of medical supplies under the Defense Production Act (DPA), there is no federal law that defines price gouging.^[iii] Instead, price-gouging cases and enforcement related to consumer goods typically occur at the state level—a potential challenge for retailers during a national emergency.^[iv] State statutes vary in how they define price gouging, the severity of the associated legal consequences, and the time frames during which they apply (in addition to variation in when states declared a state of emergency and likely variation in when states of emergency are lifted).^[v]

This article discusses some of the economic issues associated with anti-price-gouging laws and enforcement, including issues associated with establishing a fair market price for allegedly overpriced consumer goods, demonstrating whether price increases were justified by costs, and areas of potential overlap between price-gouging allegations and antitrust issues. It also discusses how the FTC previously handled some of these economic issues in its national investigation, ordered by Congress in the aftermath of Hurricanes Katrina and Rita, into alleged gasoline price gouging.

Before delving into these issues, it is worth noting that economists debate whether anti-price-gouging laws actually benefit or harm consumers.^[vi] Charging higher prices during an emergency may seem intuitively unfair (particularly if the seller's margins increase), but when prices are permitted to rise during an emergency, the "price signal" helps to limit hoarding or over-consumption by households that do not need the scarce commodity.^[vii] Shortages of products like hand sanitizer and toilet paper during the pandemic may not have occurred if retailers had been able to raise the price of these products rather than instituting belated and easily circumvented purchase limits. However, the argument against market intervention through price-gouging laws ignores the issue of income inequality: while higher prices can help prevent hoarding, they may cause the market to allocate goods toward the consumers who can easily afford them, rather than toward those with the greatest need during the emergency.^[viii]

Pricing and cost considerations involved in assessing price gouging

The fundamental ingredient of a price-gouging allegation under state anti-price-gouging statutes (or, to a more limited degree, federal enforcement actions), is the claim that the seller's prices rose excessively after a declared state of emergency.^[ix] State price-gouging laws typically involve a presumption that sufficiently large price increases during an emergency are evidence of price gouging, placing the burden on the retailer to present mitigating factors.^[x] Sellers that typically exhibit fluctuating margins or seasonal pricing may need to be particularly cautious because low prices and/or margins in the period preceding the emergency may give a false impression of intentional price gouging during the period of the emergency.^[xi]

The unusual set of goods under scrutiny during the pandemic and the prevalence of new sellers may create challenges in applying state price-gouging laws. For example, relevant price comparisons may be hard to establish for products that were not commonly used before the pandemic (e.g., cloth masks) or may not have existed at all (e.g., home coronavirus testing kits).^[xii] In these cases, historical price data to establish the prevailing price before the state of emergency may be scarce.

An economic evaluation of the plausibility of price-gouging allegations might start by evaluating the pricing behavior of the allegedly price-gouging seller compared to other sellers in the same market (some state price-gouging statutes explicitly adopt this approach).^[xiii] The FTC gasoline price-gouging investigation illustrates how economists can evaluate the plausibility of price-gouging allegations using available data on the prices charged by other similar sellers around the same time. In order to assess how widespread price gouging by individual gasoline wholesalers and retailers may have been in the aftermath of the hurricanes, the FTC adopted a three-part test for potentially excessive price increases that considered (1) whether the gas station's price relative to the city average rose immediately after the hurricanes, (2) whether the gas station's price rose relative to other stations from the same brand and city, and (3) whether its prices were in the top 5th percentile of prices charged in that city for at least three-fourths of the week following each hurricane.^[xiv] The emphasis on city-level comparisons will not be relevant for all types of consumer goods that have seen price-gouging allegations during the pandemic, but the intuition behind comparing prices set by retailers that compete in the same market carries over to the pandemic. For example, price comparisons between retailers of the same type (grocery stores to other grocery stores, online sellers to other online sellers) or that serve the same consumer segment (discount versus premium) are more likely to be informative.

The interpretation of higher prices during a state of emergency is complicated by the fact that many sellers are likely to experience increasing costs during an emergency. Because state price-gouging laws often make price increases over the legal threshold presumptively illegal, sellers may need to demonstrate that their price increases were motivated by higher costs, or relatedly, that their margins did not increase.^[xv] Higher costs may be the result of sellers' interdependence with upstream producers. For example, the seller may face upstream materials shortages and price increases or delivery delays from its suppliers. The seller's own production costs may increase as the result of new worker safety protocols and increased worker absence due to illness. There may be inputs in the firm's production, such as its workforce or its physical facilities, which are challenging to quickly scale up in response to higher demand for some products, thereby creating higher costs (overtime pay, lower efficiency due to facility over-utilization). The entry of many new sellers during the pandemic, such as small-scale producers and sellers of cloth masks, will make variation in production costs a particularly important explanation for differences in sellers' prices for the same product. For example, a new business selling cloth masks on Etsy may charge higher prices than a large retailer that sources cloth masks from a factory producer, but the higher prices charged by small sellers may

relate to less efficient production, rather than an attempt at profiteering.[\[xvi\]](#)

The FTC acknowledged a variety of ways in which retailers' costs might be affected by an emergency, thus explaining why some retailers increased their prices much more than others. The FTC noted that much of the dispersion in local retail gasoline pricing could be explained by variation in retailers' relationships to upstream producers, which included both arm's-length and vertically integrated suppliers.[\[xvii\]](#) The FTC also observed that in the uncertain supply environment that prevailed after the hurricanes, some retailers faced a risk of intermittent supply disruption and higher wholesale costs due to consumer "panic buying," which led them to anticipate higher wholesale prices, and thus charge higher retailer prices, than would appear to be optimal given the behavior of other retailers in the area. However, the FTC noted that the fact that some but not all retailers charged higher prices due to anticipated cost increases is consistent with the fact that sellers are likely to differ in the amount of information they have about market conditions.[\[xviii\]](#)

It is likely that, for all the reasons discussed, many sellers may face increased costs, making it difficult to identify price-gouging firms simply by conducting a price comparison. Unfortunately, the emphasis on regulating price increases rather than markup increases in many state price-gouging laws suggests that retailers that choose to pass on an increase in costs to their customers may face price-gouging allegations.[\[xix\]](#)

When does price gouging become an antitrust concern?

Price gouging is not in itself a violation of federal antitrust law: even a monopoly—provided that it is a lawful monopoly—may set whatever price it chooses.[\[xx\]](#) However, as the Department of Justice notes, allegations of price gouging may magnify attention not only on individual sellers, but on the conduct of firms throughout the industry, particularly if that industry already receives attention from antitrust regulators.[\[xxi\]](#) Indeed, the congressionally directed investigation into gasoline prices after Hurricanes Katrina and Rita led the FTC to investigate not only whether there was evidence of price gouging by individual gasoline retailers, but also whether gasoline prices were affected by market manipulation.[\[xxii\]](#) The industry had already been the subject of congressional scrutiny: the FTC combined its price-gouging investigation with another investigation that Congress had ordered just months before the hurricanes into possible long-term price fixing and market manipulation in the U.S. petroleum industry.[\[xxiii\]](#) While the investigation found no evidence of anticompetitive conduct, and only isolated incidents of price gouging, the investigation involved significant FTC resources and required substantial industry cooperation, including interviews and data requests from firms at all levels of the U.S. supply chain.[\[xxiv\]](#)

So far during the pandemic, some of the prominent targets of price-gouging complaints have been firms in industries with a history of significant antitrust challenges. Amazon, an early target of price-gouging complaints related to its third-party sellers, also faces antitrust challenges over its most-favored-nation clauses with third-party sellers.[\[xxv\]](#) The egg industry, which has a long history of antitrust investigations and private antitrust claims, has also been among the largest targets of price-gouging class actions thus far, involving many large national grocery stores, as well as egg producers and wholesalers.[\[xxvi\]](#)

The unprecedented nature of the coronavirus pandemic has already led to challenges to retailers' pricing practices under state price-gouging statutes and federal enforcement authority under the DPA. As the pandemic continues, allegations of price gouging and possibly of price fixing will likely continue to accumulate. From an economic perspective, it is important to analyze retailers' pricing behavior carefully, taking into particular account the many factors that may cause costs to increase

during the pandemic, potentially leading to large price increases that do not imply proportionate growth in retailer profits.

The views expressed in this article are solely those of the author, who is responsible for the content, and do not necessarily represent the views of Cornerstone Research. This article was first published by the American Bar Association's Section of Antitrust Law.

[i] Lauren Berg, *Amazon Price-Gouged Amid Pandemic, Calif. Consumers Say*, Law360, Apr. 22, 2020, available at

<https://www.law360.com/corporate/articles/1266266/amazon-price-gouged-amid-pandemic-calif-consumers-say>; Dave Simpson, *eBay Hit with Virus-Related Price-Gouging Class Action*, Law360, May 4, 2020, available at <https://www.law360.com/articles/1270342/ebay-hit-with-virus-related-price-gouging-class-action>.

[ii] John R. Wilke, *Federal Prosecutors Probe Food-Price Collusion*, Wall St. J., Sept. 23, 2008, available at

<https://www.wsj.com/articles/SB122213370781365931>.

[iii] The Department of Justice has already taken enforcement action against alleged hoarding of medical supplies under an Executive Order pursuant to the DPA, in cooperation with the Department of Health and Human Services (HHS) and Federal Emergency Management Agency (FEMA). See

Department of Justice, *Combatting Price Gouging & Hoarding*, May 5, 2020, available at

<https://www.justice.gov/coronavirus/combattningpricegouginghoarding>; HHS.gov, *DOJ and HHS Partner to Distribute More Than Half a Million Medical Supplies Confiscated from Price Gougers*, Apr. 2, 2020, available at <https://www.hhs.gov/about/news/2020/04/02/doj-and-hhs-partner-to-distribute-more-than-half-a-million-medical-supplies-confiscated-from-price-gougers.html>.

[iv] Ballard Spahr, LLP, *Understanding Price Gouging Laws During COVID-19*, JD Supra, Apr. 6, 2020, available at

<https://www.jdsupra.com/legalnews/understanding-price-gouging-laws-during-98583/>.

[v] Richard Lawson & Shoshana Speiser, *Cloudy with a Chance of Price Gouging*, Law360, Aug. 28, 2018, available at

<https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging>.

[vi] David Henderson, *A Poll of Economists on Price-Gouging*, EconLog, Sept. 15, 2017, available at

https://www.econlib.org/archives/2017/09/a_poll_of_econo.html; Rafi Mohammed, *Why Businesses Should Lower Prices During Natural Disasters*,

[vii] Donald J. Boudreaux, “Price Gouging” After a Disaster Is Good for the Public, Wall St. J., Oct. 3, 2017, available at <https://www.wsj.com/articles/price-gouging-after-a-disaster-is-good-for-the-public-1507071457>; Jeffrey Dorfman, *Price Gouging Laws Are Good Politics But Bad Economics*, Forbes, Sept. 23, 2016, available at <https://www.forbes.com/sites/jeffreydorfman/2016/09/23/price-gouging-laws-are-good-politics-but-bad-economics/>.

[viii] Michael Hiltzik, *Column: Memo to Economists Defending Price Gouging in a Disaster: It’s Still Wrong, Morally and Economically*, L.A. Times, Aug. 28, 2017, available at <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-price-gouging-harvey-20170828-story.html>.

[ix] Note that in many states, price-gouging laws apply only to retailers. In some cases, upstream wholesalers or distributors may also be subject to price-gouging laws. See Lawrence D. Silverman & Carmen M. Ortega, *The Reach of Price Gouging Laws: Why Wholesale Distributors Are Not Exempt*,

Akerman, Apr. 6, 2020, available at [https://www.akerman.com/en/perspectives/the-reach-of-price-gouging-laws-why-wholesale-distributors-are-not-](https://www.akerman.com/en/perspectives/the-reach-of-price-gouging-laws-why-wholesale-distributors-are-not-exempt.html)

[exempt.html](https://www.akerman.com/en/perspectives/the-reach-of-price-gouging-laws-why-wholesale-distributors-are-not-exempt.html).

[x] Richard Lawson & Shoshana Speiser, *Cloudy with a Chance of Price Gouging*, Law360, Aug. 28, 2018, available at <https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging>.

[xi] For example, during an FTC investigation into possible gasoline price gouging after Hurricanes Katrina and Rita, the FTC noted that fluctuating margins created a spurious impression of price gouging in some cases. See Federal Trade Commission, *Investigation of Gas Price Manipulation and Post-Katrina Gasoline Price Increases*, 2006, at 140-41, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>.

[xii] Darrel Etherington, *LabCorp’s At-Home COVID-19 Test Kit Is the First to Be Authorized by the FDA*, Techcrunch, Apr. 21, 2020, available at <https://techcrunch.com/2020/04/21/labcorps-at-home-covid-19-test-kit-is-the-first-to-be-authorized-by-the-fda/>.

[xiii] Richard Lawson & Shoshana Speiser, *Cloudy with a Chance of Price Gouging*, Law360, Aug. 28, 2018, available at <https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging>.

[xiv] Only 1% of retailers failed these screens, and the FTC noted that some of the station owners whose prices were flagged by the three-part test cited station-specific increases in cost. Federal Trade Commission, *Investigation of Gas Price Manipulation and Post-Katrina Gasoline Price Increases*, 2006, at 110-13, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>.

[xv] CA Penal Code § 396 (2017), available at <https://law.justia.com/codes/california/2017/code-pen/part-1/title-10/section-396/>; Edward J. Page & Min K. Cho, *Price Gouging 101: A Call to Florida Lawmakers to Perfect Florida's Price Gouging Law*, 80 Florida L.J. 49 (2006), available at <https://www.floridabar.org/the-florida-bar-journal/price-gouging-101-a-call-to-florida-lawmakers-to-perfect-floridas-price-gouging-law/>; Richard Lawson & Shoshana Speiser, *Cloudy with a Chance of Price Gouging*, Law360, Aug. 28, 2018, available at [https://www.law360.com/articles/1076395/cloudy-with-](https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging)

[a-chance-of-price-gouging](https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging).

[xvi] Anna Hecht, *These 3 Etsy Shop Owners Have Each Sold Hundreds of Cloth Face Masks since the Pandemic Started*, CNBC, May 7, 2020, available at <https://www.cnbc.com/2020/05/07/etsy-shop-owners-sell-hundreds-of-cloth-face-masks-during-pandemic.html>.

[xvii] Federal Trade Commission, *Investigation of Gas Price Manipulation and Post-Katrina Gasoline Price Increases*, 2006, at 107, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>; Scott Berhang, *Pricing 101 Part 4: Demystifying Retail Fuel Prices and Players*, OPIS Blog,

Sept. 12, 2017, available at <http://blog.opisnet.com/demystifying-retail-fuel-prices-and-players>.

[xviii] Federal Trade Commission, *Investigation of Gas Price Manipulation and Post-Katrina Gasoline Price Increases*, 2006, at 107-8, 195, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>.

[xix] Richard Lawson & Shoshana Speiser, *Cloudy with a Chance of Price Gouging*, Law360, Aug. 28, 2018, available at <https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging>.

[xx] Directorate for Financial and Enterprise Affairs Competition Committee, *Working Party No. 2 on Competition and Regulation: Excessive Prices*, Oct. 17, 2011, at 2, available at <https://www.justice.gov/sites/default/files/atr/legacy/2014/05/30/278823.pdf>.

[xxi] *Id.* at 5-6.

[xxii] Federal Trade Commission, *Investigation of Gas Price Manipulation and Post-Katrina Gasoline Price Increases*, 2006, at i, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>.

[xxiii] *Id.*

[xxiv] *Id.*

[xxv] Mike Leonard, *Amazon Accused of Monopolization, Sweeping Price-Fixing Scheme*, Mar. 20, 2020, available at <https://news.bloomberglaw.com/mergers-and-antitrust/amazon-accused-of-monopolization-massive-price-fixing-scheme>.

[xxvi] Matthew Santoni, *Egg Producer Fights 3rd Circ. Appeal after Antitrust Verdict*, Law360, Sept. 13, 2019, available at <https://www.law360.com/articles/1198774/egg-producer-fights-3rd-circ-appeal-after-antitrust-verdict>; John R. Wilke, *Federal Prosecutors Probe Food-Price Collusion*, Wall St. J., Sept. 23, 2008, available at <https://www.wsj.com/articles/SB122213370781365931>.

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