



Professional Perspective

# State Price-Gouging Regulation and Compliance During Covid-19

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Price-gouging investigations surged throughout the country as the coronavirus spiked in 2020. Most attention has been focused on state price-gouging statutes, which generally prohibit price increases on certain consumer products immediately following a declaration of emergency.

State attorneys general have substantial toolkits, though, and state consumer protection statutes are often broadly written to encompass a variety of misconduct. These statutes are designed to protect consumers from predatory, deceptive, and unscrupulous business practices in everyday transactions, and provide another avenue of attack for state attorneys general who are looking to fight against improper business transactions during the Covid-19 pandemic. This article reviews those regulatory tools and potential defenses for companies.

## State Consumer Protection Statutes

In general, state consumer protection statutes prohibit deceptive practices in consumer transactions, and often include provisions broadly prohibiting unfair or unconscionable business practices. Specifically, these statutes outlaw:

- False, misleading, or deceptive advertising
- Unconscionable pricing
- Fraud
- Other deceptive or “unfair” trade practices

In the months since the pandemic began, state attorneys general have taken action against sellers for false, misleading, or deceptive advertising regarding disease cures. The New York Attorney General sent cease-and-desist letters to companies claiming their products can prevent or beat Covid-19, and Florida’s Attorney General launched an investigation into Norwegian Cruise Lines this spring over allegations of Covid-19 sales pitches.

As the pandemic rages on, creating new health issues and economic damage as it goes, states will likely continue to return to the consumer protection statutes to identify and fight against perceived unfair business practices. Companies should be mindful of these restrictions when issuing any statement or advertisement regarding Covid-19.

Likewise, we expect there to be an increase in investigation and enforcement activity regarding reimbursements and refunds for canceled trips, bookings, and events, as the virus continues to wreak havoc on personal and business plans. New York Attorney General Letitia James negotiated a settlement guaranteeing consumers who purchased season passes, plans, and services as the theme park Fantasy Island will be reimbursed for advanced purchases.

## Arrows in the State's Quiver

Attorneys general have a variety of tools and resources to combat unfair and deceptive practices, including:

**Equitable Relief.** The state may seek an injunction or temporary restraining order requiring the business to halt the unfair or deceptive practice.

**Seizure.** Some statutes permit the state to seize products offered for sale by an allegedly deceptive or unfair practice.

**Civil Damages.** Attorneys general can pursue civil damages including restitution to consumers of exorbitant prices and/or disgorgement of improperly obtained profits. Many statutes also include a private right of action allowing consumers to sue sellers directly to recover civil damages, often including attorneys’ fees.

Civil actions under consumer protection statutes are potentially very costly, as some statutes permit treble damages (three times actual damages) to maximize what may otherwise be a relatively small recovery. Likewise, consumer protection statutes often provide for punitive damages awards as well.

Plaintiffs have already filed civil actions against companies marketing and selling products used to protect against Covid-19. GOJO Industries, the maker of Purell, faces a proposed class action suit relating to its hand sanitizer claims in New York, California, and Ohio. Similar suits have been filed against Target for its branded hand sanitizer, as well as other product makers.

**Civil Penalties.** States can also seek civil penalties, usually set by statute and applied on a per violation basis, ranging from \$1,000 to \$5,000 for each violation. State enforcement authorities typically avoid “course of conduct” allegations in such cases, as the potential penalties on a per violation basis have exponential impact.

**Criminal Penalties.** Most statutes include criminal penalties for violations committed deliberately or intentionally. For example, the Missouri Merchandise Practices Act imposes criminal fines for willful or knowing violations of the act, making the violations either misdemeanors or felonies based on the amount of loss.

**Regulatory Restriction.** Investigations by state attorneys general may spill over into other licensing and regulatory agencies. Sellers may have to disclose the investigation, or the resultant penalty, on applications for business licenses or renewals, and the fact of a past violation may have negative consequences on future licensure.

## Defenses in Your Arsenal

Companies facing investigations or enforcement for violating consumer protection statutes have a variety of defenses available.

**Statutory Language Defenses.** Given that consumer investigations and actions are statutory, they may be particularly vulnerable to attack based on the limitations imposed by the language of the statute. Many consumer protection statutes limit their applicability to “consumer” transactions, thereby excluding wholesale or business-to-business transactions. The characterization of a transaction should fit narrowly under the specific language of the statute and exclude transactions that fail to fit. And many consumer acts limit the businesses to which they apply, excluding businesses like banks and utilities.

**Unconscionable Price Defenses.** Consumer actions based on prices charged for goods or services are particularly vulnerable to margin-focused defenses. If a company can show that the increase in the price charged for a good or service was attributable to increased costs associated with obtaining, manufacturing or providing the product or service, while the margin was either constant or increased only incrementally, the business can likely avoid enforcement or prosecution under the relevant statutes.

**Truth as a Defense.** A business's ability to demonstrate that the statements made were either true or were based on diligence and good-faith reliance on specific information will be a strong and effective defense to a deceptive advertising claim.

Regardless of the specific defense, investigating and defending these actions is document-intensive.

Companies should memorialize their pricing and advertising decisions made during the Covid-19 pandemic, including detail as to the direct and indirect costs that drove the pricing decisions. Investigations into pricing and marketing activities may not arise for months or even years, long after the rationale supporting the decisions is apparent. Just as important is to preserve evidence of cost—invoices, purchase orders, receipts, etc.—to demonstrate that an increased price was attributable to cost increases.

## Conclusion

Businesses must be conscious of the applicable consumer protection laws in each jurisdiction in which they sell products and services. This can be a challenge particularly for businesses that operate in multiple states. Businesses who sell products and services that may be necessary or essential amid the Covid-19 crisis should carefully review and examine their pricing and advertising practices to avoid scrutiny or enforcement under consumer protection statutes.