

HOW WOULD YOU LIKE YOUR EGGS...SUED? NEW YORK ATTORNEY GENERAL SUES EGG SUPPLIER FOR PRICE-GOUGING

Hodgson Russ Food & Beverage Alert
August 31, 2020

With each passing trip to the supermarket, it seems the cost of living continues to increase. COVID-19 induced consumer mass-quantity shopping and panic-buying depletion of grocery shelves, in conjunction with the laws of supply-and-demand, is at least partly to blame. But in some cases price increases seem excessive, and now, responding to consumer complaints surrounding the increasing prices of food staples, New York's Attorney General has filed suit against Hillandale Farms, one of the nation's largest producers and wholesale suppliers of eggs, alleging that it engaged in illegal price-gouging in response to COVID-19. This lawsuit makes clear that sellers of essential goods must understand the difference between responding to legitimate supply and demand pressures and crossing into illegal price-gouging territory.

As alleged in the August 11, 2020 Complaint, the demand for food staples – and particularly eggs – increased dramatically in March 2020 due to panic-buying consumers. Eggs are considered an essential food staple to 93% of households across the United States and, as of March 16, 2020, egg sales increased over 86% as compared to a year earlier. At the same time, wholesale egg prices reached record levels as many egg producers increased their prices three-fold compared to 2019 pricing. See *People v. Hillandale Farms Corp. et al.*, Index No. 451650/20202, Dkt. No. 1 (Compl.), ¶¶ 21-29.

Against this backdrop, the lawsuit claims that Hillandale Farms, the fourth largest egg producer in the United States, allegedly quadrupled the price of its eggs to profit from the surge in consumer demand in March and April 2020. According to the Attorney General, Hillandale sold over four million cartons of price-gouged eggs in New York, harming hundreds of thousands of New York consumers.

According to the Complaint, the Attorney General conducted an extensive investigation into the pricing practices of retail grocery stores, wholesale food distributors, and egg producers to determine the parties involved in the egg price increases. The Attorney General concluded that Hillandale Farms' increase in price was not an offset in response to an increase in production costs due to COVID-19, "but simply to line its own pockets and profit off New Yorkers during a time of crisis." For example, between January 1, 2020 and March 12, 2020, Hillandale sold large egg whites to a retailer at prices ranging from \$0.59 to \$1.10 per dozen. On March 15,

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2020, two days after the President of the United States declared the Novel Coronavirus Disease a national emergency, prices increased from \$1.10 to \$1.49 per dozen. The following week, the price of large egg whites increased again to \$2.26 per dozen, and the week after that to \$2.93 per dozen. Hillandale allegedly profited over \$4,000,000.00 due to pricing increases at this time.

Hillandale, however, is claiming that its pricing benchmarks are “market-based,” as set by collective index prices for agricultural commodities. Because the pricing index functions off market information, prices tend to increase when demand sharply increases. Sarina Trangle, [Egg producer Hillandale gouged prices, according to AG lawsuit](#), *Newsday* (August 11, 2020).

These competing claims may leave manufacturers and producers confused: how can a business take advantage of market opportunities without running afoul of price-gouging laws?

In a stable market, when product supply decreases, the price of the good increases; thus, when product supply increases, the price of the good should decrease. By comparison, price-gouging is the practice of increasing product prices to unfair or unconscionable levels, in gross excess of the normal selling price during periods of “abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public.” N.Y. Gen. Bus. Law § 396-r. As witnessed during the COVID-19 pandemic, the price and availability of typically non-essential items, such as disinfectant products, hand sanitizer, face masks, and toilet paper, continue to remain unavailable or sold at increased prices. Other items like thermometers and gloves are selling at twice or triple their normal price. While these products are typically deemed unessential, they have quickly become essential as governments continue to urge safety protocols to combat the spread of coronavirus. As demand for these products has increased, so have allegations of price-gouging, as the statute specifically covers goods vital to the public health and safety.

Under New York’s price-gouging statute, whether a violation has occurred is based on factors including whether the amount of the excess in price is unconscionably extreme, or whether there was an exercise of unfair leverage or unconscionable means, or a combination of both. § 396-r(3)(a). Also relevant is the pricing of the same or similar goods and services in the market and if they were readily obtainable in that trade area, as well as pricing before the onset of the disruption of the market. See § 396-r(3)(b)(i)-(ii). Even small price increases can be deemed unconscionably excessive under the price-gouging law, if the excess was obtained through unconscionable means. See *People ex. rel. Vacco v. Beach Boys Equip. Co., Inc.*, 273 A.D.2d 850, 851 (4th Dep’t 2000).

However, a defendant may rebut a prima facie case of price-gouging 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. See § 396-r(c). Thus, businesses can defend themselves against price-gouging allegations by proving that the increased price was directly attributable to increases in material and labor. To do this successfully, make sure to keep a detailed record of all transactions and price changes, as well as documentation evidencing the rationale for any increases in price. And if third parties are selling your goods for re-sale, consider issuing guidelines or directives on appropriate pricing.

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The coronavirus pandemic has created an unpredictable market, exacerbating compliance challenges. If you have questions about how price-gouging laws impact your business, please call Reena Dutta (716.848.1626), Andrew Freedman (716.848.1332) or Emily Florczak (716.848.1714).

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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