

COLUMBUS BUSINESS FIRST

What you can do now to help protect your business in post-Covid-19 litigation

One thing is certain: There will be lots of litigation related to Covid-19, including claims related to antitrust, deceptive advertising and price gouging. Suppliers, distributors and retailers are all at risk, and businesses in the food, energy and health care industries are especially vulnerable. It therefore makes sense for businesses to do now whatever can be done to protect themselves as best they can.

What we know

Lawsuits and investigations have already begun, by both private parties and state and federal authorities. On the state front, Florida's Attorney General said her office is investigating more than 1,200 complaints about price gouging. The Federal Trade Commission has sent warning letters to dozens of businesses regarding their unsupported claims that their products can treat or prevent Covid-19. The Texas Attorney General has sued an auction company for allegedly price-gouging medical masks and an egg producer for allegedly selling eggs at an inflated price. And the FBI arrested a Brooklyn man for hoarding critical supplies.

On the private side, a consumer class action was filed against GrubHub, DoorDash, Postmates and Uber Eats claiming that they forced restaurants to charge the same for delivered meals as they charge for dine-in meals and they further charged excessive delivery fees. 3M also filed a suit against a mask distributor claiming price gouging and deceptive trade practices and obtained a temporary restraining order.

What we expect

These types of actions are likely to become commonplace as state attorneys general and the federal government increase investigations into price gouging and inappropriate collaboration. While many states are enacting or considering new price-gouging laws, businesses should not rely on a given state's lack of price-gouging laws or absence of a private right of action when analyzing its pricing strategies. Plaintiffs are already bringing their price-gouging claims using other statutes, such as unfair business practices laws.



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May 27, 2020

Businesses in the middle of the supply chain are especially vulnerable. Where increased prices affect pricing downstream, one company may be fighting the same issue from dual perspectives – as both plaintiff and defendant. Companies in the middle of the supply chain, where they are both buyers and sellers, can be the villain to one constituency, but the victim of other companies' activities. This risk to these businesses is especially heavy in states where an increase in the cost of producing or selling the product is not a defense in price-gouging suits.

In a different vein, failed businesses may seek a scapegoat and may view business practices by competitors – whether collaborative or unilateral – as the source of their failure. Consumers too will look to deep-pocketed companies as a source against whom they can vent their frustrations. It may not be too big of an exaggeration to say that every company's actions during the crisis will come under scrutiny, one way or another.

What we can do now

We all know there is no way to prevent someone from suing you. Businesses can

try to protect themselves as best they can to minimize chances of suit later or at least maximize its chances of prevailing in such lawsuits, and prevailing early. Here are some recommendations:

Make sure your documents are clean. Make sure your employees are not careless in their documents or emails. Talking about "raising prices excessively," "correcting the market," "getting rid" of that pesky competitor or praising the Covid-19 pandemic for allowing you to raise prices are all statements that can land a company in hot water. Now is the time to impress upon your employees to ensure that such statements are avoided. Review your supply chain. Document well your increased input costs in case there are allegations of price gouging down the line. Review your contracts to make sure that you are charging prices within your contractual rights.

Maintain antitrust compliance. As competitors face the same economic forces arising from the Covid-19 crisis, now is not the time to relax antitrust compliance. The Department of Justice and Federal Trade Commission have called on the public and whistleblowers to report antitrust violations. Enforcement officials will want to add teeth to those calls. Do not let your company get bitten. Industry-wide solutions to Covid-19 issues must be vetted by antitrust counsel. Review your pricing decisions and supply decisions. These days, you may have to make hard choices about whom to supply and at what prices. Talk to

counsel about these decisions and make sure they comply with federal and state laws and regulations. Do not just "wing" it. Not only may there be civil or criminal penalties, but the damages to your goodwill may be immeasurable. We are going through unprecedented times and the future will likely be very different from what we expected. But with forethought and diligence we can protect ourselves legally and come through this stronger.

For more information, contact Jay Levine, Allen Carter or any member of Porter Wright's Antitrust and Consumer Protection Practice Group.

Porter Wright Morris & Arthur LLP is a large law firm that traces its roots to 1846 in Ohio. With offices in Columbus, Cincinnati, Cleveland and Dayton, Ohio; Washington, D.C.; Naples, Florida; Chicago, Illinois; and Pittsburgh, Pennsylvania, Porter Wright provides strategic legal counsel to a worldwide base of clients.

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