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Price Gouging Liability under the Michigan Consumer Protection Act

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On Tuesday, March 17, 2020, Butzel Long issued a Client Alert regarding a new Executive Order designed to curb “price gouging” during the current state of emergency. This Alert provides a brief overview of potential seller liability under a different law: the Michigan Consumer Protection Act (MCPA). It also compares the coverage of the MCPA provisions and the new Executive Order.

The MCPA prohibits Selling Goods to Consumers at a Price “Grossly in Excess” of the Price the Goods are sold by Others

The MCPA defines and outlaws certain “unfair, unconscionable, or deceptive” business practices when selling to consumers (individuals, not businesses). Although it does not outlaw price gouging as such, Section 3(z) of the MCPA (MCL 445.903(z)) prohibits “charging the consumer a price that is grossly in excess of the price at which similar property or services are sold.”

There is no published case addressing what this provision means. (We are aware of a case (because Butzel Long successfully defended it) in which a movie theater was sued under this provision because McDonald’s sold Coca Cola for a much lower price than the movie theater. Refreshingly, the court quickly dismissed the case.) Given the vagueness of “grossly in excess” and the lack of case law, it is not possible to provide precise guidance as to when price increases might violate this provision. However, on its face, it might apply if, for example, if one grocery store substantially increased its price for milk during the state of emergency, while other grocers did not.

Violating the MCPA May Result in Liability

The MCPA has numerous enforcement provisions, some of which are very complex. In broad overview, either the Attorney General, a prosecutor or an individual consumer may sue (1) for an

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injunction to stop the unlawful pricing and (2) to recover damages. In addition, the Attorney General may recover civil fines up to \$25,000 and consumers may recover attorney fees.

The MCPA and Executive Order overlap, but have Important Differences in Scope

The MCPA and the Executive Order differ in several important respects:

- The MCPA only protects consumers. The Executive Order is not perfectly clear, but it appears to protect both consumers and businesses.
- The MCPA provides no objective guidance as to what pricing is “unreasonably disproportionate.” The Executive Order provides some objective measure of price gouging: generally, an increase of 20% above the March 9 price. To be clear, the Executive Order also has a separate prohibition on selling “at a price that is grossly in excess of the purchase price at which the person acquired the product,” which lacks any objective standard.
- The only express remedy for violation of the Executive Order is criminal – a willful violation is a misdemeanor. The MCPA, on the other hand, provides the range of remedies discussed in the preceding section.

Please contact the author of this Alert or your Butzel attorney with any questions regarding the MCPA.

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