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THE GREAT TOILET PAPER CRISIS: PRICE GOUGING DURING THE CORONAVIRUS PANDEMIC

by Bill Drabble

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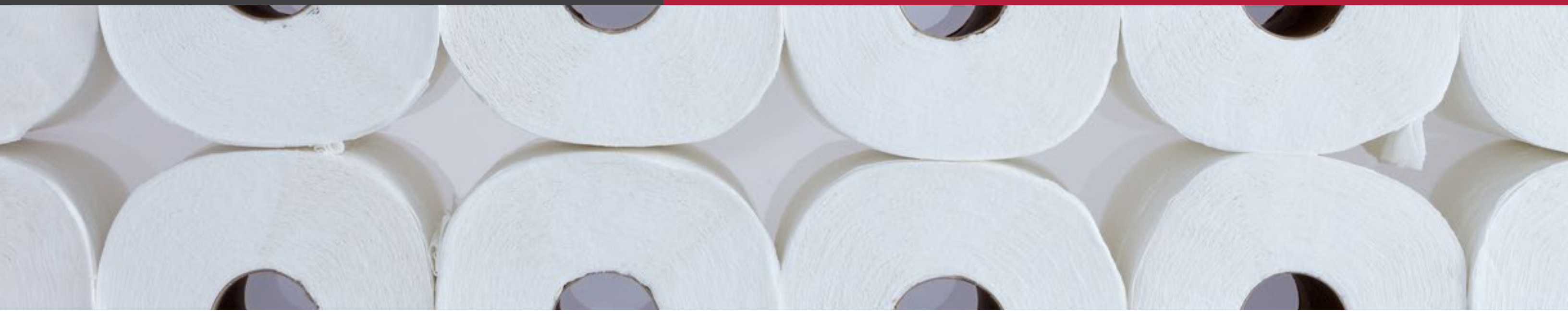

The COVID-19 pandemic is a once-in-a-lifetime event, but it has resulted in a familiar response—panic buying and hoarding. Across the country, staples such as toilet paper, hand sanitizer, bottled water and surgical masks are flying off the shelves, even though industry experts say that there is no shortage and that their supply lines continue to run. The retailers' natural response to the sudden (and irrational) increase in demand for those products would be to raise their prices, but merchants who do so run the risk being accused of and sued for "price-gouging."

PRICE-GOUGING UNDER TEXAS LAW

Texas is one of 34 states that has enacted price-gouging laws to protect consumers after a disaster. The Texas Deceptive Trade Practices—Consumer Protection Act (DTPA) lists "price-gouging" as one of the prohibited false, misleading or deceptive acts or practices. Under the DTPA, "price-gouging" is taking advantage of a disaster declared by the Governor or the President by either: (1) "selling or leasing fuel, food, medicine, lodging, building materials, construction tools or another necessity at an exorbitant or excessive price;" or (2) "demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, lodging, building materials, construction tools or another necessity."

AT WHAT POINT DOES A PRICE INCREASE BECOME PRICE-GOUGING?

The DTPA does not flatly prohibit merchants from increasing their prices for necessities after a disaster. Rather, it prohibits them from charging "exorbitant" or "excessive" prices, that is, prices that go beyond what is reasonable or customary.

Attempting to determine the reasonable or customary price to use as a yardstick raises a host of questions. Should we use the price before the disaster (when the demand for the goods was lower) or should we account for the increased demand? If the former, is the price immediately before disaster the appropriate comparator or should we use an average price over a period preceding the disaster? Should we factor in any geographical differences in price? What if the cost for the goods sold increases following the disaster?

Determining how much deviation to allow from the reasonable price is no easier. Most statutes from other states say that a 10 percent increase is excessive. Others allow a 20 percent or 25 percent increase. Unfortunately, the DTPA provides no guidance, and no court has interpreted that provision either.

Ultimately, the question of whether a price was "exorbitant" or "excessive" will likely be answered by the jury on a case-by-case basis. And juries are unlikely to sympathize with merchants who increase their prices during a time of need, even if that increase was justified by increased costs of production or market conditions.

WHO DOES THE PRICE-GOUGING LAW PROTECT?

Although the DTPA is a consumer-protection act, "consumer" is defined broadly. The statutory definition encompasses any person who seeks or acquires goods or services, whether they are doing so for personal, household, or family purposes or business purposes. The DTPA, however, contains a few exceptions for large companies and transactions. It does not protect persons who have assets of $25 million or more and purchase or lease the goods or services for commercial or business use. Transactions exceeding $100,000 may also be exempt provided that they satisfy certain criteria.

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WHEN DOES THE PRICE-GOUGING LAW APPLY?

The DTPA prohibits price-gouging during a "designated disaster period." That period being on the earlier of (a) the date the disaster occurs; (b) the date of the Governor's proclamation or executive order declaring the disaster; or (c) the declaration of the disaster by the President if any part of Texas is included within the federally declared disaster area. The period ends on the 30th day after the disaster declaration expires or is terminated.

On March 23, 2020, Texas Governor Greg Abbot declared a state of disaster due to COVID-19 for all counties in Texas, triggering the price-gouging law and merchants' potential liability for violating it.

WHAT ARE THE CONSEQUENCES OF PRICE-GOUGING?

The consequences of price-gouging are severe. While it is not a crime, the Attorney General's consumer protection division investigates and enforces the price-gouging law. Texas Attorney General Ken Paxton has already warned that his office "will work aggressively to prevent disaster scams and stands ready to prosecute any price-gouger who takes advantage of those taking precautions and looking for safety and supplies." Violators may be required to reimburse the buyers, and they may be liable to a civil penalty of up to $10,000 per violation and an additional penalty of up to $250,000 if the buyers were elderly.

In addition, the buyers can sue for violating the price-gouging provision of the DTPA and recover their actual damages, treble damages if the merchant knowingly or intentionally violated the DTPA, cost costs, and their reasonable and necessary attorney's fees.

DOES TEXAS'S PRICE-GOUGING LAW ACTUALLY HELP IN A CRISIS?

While opportunistic merchants garner little sympathy, Texas's price-gouging law, like most anti-market measures, probably does more harm than good. Panic buying and hoarding creates an artificial shortage of goods and becomes self-reinforcing. A consumer believes that his neighbor will buy more than he needs and decrease the available supply, so that consumer also buys more than he needs. Raising prices would force consumers to economize and would ultimately bring down prices by incentivizing merchants to increase their supply.

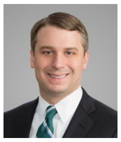
If merchants do not increase their prices, critical goods quickly disappear from store shelves and are unavailable to people who really need them. While buyers may be upset at paying a higher price after a disaster, they are better off with goods purchased at a high price rather than no goods for sale at all.

Moreover, price controls typically create black markets in which the goods are sold for truly obscene prices. People will purchase the goods at a legally-permitted price and then re-sell them to make a profit. Black market prices are higher than both the price authorized by law and the price that the free market would set, since it must account for the legal risks. For instance, during a recent online auction, bidding on package of 16 respirator masks reached as high as $180. Amazon sold a set of 100 similar masks for less than $5 in late January. None of this is surprising. If merchants do not charge market prices, middlemen will naturally step in.

WHAT CAN YOU DO?

If you sell necessities, such as food, fuel, medicine, lodging, tools or building materials, be wary of any price increases in the aftermath of a declaration of a disaster in Texas, even if your business is not in the disaster area. You can also assist in combatting the panic buying and hoarding by limiting the number of goods sold to each customer or setting early hours in which shopping is reserved for those truly in need, such as seniors.

ABOUT THE AUTHOR



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Bill focuses his practice on representing property owners, landlords, tenants and developers in real estate litigation before courts throughout North Texas, including disputes over land sales, breaches of lease agreements, premises-liability claims and other disputes involving commercial and residential properties.