

Litigation and Enforcement in the Era of the Coronavirus Pandemic

As society changes in unexpected ways due to the coronavirus outbreak, litigation and enforcement issues have come into the spotlight and become more important than ever. In this Litigation and Enforcement issue, we take a look at how COVID-19 is impacting healthcare markets and law and enforcement.

Uncertainty From Outbreak Impacts Court Cases and Law Enforcement

As the COVID-19 pandemic rages on globally, both essential and nonessential industries have been affected in unprecedented ways. Across the country, legislatures and courthouses have postponed or indefinitely suspended activities due to the spread of the coronavirus, putting lawmaking and court cases on hold. As court closures resonate across the nation, even the nation's highest court is not immune. The Supreme Court announced that it will delay oral arguments of dozens of cases scheduled for March and April, putting those cases in limbo while potentially changing the timeline of many other cases on its docket.

ERISA Preemption of State PBM Laws

One such case is *Rutledge v. PCMA*, which The Source has been closely tracking. In January, following a long and contentious [history](#) of lawsuits challenging pharmacy benefit manager (PBM) laws from various states and subsequent inconsistent circuit court rulings, the Supreme Court granted review of the issue of Employee Retirement Income Security Act (ERISA) preemption

in the Arkansas law. As the case heats up, a bipartisan group of 46 attorneys general and industry groups filed [amicus briefs](#) in support of the law last month. However, the adjudication timeline of the case now remains uncertain, as oral arguments originally scheduled for April 27 are [now postponed](#) to an unknown date, leaving other similar cases pending in North Dakota and Oklahoma.

Immediately following the postponement and citing the risk of “indefinite abeyance,” Oklahoma requested to enforce a similar PBM law, the Patient’s Right to Pharmacy Choice Act (HB 2632), which was suspended due to a pending lawsuit from PCMA, [\[1\]](#) the same group that challenged the Arkansas law. The Oklahoma Insurance Department [filed a motion](#) in federal court to lift the stay in the lawsuit, which was agreed upon when the Supreme Court granted certiorari of the Arkansas case. The agency further indicated that amidst the coronavirus crisis and the uncertainty that it brings, it “needs all the regulatory tools at its disposal,” as the agency had received preliminary reports of PBMs abusing their market power, and “the state cannot wait until small and rural pharmacies are shuttered by PBM practices to begin investigations and enforcement.” [\[2\]](#)

Future of the Affordable Care Act

The delay in the Supreme Court docket is also likely to affect the [Affordable Care Act \(ACA\) lawsuit](#). In January, the Supreme Court denied the motion for an expedited review of the 5th Circuit’s decision on the law’s severability, in hopes to reduce prolonged uncertainty of the ACA’s future. However, in the latest update last month, the high court greenlighted its review of the 5th Circuit’s decision, albeit for the next term starting in fall 2020. The Supreme Court review would considerably fast-track the case by bypassing the lower court remand.

While many expect the case to be heard in the fall and decided by the end of the next term in June 2021, the pandemic places this timeline into significant question. The Supreme Court recently [announced](#) it would extend the traditional 90-day deadline to file certiorari petitions to 150 days “in light of the ongoing public health concerns relating to COVID-19,” while the parties jointly requested to extend the time to file briefs in the case to August 18, 2020. While the timeline of the ACA litigation remains uncertain, the importance of the ACA exchange plans to those who have recently lost their jobs may help further solidify the law’s place in American society, which could alter the course of the litigation.

Agencies Step Up Enforcement of Medical Supplies Price Gouging

One issue that’s taken center stage in this pandemic is price gouging of medical supplies and personal protective equipment (PPE). From state to federal agencies, enforcement against price fixing and anticompetitive behavior has become more important than ever.

State Regulation and Enforcement

In response to the recent wave of online retailers selling health products such as N95 masks and disinfectants at exorbitant prices, state governments have stepped up their enforcement efforts targeting such practices. Many states have statutes targeting price gouging, particularly during a state of emergency or disaster. As governors across the country declare a state of emergency in their state, state agencies and regulators are kicking enforcement into high gear.

In addition to opening new consumer complaint hotlines and online portals to encourage reports of unfair practice, 33 state attorneys general from states including California, New York, and Massachusetts have called on companies, such as [Amazon](#) and [Walmart](#), to crack down on price gouging behavior.

Moreover, states such as Washington and Wisconsin have issued cease-and-desist letters to online sellers based in their state, threatening lawsuits under state consumer protection and price gouging laws, as well as penalties of up to \$2,000 per violation. Other states like Illinois are amending state laws or issuing executive orders to extend the state's authority to regulate price gouging of goods to cover medical supplies and products.

White House and Congressional Response

Amidst a flurry of state activities, the federal government has also jumped into action. While many states have statutes targeting price gouging, there is no specific federal law that addresses such conduct. The COVID-19 crisis could change this. In late March, the White House issued an [executive order](#) to prohibit stockpiling of medical and health supplies, including medications, ventilators, and PPE, and selling them at excessive prices during the pandemic. Congress also introduced a pair of bills, the COVID-19 Price Gouging Prevention Act and the Disaster and Emergency Pricing Abuse Prevention Act, while urging both the [Department of Justice](#) and the [Federal Trade Commission](#) to vigorously enforce the executive order against price gouging.

While these special times present increased opportunities for anticompetitive behavior, they also increase scrutiny of such practices, as federal and state governments enhance monitoring and encourage consumer reporting of misconduct, followed up by new laws and more aggressive enforcement. The shift in landscape created by the pandemic may have lasting impacts and create legacies that could last beyond the current crisis, hopefully as a change for the better for our society.

[\[1\]](#) Pharmaceutical Care Management Association v. Mulready et

al., No. 5:19-cv-00977.

[\[2\]](#) Danielle Nichole Smith, *Okla. Wants To Enforce PBM Law Amid COVID-19 Crisis*, Law360, Apr. 8, 2020.