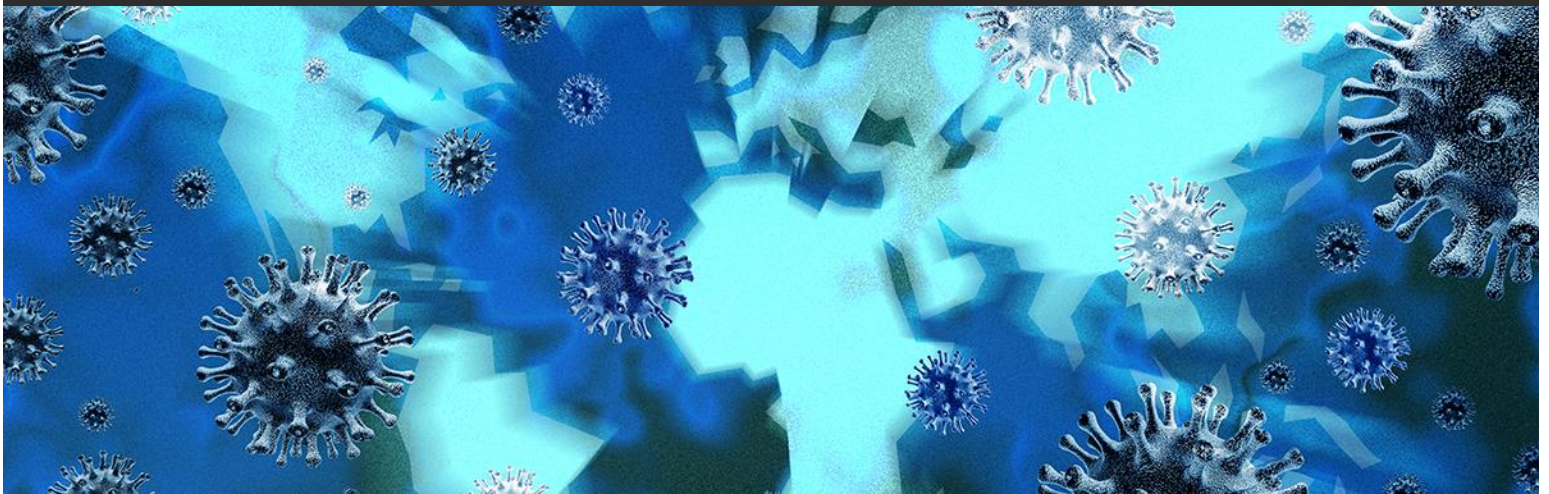


**Alert | Health Emergency Preparedness Task Force:
Coronavirus Disease 2019**



March 2020

Price Gouging in Massachusetts

COVID-19 has brought about disruptions on a scale not seen in this generation. Within a two-week period, the federal government has declared a national emergency and close to forty states have themselves declared statewide emergencies. As demand for certain products increases during this public health emergency and supply chains are disrupted, and without a broad-based federal price-gouging law in place, states look to their own laws to protect consumers. Not every state has a price-gouging law. Several states, such as California and Connecticut, do, and others, like Michigan and New York, are working to pass a price-gouging law or strengthen an existing one. Massachusetts is policing the pricing of consumer goods to seek to ensure no retailer engages in price-gouging. The attorney general reportedly stated that the Office is monitoring price gouging on items such as hand sanitizers and face masks.¹

Currently, Massachusetts does not have a general price-gouging statute and it may seek to enact one. However, absent emergency legislative or regulatory measures, the Massachusetts Attorney General already has authority under Mass. Gen. Laws Chapter 93A (“Chapter 93A”) to police unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.²

¹ “Massachusetts AG Warns Of Scams Around Coronavirus Uncertainty,” May 10, 2020, CBS Boston, <https://boston.cbslocal.com/2020/03/10/coronavirus-scams-massachusetts-attorney-general-maura-healey/>.

² See G.L. c. 93A §§ 2, 4, *et seq.*

Specifically, the attorney general's regulations broadly state, in relevant part, that an act or practice violates Chapter 93A if it is "oppressive or otherwise unconscionable in any respect."³

Absent any specific state legislation or specific price-gouging regulation that may be enacted to respond to COVID-19, the attorney general may look to the language in 940 C.M.R. 3.18, which prohibits selling gasoline at unconscionably high prices during market emergencies, as guidance on what may be unfair under 940 C.M.R. § 3.16 as it relates to price-gouging. Basically, 940 C.M.R. § 3.18 provides that it is unfair or deceptive "during any market emergency" to sell gasoline (or any petroleum product) at an "unconscionably high" price. The regulation provides that a price is "unconscionably high" if:

- a) the amount charged represents a *gross disparity* between the price of the petroleum product and
 1. the price at which the same product was sold or offered for sale by the petroleum-related business in the usual course of business *immediately prior* to the onset of the market emergency, or
 2. the price at which the same or similar petroleum product is readily obtainable by other buyers in the trade area; and
- b) the disparity is not substantially attributable to increased prices charged by the petroleum-related business suppliers or increased costs due to an abnormal market disruption.

The price-gouging regulation for gasoline does not define "gross disparity" or "immediately prior."⁴ However, at least one federal district court in Massachusetts has interpreted "gross disparity" to mean "the difference between the value and the consideration is so substantial that the exchange is facially inadequate."⁵ On appeal, the First Circuit concluded that "gross disparity" may be assessed by looking at the increase in prices to consumers vis-à-vis the increase in gross margins, which is calculated based on costs to sellers.⁶ The First Circuit held that dramatic changes in *gross margin* might illustrate that a price increase is a "gross disparity" in price because it reflects price increases unexplained by cost increases.⁷ The First Circuit also cited, as examples, to two cases where gross margin increases of 32 cents and 60 cents were held to constitute as price-gouging under New York law.⁸

The First Circuit stated that price-gouging rules are generally designed to protect consumers from acute and unconscionable increases in the prices they must pay for basic consumer goods during times of market emergency, not to mandate that retailers decrease their prices as quickly as their costs decline after the most acute crisis in supply of the goods has passed. Nor are these regulations meant to give the government control over the setting of certain product prices.⁹

The attorney general office enforces its own regulations under Chapter 93A by conducting civil investigations and through enforcement actions. In doing so, the attorney general may seek restitution on behalf of all Massachusetts residents who suffer an ascertainable loss (here, likely the amount of the gouged prices), plus a civil penalty of up to \$5,000 per violation if a seller knew or should have known the

³ 940 C.M.R. § 3.16.

⁴ A "market emergency" is defined as "[a]ny abnormal disruption of any market for petroleum products, including but not limited to any actual or threatened shortage in the supply . . . or . . . increase in the price," resulting from natural disaster, energy failure, war, national or local emergency, or other extraordinary circumstances. See 940 C.M.R. § 3.01.

⁵ See *White v. R.M. Packer Co., Inc.*, 2010 WL 8971776, at *6 (D. Mass. Jan. 6, 2010), *aff'd* 635 F.3d 571 (1st Cir. 2011).

⁶ See *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 588 (1st Cir. 2011).

⁷ See *id.*

⁸ See *id.*

⁹ See *White*, 635 F.3d at 588.

act or practice was in violation of Chapter 93A. Private consumers may bring their own claims under Chapter 93A and seek class-wide relief as well.

Businesses may expect Massachusetts to be vigilant in monitoring prices to ensure that price-gouging does not take place. Not every price increase constitutes price gouging of course. Nonetheless, as businesses continue to operate during this state of emergency, they may wish to take care that their price increases are appropriate and supported under the relevant circumstances.

For more information and updates on the developing situation, visit [GT's Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#).

Authors

This GT Alert was prepared by **David G. Thomas**, **Robert A. Sherman**, and **Mian R. Wang**.

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany. [~]Houston. Las Vegas. London. ^{*}Los Angeles. Mexico City. ⁺Miami. Milan. [»]Minneapolis. Nashville. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul. [∞]Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv. [^]Tokyo. [‡]Warsaw. ⁻Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. [~]Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^{}Operates as a separate UK registered legal entity. ⁺Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [»]Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [∞]Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. [^]Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. [‡]Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ⁻Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2020 Greenberg Traurig, LLP. All rights reserved.*