Amy Welborn*

Price Gouging

The federal government is currently considering a price gouging law. Only 34 states have price gouging laws. The Texas Deceptive Trade Practices Consumer Protection Act states that "price gouging" is taking advantage of a disaster declared by the governor or President by "selling or leasing fuel, food, medicine, lodging, building materials, construction tools or another necessity at an exorbitant or excessive price[,] or 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[.]"[1] While other states have rules regarding deviation of price, Texas does not. Some states hold that a deviation of as little as 10% is excessive. As such, the determination of if something is considered price gouging would be a question of fact, making a summary judgment on this issue unlikely.

Price gouging is illegal during a disaster period, which is defined as the earlier of (a) the date the disaster occurs, (b) the date the Governor declares a disaster, or (c) the date of declaration of a disaster by the President, if any part of Texas is included in a federal disaster area.

Currently, parts of West Texas were declared a disaster very early on for the COVID-19 situation, due to the cost of oil dropping.

Complaints for price gouging can be filed with the Texas Attorney General and can result in fines, and merchants can be required to reimburse the customers. Individuals can bring single price-gouging claims, and class actions can also be filed.

Unfortunately, while a store may not be price gouging, any increase of price on an item can be argued as such. If a supplier increased the cost or an item had been unusually discounted in the weeks before, while the claim is defensible, it would have to be litigated.

False Claims/Product Liability

We have already seen individuals like Jim Bakker and Alex Jones get sued or have complaints against them for making false claims regarding products that they are selling. Bakker alleged his product could cure COVID-19, and Jones alleged his toothpaste killed all COVID viruses. Retailers will need to ensure that the vendors that they are purchasing products from are not making outlandish claims that could result in downstream liability. The elements under the federal Lanham Act and common law are: (1) a false or misleading statement of fact; (2) used in a commercial advertising or promotion; that (3) deceives or is likely to deceive in a material way; and (4) has caused or is likely to cause competitive or other injury to the plaintiff.

If there are products, such as hand sanitizer or soap sold by a retailer, that are claiming or making what a consumer believes to be a false claim or product liability suit regarding COVID-19, the retailer could also be sued. Further, lawsuits will also be filed stating that products were used and failed to prevent a consumer from falling ill. If masks are sold at a retailer, consumers may claim that they fell ill wearing them, as they failed to provide protection.

There is no evidence to support COVID-19 can be transmitted via food or food packaging. Further, like all viruses, COVID-19 cannot grow in food. There is also some evidence that COVID-19 does not survive

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well in the stomach due to the stomach's acid content. Regardless, safety measures should still be taken to reduce the risk of a product liability lawsuit. Restaurants, hotels, grocery stores, and other retailers that sell food should be very careful to ensure that the food is not contaminated. Grocery stores must shut down their bulk food items to prevent people from sneezing or otherwise spreading the virus onto the food items. No food should be displayed openly. There should be added protections to ensure that the persons preparing food are healthy.

Membership/Subscription/Fee Claims

Many gyms, health clubs, and other membership-based retailers closed their doors before being required to do so by a local or state order. Others were forced to close upon the entry of an order.

A class action lawsuit has been filed in the U.S. District Court for the District of Massachusetts by members of the Boston Sports Club against its parent company, Town Sports International Holdings, Inc., alleging that the members are being charged their monthly fees when the facility is closed. The lawsuit claims the club is "charging [monthly] membership fees without being able to provide access to its facilities."[2] The members allege the actions are "unconscionable corporate avarice."[3] The company closed its locations in Massachusetts in mid-March. The parties are seeking compensatory relief, injunctive relief, and attorney fees. The company has faced scrutiny from the attorney generals in New York, Pennsylvania, and the District of Columbia, other states in which they operate clubs.

A class action lawsuit has been brought against Liberty University, alleging that the university has been profiting off the pandemic by reducing student services, but not refunding student fees paid for the services. The university, which has kept its dorms open, has moved its classes online. The university has cancelled student activities, closed its recreation centers, and suspended team sports. The lawsuit claims that the University is offering a credit toward the fall semester's tuition if the student selected to receive it by March 28, 2020, but if a student does not intend to return, the student's fees were not returned. The lawsuit alleges that the school stated it would remain open as a pretext to keep the student fees. Drexel University and the University of Miami have had similar lawsuits for student fees filed against them.

Premises Liability Claims

Consumers that visited a retail location and then came down with COVID-19 may bring claims for premises liability. These claims will argue that the retailer did not take proper precautions to ensure the safety of the invitee and that the store itself was a hazardous condition. Of course, the plaintiff will have to prove that it was an unreasonably hazardous condition and that the retailer knew or should have known it existed. The plaintiff may also claim that a retailer failed to warn of a hazardous condition when allowing the consumer to shop in the store or even when bringing merchandise to a vehicle. Plaintiffs may also claim that the retailer failed to make the premises safe by using proper cleaning and safety procedures. Retailers will, of course, be able to argue "act of god." Further, the plaintiff must prove that s/he contracted COVID-19 from the store. This will be very difficult to prove.

Plaintiffs may allege negligence per se if local, state, or national orders were not followed. For example, if a local order limits the number of persons that can be in a particular area and the store allows a group to congregate inside or outside, this could be seen as a violation of the order. If someone gets sick from an individual in that group, a claim could potentially be brought against the retailer.

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One way to prepare for these types of claims is to save all the footage of local news stories showing people outside. Also, save stories showing the dates that different orders went into effect. In Texas, the governor has not required a quarantine in place, and it is done by local government, as such orders have gone into effect on different dates. Also, be sure and keep track of social media and other places were individuals are posting photos of your stores. For example, if you have a policy requiring person to line up 6 feet apart and that is not being done, a photo of this can be used to show that procedures were not being followed.

The safety measures implemented in a store can be Catch 22s. If you do not have the procedures, you are not protecting the customers, but if you do, they can be used against you when not followed or can be argued to be insufficient. Not unlike policies regarding removing items for high shelves, the policies are in place to protect the customer, but that does not mean the customer will follow them. Unfortunately, here the issues caused by one customer can be the source of litigation for a multitude of potential plaintiffs. If you see an egregious breach of a policy, it would be best to note it as an incident on an incident report. That will protect you from any argument that the company was complacent or allowed persons not to comply with policies and procedures.

Princess Cruise Lines has already been sued for negligence and gross negligence by passengers that were onboard the ship with a significant outbreak. A Missouri couple, Debra and Michael Dalton, allege that the cruise line failed to safeguard them from exposure during a cruise to Hawaii. The suit alleges that they "were simply asked to fill out a piece of paper confirming that they were not sick" in order to board the ship.[4] The suit alleges there was no "proper screening protocol in place to minimize the risk of exposure of the disease."[5] The cruise line also has been sued by the passengers of a ship quarantined off the coast of California for failing to provide for the safety of its passengers.

Princess Cruise Lines will likely argue that the plaintiffs have waived the right to bring these claims because they signed a waiver before boarding a ship, which would have released the cruise line. This waiver argument will be utilized in other cases as they evolve. Further, the use of waivers will become more and more prominent. Before, waivers were used when people went skiing, played paint ball, and did other activities that could lead to injury. Now, going into a simple retail establishment could potentially cause death. Hotels, resorts, and many other establishments will likely require patrons to sign a waiver. However, a waiver argument is only as strong as the waiver itself. And there are bars in most states preventing the waiver of the negligence and/or gross negligence of the establishment itself. Therefore, a waiver will not typically deter litigation.

An Arizona couple, James and Kelea Nevis, have brought suit against Costa Cruises, a Carnival Cruise company, alleging that crew members knew a passenger had COVID-19 symptoms but did not tell the other guests to isolate themselves to their rooms. The Nevises tested positive for COVID-19 after they docked. The Nevises' lawyer has argued that the waivers are void when the boat docks at a U.S. port.

Additionally, there will be arguments that COVID-19 was in the plumbing. In 2003, SARS was found to be transmitted though sewage pipes. During the SARS outbreak, there were more than 30 people infected and 42 deaths in one apartment complex building due to transmission through plumbing lines. In one case, COVID-19 was found to spread through a housing building. It is suspected to have traveled via the elevator button or the plumbing. The first two patients in the building lived above and below each other. It has been speculated that the virus could travel through a vent pipe, U-trap, or dry pipes. Additionally, a proper ventilation system should be present.

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The CDC has confirmed that fecal transmission is possible. It is important to keep public restrooms clean and to ensure that proper logs of cleanings are maintained. Customers should be reminded to notify the establishment if there is a problem with a public restroom.

Negligence Claims

Negligence claims could arise from a specific act of an employee. If an employee knowingly comes to work with COVID-19 and has let his/her employer know that s/he is not feeling well, this could be considered negligence and respondeat superior. Further, if proper cleaning is not done daily, this could be seen as a negligent act. Businesses that do not follow proper social distancing policies could also be found negligent. For example, handing a customer a basket that has not been sanitized, touching a guest during an interaction with an employee, or seating customers near one another could all be seen as negligent acts.

Wrongful Death

Wrongful death claims will be filed by the families of those that die from COVID-19. In Cook County, Illinois a family member of a Walmart employee that had died of COVID-19 has brought a case against Walmart.[6] Wando Evans had worked as an overnight stocker for Walmart for 15 years. He told his store management that he had symptoms consistent with the virus two weeks before, but claims he was ignored. He was sent home sick by his manager two days before his death. The lawsuit alleges that Walmart was negligent in failing to implement and enforce social distancing guidelines and in failing to properly clean and sanitize the store. The lawsuit alleges that because Walmart is a high-volume retailer, it has a responsibility to take additional precautions to protect employees and customers. The suit alleges that Walmart had a duty to provide the employees with personal protective equipment, implement social distancing, and to prevent exposed employees from working.

In late April, suit was brought by Susan and Michael Dorety of Texas because Mr. Dorety contracted COVID-19 after boarding a Princess Cruise Line ship on February 21 and later died. The suit claims that the cruise line had just discharged some infected passengers and took on a new group of passengers without properly cleaning the ship.

Workers Compensation

Many workers will file workers compensation claims for medical bills and loss of income related to COVID-19. However, employers should expect that plaintiffs will also allege gross negligence so as to remove the claims for the limitations put on workers compensation recoveries.

OSHA Litigation

The Occupational Safety and Health Act of 1970 requires under the General Duty Clause that an employer provide a workplace that is free from recognized hazards that are likely to cause death or serious physical harm to the employees.

While employees may allege that they got sick at their place of employment, it will be difficult to prove where a person was exposed to COVID-19.

In the case against Walmart, the attorney for the employee's family has also requested that the Occupational Safety and Health Administration investigate Walmart.

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Hospitality Litigation

Hotels, event centers, catering companies, and other hospitality and event related companies will see numerous claims over breach of contract. The cancelling of events will result in multiple litigation opportunities. The individuals scheduling an event can sue regarding the rescheduling, the cancellation policy, or to seek a full refund. The sub-contractors and other vendors may still require the hotel to fulfill their contracts, regardless of if the event is moving forward.

While many hotels have completely closed, others remain open. When a hotel remains open, the hotel should take extra precautions to show that extra cleanings and wipe-downs are occurring. This should be recorded daily. Additionally, records of cleaning supplies purchased and used should be recorded to prove that the work was actually performed.

After every customer, a hotel room should be thoroughly sanitized, all linens washed in hot water, and the room cleaned with bleach. If a hotel is not full, every effort should be made to put guests on different floors and keep their rooms as far apart as possible.

Supply Chain Litigation

Many suppliers are having difficulty getting products. Manufacturers are having difficulty obtaining materials to produce products. Additionally, many factories and companies have closed down or halted production due to the quarantine-in-place orders preventing employees from working or the lack of materials. Your manufacturers and suppliers may not be able to provide products for which a company had contracted. This can result in downstream litigation. If an item is promised to a customer on a specific date and cannot be provided due to a vendor issue, the consumer could bring a case against the retailer. The problems with supply chain will continue even after the shelter-in-place is lifted. As such, a hotel may not be able to provide the wine promised for a wedding, even if the wedding can proceed, due to the vineyard being closed.

Securities Litigation

Some shareholder cases have already been filed against companies like Norwegian Cruise Lines, alleging false and misleading claims in SEC filings which caused the stock to be over-inflated. When the markets crashed, companies lost significant value. Shareholders will attempt to allege that this is due to the companies being overvalued prior to the crash, or that the company was not significantly prepared and caused the investors financial damage.

Insurance Litigation

There will also be suits by retailers and hospitality groups against their insurance carriers. Many business interruption policies exclude or do not specifically include pandemics.

Six Chicago bar and restaurant groups have filed a federal lawsuit in the U.S. District Court for the Northern District of Illinois against their carrier, Society Insurance Company, accusing it of wrongfully denying claims related to business interruption insurance. In Napa County, French Laundry Partners, LP has brought suit against Hartford Fire Insurance Company and other entities. Similar claims are being brought in Florida and will soon be filed in all states. The insurance policies all claim that there must be physical property loss in order for the business interruption coverage to apply. The plaintiffs argue that

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COVID-19 "physically infects and stays on surfaces of objects or materials."[7] The plaintiffs also allege bad faith for the blanket denials of COVID-19 claims. In Illinois and Florida, the plaintiffs are seeking a class action on behalf of all the restaurant and bar owners.

*Amy Welborn primarily practices litigation as a partner at Hawkins Parnell & Young LLP. She can be reached at awelborn@hpylaw.com.

[1] Tex. Bus and Commerce Code Sec. 17.46(b)(27).
[2] Class Action Complaint & Request for a Preliminary Injunction & Declaratory Relief, *Delvecchio v. Township Sports Int'l, LLC*, Case 1:20-cv-10666, at 7 (D. Mass., filed Apr. 5, 2020).
[3] *Id.* at 1.
[4] Plaintiffs' Original Complaint and Jury Demand, *Dalton v. Princess Cruise Lines Ltd.*, Case 2:20-cv-02458-RGK-SK, at 5, ¶16 (C.D. Cal., filed Mar. 13, 2020).
[5] *Id.* at ¶15.
[6] *See* Complaint at Law, *Evans v. Walmart, Inc.*, Case No. 2020L003938 (Cir. Ct., Cook Cty., Ill., filed Apr. 6, 2020)
[7] Complaint for Declaratory Relief, *French Laundry Partners LP v. Hartford Fire Ins. Co.*, Case No. 20CV000397, at 3, ¶20 (Sup. Ct. Cal., Napa Cty., filed Jun. 1, 2020).

Wellness | *Mindfulness and Meditation – What is It and Why Do Attorneys Need It the Most?*

Christine Rudy*

Stop. Read the next two sentences and then close your eyes. Take a deep inhale and exhale, and notice the sensations in your body, and stay here for three breaths. Then open your eyes. Congratulations! You just engaged in a mindfulness exercise.

Stress is everywhere. Everyone encounters some form of stress each day. Stress may wake you up in the morning and keep you up at night. It shows up in traffic, with family and friends, and -- especially for attorneys -- at work. Stress also finds its best friend, anxiety, and the two can overwhelm an individual, even manifesting physically in our bodies. Oh yeah, and lest you forget, we are in a GLOBAL PANDEMIC! So collectively, we are all experiencing some form of fascinating, yet terrifying, universal anxiety.

Sadly, while we cannot eliminate all the stress of our world, we can change our reactivity (while adding more nonreactivity) to stress. Mindfulness and meditation are buzz words we hear regularly. The concepts are broad-reaching. So…what is mindfulness? What is meditation? I have to sit in silence and turn my brain off? I am an attorney. My mind is literally trained to analyze non-stop. You are telling me to turn it off for 20 minutes?! An HOUR!? How is that possible? All great questions. While this article will never in its limited scope comprehensively address the topics of mindfulness and meditation, my hope is that I pique your interest, such that you at least *attempt* some form of mindfulness and/or meditation practice. Who knows, you may actually find a practice you like and incorporate same into your routine.

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