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Kentucky Price Gouging Case Offers Major Test of State AG E-Commerce Powers

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State attorneys general have assertedly pursued price gouging actions against online retailers during the pandemic, issuing consumer alerts and announcing investigations, lawsuits, and settlements. WilmerHale attorneys look at a case on appeal to the Sixth Circuit brought by the Online Merchants Guild against the Kentucky AG, and say it is a real test of state AG consumer protection power.



Brian Mahanna

Former California Attorney General Kamala Harris, now nominee for vice president, posed the following question to Americans during her recent debate with Vice President Mike Pence.

“How calm were you when you were panicked about where you’re going to get your next roll of toilet paper?”



Samantha Becker

The question conjured memories of the chaos that marked the early months of the pandemic, when hoarding, supply chain disruptions, and—at times—unscrupulous commercial practices caused everything from masks to eggs to two-ply to disappear from shelves or be available only at much higher prices.

Armed with civil and, in some states, criminal authority to combat “price gouging” during periods of emergency, Harris’s former state AG colleagues have attacked this issue with gusto, issuing consumer alerts and announcing investigations, lawsuits and settlements.

And as fears of contracting the coronavirus combined with social distancing requirements and business closure orders pushed unprecedented numbers of Americans to shop online, AGs have responded to the many e-commerce price gouging complaints they have received. In March, 33 AGs [wrote](#) to e-commerce platforms, including Amazon, asking them to more rigorously monitor pricing by third-party retailers and refer price gouging complaints to the AGs for investigation.

The next day, with Amazon’s cooperation, Kentucky Attorney General Daniel Cameron [issued](#) subpoenas to several retailers regarding potential price gouging—triggering litigation that may limit AGs’ power to police e-commerce.

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Online Merchants Guild v. Cameron

In response to Cameron’s subpoenas, Online Merchants Guild, a trade association, sued in federal court, alleging that the AG’s investigations violated the Dormant Commerce Clause by applying Kentucky law to out-of-state offers and sales, and seeking to enjoin the investigations. On June 23, Judge Gregory Van Tatenhove, of the U.S. District Court for the Eastern District of Kentucky, [granted](#) Merchants Guild’s request for a preliminary injunction.

The court first accepted Merchants Guild’s organizational and associational standing arguments, noting that it has expended significant resources to help members understand state price gouging laws, which plaintiff asserts are vague and complex, against the backdrop of threatened AG enforcement.

The court then reviewed the facts to determine whether the Kentucky AG’s investigation by its very nature applied Kentucky law in violation of the Dormant Commerce Clause doctrine, under which state laws are unconstitutional if applied extraterritorially to commerce occurring wholly outside the state.

Observing that Amazon requires third-party retailers to set a single, nationwide price, rather than allowing state-specific prices, the court found Cameron’s “actions effectively dictate the price of items for sale on Amazon nationwide” and, “to avoid potential liability[,] Merchants Guild members must either ‘treat Kentucky prices as a national ceiling, or exit the national marketplace.’” Therefore, the court blocked the AG’s price gouging investigations “in connection with offers or sales” on Amazon.

Appellate Arguments and Broader Implications

Cameron has appealed to the Sixth Circuit, [asserting](#) that the district court misapplied the standing and extraterritoriality doctrines, and that its price gouging investigations represent a heartland exercise of state 10th Amendment police power. Thirty-one AGs filed an [amicus brief](#) in support of Cameron, arguing states have a strong interest in e-commerce price gouging enforcement, particularly given the pandemic-inspired surge in online shopping for essential items like personal protective equipment.

For several interrelated reasons, the implications of the district court’s decision, if upheld, are significant.

First, AGs believe the power to protect consumers from fraud is at the core of their mission and have expanded their role in policing e-commerce simultaneous with its growth. At the same time, state price gouging laws are often vague and occasionally conflict, creating significant complications for reputable businesses dealing with supply chain disruptions and rising costs.

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Second, while *Merchants Guild* concerns price gouging investigations, its logic can apply to AG investigations under state unfair and deceptive acts and practices statutes, which are often more open to interpretation—utilizing general legal terms like “unfair,” “deceptive,” and “abusive”—than state price gouging laws, which often establish explicit safe harbors and thresholds for violation. Indeed, Kentucky’s halted investigations were proceeding under both its price gouging and UDAP laws.

Third, approximately half of online sales take place on Amazon’s platform; moreover, its nationwide pricing model is not anomalous—other major e-commerce platforms have similar rules. At the same time, the Communications Decency Act generally immunizes e-commerce platforms from civil liability based on third-party content.

Third-party retailer immunity would place a broad swath of e-commerce activity beyond the reach of state law enforcement, leaving the Federal Trade Commission and US Department of Justice—which have been less aggressive in policing price gouging—as the sole enforcement entities.

In short, *Merchants Guild* presents a real test of state AG consumer protection power and will substantially impact the e-commerce regulatory landscape, particularly during emergencies. Online retailers and platforms should keep an eye on the Sixth Circuit appeal.

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