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Expert Analysis – Opinion

Companies Should Not Illegally Profit From Our Pandemic Pain

By **Daniel Karon** April 15, 2020, 4:30 PM EST

I hope this article finds you and your loved ones healthy, safe and well. These past weeks have been some of the most tumultuous and emotional we have ever endured. None of us has escaped the impact of the coronavirus outbreak.

Our response to this crisis has been extraordinary — not only for what it has required from us but for what it has revealed of us. Far from causing division, chaos and discord, this crisis, and the social distancing it has spawned, has showcased something profound and moving: our innate and deeply felt need to connect with each other.



Daniel Karon

Lawyers are uniquely privileged to play the role of connector.

We guide and counsel our clients when they are at their most vulnerable — including now, when we share that vulnerability. It's this responsibility and professional charge that moves us to make the world a better place by providing our clients the comfort and security that they crave.

But sadly, the counsel needed during this crisis has begun to change in an ugly way. Because at the same time as everyone focuses on stemming the COVID-19 tide, opportunistic companies have begun taking advantage of consumers and workers. A few examples will demonstrate my point.

Let's say you ordered hand sanitizer from an online shipping company. Though you normally would have expected to receive your item in a couple of days, the shipping company's terms and conditions explained that if the item ordered was out of stock or unavailable to ship immediately, the shipping time wouldn't begin until the shipping company received the item. That meant it would take a couple of business days after the shipping company's receipt of the hand sanitizer for it to reach you.

Accordingly, the shipping company advised that your order would take four weeks. But the shipping company then offered you the option of expediting your order to two weeks, that is, if you wanted to pay an extra \$50—over 200% of your order's \$25 purchase price. Anxious as you were, which anxiety the shipping company exploited, you expedited your order, and the shipping company gouged you for triple your order's purchase price.

Let's next say you tried to return a commercial airline ticket. Under normal circumstances, this airline's canceled tickets result in a credit good for a year with no change fee. You were hoping that because of your meeting's virus-related cancellation, the airline would refund your purchase price. But not only did the airline refuse your refund request (instead, giving you the traditional and expected credit), it also kept the \$25 fee that you paid for the privilege of early boarding.

Mind you, the airline had neither acted on nor otherwise committed any resources to your early boarding request. Yet the airline insisted on keeping your unused fee because its website said it could, despite the creation of your contract with the airline under far different circumstances.

What's more, let's say the airline carefully crafted its passenger contract of carriage to provide one-sided relief when a force majeure-related flight cancellation occurred — something like, "The airline shall not be liable for any failure or delay in operating any flight due to force majeure events, including, without limitation, acts of God."

According to this language, if a force majeure event caused the airline to cancel a flight, the airline wouldn't have to perform on the parties' contract. But if the same event caused a passenger to cancel, the passenger would still have to perform — i.e., pay the early boarding fee — even though the airline never acted upon, or omitted to act upon, the parties' agreement concerning this fee.

One more. Ohio (where I live) is one of the 43 states with stay-at-home orders. Ohio's order lists 12 types of businesses as open and six as closed.[1] One of the open businesses is “Car Services For Essential Travel Only.”

Let's say a small car wash in town is remaining open, telling its employees that it is an essential car service. Accordingly, the owner is demanding that the car wash employees attend work at what is almost certainly an illegal workplace. And because none of the car wash employees are members of a protected class (race, color, national origin, religion, sex [including pregnancy, childbirth and related medical conditions], disability, age [40 and older], citizenship status or genetic information), they're afraid to say anything and risk losing their jobs.

These are but a few examples of how merchants and employers can mistreat consumers and workers due to our shared crisis. When we come out the other end of this, if we have clients who wind up out of pocket, or who feel like they were abused at work, we need to ask these three questions:

- Does my client have rights that might provide a remedy?
- If so, what are my client's rights?
- How do I most effectively enforce my client's rights?

To better understand these questions — and their answers — let's channel them through my three hypotheticals.

Price-Gouging

Nearly every state has declared a state of emergency to fight coronavirus. In addition to making more resources available to residents, these declarations trigger additional protections for consumers in the form of anti-price gouging laws.

These laws automatically go into effect and prevent merchants from significantly increasing the cost of goods and services during a crisis. Indeed, a bipartisan group of attorneys general recently sent a letter to [Amazon](#), [Wal-Mart Stores Inc.](#), [Facebook Inc.](#) and [eBay Inc.](#), outlining steps they want the online platforms to take to end price gouging.[2]

More specifically, in New Jersey, a 10% price increase during an emergency would most likely be illegal. In Pennsylvania, a 20% price increase is presumed unlawful, although lower price increases could be illegal depending on the circumstances.

In states without anti-price gouging laws, state of emergency declarations can lead to emergency legislation. Maryland, for example, doesn't have an anti-price gouging law. Still, shortly after the governor declared a state of emergency, both houses of the general assembly introduced legislation aimed at limiting to 10% price increases in consumer goods and services.[3]

Turning to my shipping company example, which, let's say, involved a transaction between a consumer located in Cleveland, a seller located who-knows-where and the shipping company located (in some manner or another) in California, one of the first questions would be which state's law applies to a gouging claim.

Focusing on the shipping company (and assuming the efficacy of a gouging case against it), let's say its terms of use require that "the laws of the state of California, without regard to principles of conflict of laws, will govern these terms and conditions and any dispute of any sort that might arise between you and us."

This means you'd have to determine the strength (or not) of California's anti-price gouging law. And because this choice-of-law calculus wouldn't affect venue (unless circumscribed in the shipping company's terms and conditions), our consumer could still bring her claim in Cleveland where she lives. Of course, in a local, two-party price-gouging transaction (e.g., a gas stations' overcharge), troublesome choice-of-law issues wouldn't arise.

Force Majeure Clauses and the Impossibility of Performance

Because most arrangements that cost consumers money are rooted in contract (whether express or implied or in writing or orally), when potential wrongdoing occurs, the parties' contract — if any — is the first place to look. And if the agreement contains a force majeure clause (as our airline's agreement does), this clause will invariably excuse the merchant alone from performing.

Where a merchant insists on keeping all or part of its customers' money for a contract that cannot be performed, consumers shouldn't just walk away. They should consider whether a reading exists to support the bilateral application of the merchant's force majeure clause. (Sadly, yet expectedly, our airline did a commendable job ensuring that only it had rights under its force majeure clause.)

But if the contract doesn't contain a force majeure clause (and many won't), the common-law doctrine of impossibility of performance could prove a useful consumer tool. This doctrine tends to apply when the following conditions exist:

- The underlying event is neither party's fault;
- The event occurs after the contract's formation, and the parties did not foresee it; and
- Because of the event, it becomes physically or commercially impossible for the parties to fulfill the contract, or the event transforms the parties' obligation to perform into a radically different obligation than they initially undertook.

The doctrine of impossibility of performance results in the contract automatically ending, meaning the parties will no longer be bound to perform their future obligations. So when considering this doctrine's application to consumer transactions that don't (or do?) involve one-sided force majeure clauses — or, perhaps, don't involve written contracts at all — a means might exist, after all, for consumers to obtain full refunds, such as our airline's early boarding fee.

Statutory Protection for Workers

The first place to look when discussing this example is at a state's stay-at-home order. Let's consider Ohio's order and the troubling car wash situation. No sensible argument exists that would make a car wash an essential car-service business.

Thankfully, Ohio has a robust statutory scheme that affords generous rights to workers in circumstances resembling the car wash workers':

If an employee becomes aware ... of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employee's employer has authority to correct[,] the employee orally shall notify the employee's supervisor ... of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours ... , the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred.[4]

Employers may not take any disciplinary or retaliatory action against an employee for making a report. If an employer does, the employee may bring a lawsuit seeking "reinstatement ... to the same position ... held at the time of the disciplinary or retaliatory action."

The employee may also seek "the payment of back wages, full reinstatement of fringe benefits and seniority rights, ... the costs of litigation[,] reasonable attorney's fees, witness fees, and fees for experts who testify at trial." (Whether your state has a similar statute is something you must research.)

So the car wash situation seems to involve a rather straightforward answer. But what about someone who instead works at, say, an assisted-living facility that has a COVID-19 wing populated by half a dozen residents who require faculty intervention?

The health care facility is a properly operating business, and it involves essential requirements and expectations. What if a male worker is not a member of a protected class, meaning he can't leverage that safeguard? Granted, he could talk to his supervisor about sick time or vacation days, but that wouldn't depict him as much of a team player.

Easily, this example is the most challenging and uncomfortable employment situation I've considered — primarily because I don't discern that the assisted-living facility is operating illegally. My heart simply goes out to its employees, as it does to our other frontline health care, supply chain and law enforcement heroes.

Final Thoughts

Much remains uncertain, but one thing is for sure: This crisis will pass. Our nation and its communities will recover, and regular commerce will resume. But until then, we — as lawyers, neighbors and friends — must remain vigilant to ensure that the unscrupulous among us do not profiteer our shared suffering.

In some combination or another, all of us are consumers, employers or employees. Let's be mindful to treat each other as we'd want to be treated. The world is hurting. We need to pull together and avoid making matters worse by exploiting its pain. By committing to the rule of law, I have every confidence we can do that.

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[1] https://images.ctfassets.net/plyq12u1bv8a/77WxZSWZkQYgmPhVn0WvUT/ca15231e3cab134812a0ee372f287007/C213_Shelter_In_Place_EN_LandingPage_032020_0249-01.jpg.

[2] <https://www.reuters.com/article/us-health-coronavirus-retailers-states/do-more-to-stop-coronavirus-price-gouging-us-states-tell-amazon-walmart-facebook-idUSKBN21C2NF>.

[3] <https://legiscan.com/MD/drafts/SB1080/2020>.

[4] <http://codes.ohio.gov/orc/4113.52>.