

May 15, 2020

We find ourselves in a world where a public health crisis has led to the loss of millions of jobs, the closure of thousands of businesses, and a significant reduction in domestic and global commerce, not to mention human tragedy of epic proportions. The public demands a quick solution to both the economic and public health crises. The demands may lead to questions such as whether normal competition rules, such as those that affect competitor collaboration, be suspended, or what should be the role of the laws of supply and demand in setting prices. The implication is that in times of an emergency, the normal rules don't serve us well. While emergencies require a swift and well-informed response, it is critical

31 See <https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement>

32 Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2. Violations of the Sherman Antitrust Act constitute unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C. §45.

necessary to manufacture each product. Generics had entered into exclusive licenses that allegedly deprived Mylan's competitors of the API for lorazepam and clorazepate. Without access to the API for lorazepam or clorazepate tablets, the FTC alleged that Mylan's competitors could not effectively compete for the sale of either product. Therefore, according to the FTC, Mylan could and did raise prices approximately 2000-3000% depending on the bottle size and strength. The FTC ultimately reached a \$100 million settlement with Mylan, an anticompetitive conduct that eliminates price competition and thereby results in high prices is within the reach of the U.S. competition agencies.

Tools beyond antitrust and consumer protection law may have a role to play to address market failures that may occur during a national crisis. When such tools are used, the challenge is to use them in way that will protect consumers without undermining incentives that ultimately will bring new supply into the market. Although there is no specific federal price gouging prohibition, the U.S. government can invoke specific provisions of the Defense Production Act to address excessive pricing or hoarding in exceptional cases, which may include natural disasters. The Defense Production Act, which dates back to the Korean War, authorizes the President to mandate contracts necessary for national defense and/or prevent hoarding or charging excessive prices. This statute has been invoked in the current situation with regard to designated health and medical resources. On March 23, the President issued Executive Order 13910, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, pursuant to Section 102 of the Defense Production Act.<sup>3</sup> Executive

er, was unprepared and multiple fatal crashes ensued -  
sulting furor allowed the airline industry, which claimed to  
need protection from harmful competition from new entrants,  
to press Congress to enact a pervasive regulatory scheme in  
1938 that regulated entry, price, and routes. For the next 40  
years, airlines could compete on the basis of food service and  
schedules, but very little else, resulting in limited route options