January 28, 2026

Notice of Rule Adoption

13 N.Y.C.R.R. § 600.4

Price Gouging: Unfair Leverage

Contents

Preliminary Note

On June 6, 2020, the Legislature approved and the Governor signed Chapter 90 of the Laws of 2020 (S. 8191), which amended General Business Law § 396-r, the general price gouging statute for New York State, to insert into G.B.L. § 396-r a new subdivision (5) reading "The attorney general may promulgate such rules and regulations as are necessary to effectuate and enforce the provisions of this section."

Pursuant to this grant of authority, on March 4, 2022, the Attorney General issued an advance notice of proposed rulemaking seeking public comment on new rules to effectuate and enforce the price gouging law.[1] In response, the Attorney General received 65 comments from advocacy groups, consumers, industry representatives, and academics ("ANPRM Comments").[2]

The majority of the ANPRM Comments addressed individual instances of possible price gouging, including comments on gas, milk, cable, and car dealerships. Of the more prescriptive comments, advocacy groups representing retail, including the New York Association of Convenience Stores and the National Supermarket Association, requested more clarity for terms like "unconscionably excessive" and a recognition that retailers are often accused of price gouging when their own costs are increasing.

Three economic justice advocacy groups and one economist (American Economic Liberties Project, Groundwork Collaborative, the Institute for Local Self Reliance, and Professor Hal Singer) submitted comments suggesting that market concentration and large corporations are a key driver of price gouging. Law Professor Luke Herrine submitted a comment concerning the fair price logic underpinning price gouging laws. Law Professor Ramsi Woodcock submitted a comment concerning the economic logic of price gouging laws.

The Consumer Brand Association requested clarity defining "unfair leverage" and other terms it argued were susceptible to different interpretations, and a recognition of causes of inflation that, it asserted, may not be price gouging. The American Trucking Associates and an aged care concern submitted comments particular to their industries.

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[1] Press Release, *Attorney General James Launches Rulemaking Process to Combat Illegal Price Gouging and Corporate Greed*, Office of the New York State Attorney General (March 4, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-launches-rulemaking-process-combat-illegal-price-0.

[2] These comments are collected and published on the Attorney General's website on the same page hosting this Notice. For ease of reference, citations to advance notice comments will include a pincite to this document in the form "ANPRM Comments at XX."

Following careful consideration of these comments and with reference to the Office of the Attorney General ("OAG")'s extensive experience in administration of the statute, the Attorney General announced on March 2, 2023, her intention to publish in the State Register Notices of Proposed Rulemaking proposing seven rules effectuating and enforcing the price gouging statute.[3] At the time of the announcement the Attorney General also published a regulatory impact statement for each rule, preceded by a preamble setting out general considerations applicable to all rules ("First NPRMs").[4] The Notices of Proposed Rulemaking were published in the State Register on March 22, 2023.[5]

The Attorney General received approximately 40 comments on the first round of proposals during the comment period.[6] Following consideration of the comments made in the First NPRMs, the Attorney General elected to issue seven new Notices of Proposed Rulemaking ("Second NPRMs") on largely the same topics as the First NPRMs, subject to the standard 60-day comment period for new Notices of Proposed Rulemaking.[7] The Second NPRMs attracted 32 comments, of which 20 were comments from or on behalf of various businesses or groups representing businesses, 11 were submitted by ride-hail drivers, and one was submitted by an academic economist.[8]

Following consideration of the comments, set out in the Assessment of Public Comment appended to this rulemaking, the Attorney General elected to make substantial revisions to the rule concerning the determination of pre-disruption prices, withdraw the rule concerning geographic scope and pre-disruption prices, propose a new rule concerning commencement of weather-related disruptions, and adopt the remaining rules with non-substantial changes. The Attorney General intends to undertake a fresh rulemaking on pre-

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[3] Press Release, *Attorney General James Announces Price Gouging Rules to Protect Consumers and Small Businesses*, Office of the New York State Attorney General (March 2, 2023), https://ag.ny.gov/press-release/2023/attorney-general-james-announces-price-gouging-rules-protect-consumers-and-small.

[4] Office of the Attorney General, Notice of Proposed Rulemaking – Price Gouging, https://ag.ny.gov/sites/default/files/price_gouging_rulemaking_final_for_sapa.pdf ("First NPRMs")

[5] N.Y. St. Reg., March 22, 2023 at 24-29, *available at* https://dos.ny.gov/system/files/documents/2023/03/032223.pdf. The State Register's content is identical to that of the NPRM Preamble, save that footnotes were converted to main text (as the State Register format system does not accommodate footnotes) and a clerical error respecting rule numbering was corrected. For ease of reference, all citations to the Notice of Proposed Rulemaking will be to the First NPRMs, linked to in footnote 4, in the format First NPRMs at XX.

[6] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the First NPRMs will include a pincite to this document in the form First NPRM Comments at XX.

[7] N.Y. St. Reg., Feb. 12, 2025 at 2-15, *available at* https://dos.ny.gov/system/files/documents/2025/02/021225.pdf.

[8] These comments were collected and published on the Attorney General's website (https://ag.ny.gov/rulemaking-laws-price-gouging). For ease of reference, citations to the comments received on the Second NPRMs will include a pincite to this document in the form Second NPRM Comments at XX.

disruption prices in the near future, but will submit that rulemaking as a standard notice of proposed rulemaking rather than a revision of the previous notice.

A table of actions is overleaf:

Action	Rule	Second NPRM	First NPRM
Adopted	600.1, 600.2 & 600.10: Definitions, Roadmap, Severability	LAW-06-25-00008-P	*None, includes definitions common to all rules*
Proposed New Rule	600.3: Weather-Related Disruptions	*None, new rule*	*None, new rule*
Adopted	600.4: Unfair Leverage Examples	LAW-06-25-00007-P	Rule 4 (LAW-12-23-0009-P)
Adopted	600.5: Unfair Leverage of Market Position	LAW-06-25-00006-P	Rule 5 (LAW-12-23-0010-P)
Withdrawn, new proposal soon	600.6: Pre-Disruption Price Determination/Dynamic Pricing	LAW-06-25-00005-P	Rule 7 (LAW-12-23-0012-P)
Adopted	600.7: 10% Gross Disparity Threshold	LAW-06-25-00010-P	Rule 1 (LAW-12-23-0006-P)
Adopted	600.8: New Essential Products	LAW-06-25-00009-P	Rule 3 (LAW-12-23-0008-P)
Adopted	600.9: Cost Definition and Allocation Methods	LAW-06-25-00012-P	Rule 2 (LAW-12-23-0007-P)
Withdrawn	600.9: Geographic Scope	LAW-06-25-00011-P	Rule 6 (LAW-12-23-0011-P)

Each one of these adoptions, proposals, and revisions is a separate rulemaking. Although certain rules contain cross-references, these are solely for reader convenience and do not reflect a determination that any one or more of the proposals stands or falls on the strength of any other.

Rule Text

Action: Add New Part 600.4 to Title 13 N.Y.C.R.R.

Statutory Authority: General Business Law § 396-r(5)

Subject: Price Gouging

Purpose: Clarify circumstances that could constitute unfair leverage or unconscionable means

Text of rule:

Section 600.4. Examples of Unfair Leverage or Unconscionable Means.

(a) *In General*. A seller charges an unconscionably excessive price in a sale, pursuant to General Business Law § 396-r(3)(a), if, in the course of a scrutinized sale, the seller exercises either unfair leverage, unconscionable means, or both (whether or not accompanied by an amount of excess in price that is unconscionably extreme). The exercise of unfair leverage or unconscionable means includes, but is not limited to, the conduct described in subdivisions (b) through (f) of this rule.

(b) *Deceptive Pricing*. A seller uses unfair leverage or unconscionable means if the seller engages in deceptive acts or practices that serve to misrepresent or obscure the total price of the essential product.

(c) *Conditioning the Sale of Essential Products on Agreement to Excessively Burdensome Payment Terms*. A seller uses unfair leverage or unconscionable means if, during an abnormal disruption of the market, the seller conditions the sale of the essential product on a consumer's agreement to excessively burdensome payment terms, including but not limited to a liquidated damages provision that is unenforceable as a penalty, the payment of usurious interest, or, if the essential product is to be paid for via loan or through a retail installment contract, providing as security for the loan assets whose value grossly exceeds the pre-disruption price of the essential product.

(d) *Refusal to Honor Contracted-For Prices*. A seller is presumed to use unfair leverage or unconscionable means if the scrutinized sale is to be made pursuant to a contract agreed with the buyer prior to the onset of the abnormal disruption of the market, the buyer is a consumer, and the seller threatens to withhold, or withholds, performance lawfully due under the contract unless the buyer consents to pay more than the existing contract provides the buyer must pay. For purposes of this subdivision (d):

(1) A contract is modified "so as to increase the price the contract provides the buyer

must pay," if, at the time of the modification, it is more likely than not that the modified contract would cause the buyer to pay more for the essential product than the buyer would pay under the unmodified contract.

(2) The conduct specified in this subdivision (d) constitutes unfair leverage or unconscionable means even if the buyer acquiesces to the seller's threat to withhold performance, ratifies the change in price, agrees to waive subsequent remedies, could obtain the essential products from another source of supply, would not be irreparably harmed by the withholding of performance, or any combination of the foregoing.

(3) A seller may rebut the presumption established in this subdivision (d) with evidence that, as provided in 13 N.Y.C.R.R. § 600.9, the demanded increase in the amount charged (i) preserves the margin of profit that the seller received for the same goods and services prior to the abnormal disruption of the market or (ii) is necessary to recover additional costs not within the control of the seller that were imposed on the seller for the goods or services.

(e) *High Pressure Sales Tactics*. A seller uses unfair leverage or unconscionable means if, during an abnormal disruption of the market, a seller sells an essential product to a consumer using high-pressure sales tactics, including but not limited to:

(1) tactics that materially diminish the buyer's ability to comparison shop or adequately review the terms of the sale agreement, including but not limited to the use or threat of violence, the use of obscene or abusive language, or the physical confinement of the buyer; or,

(2) demanding that the buyer not communicate with, or respond to lawful process issued by, the Attorney General or any other law enforcement agent or agency; or,

(3) any act which would cause the resulting contract of sale to be void on the grounds of undue influence.

(f) *Unfair Leverage of Market Position*. A seller uses unfair leverage or unconscionable means if, during an abnormal disruption of the market, the seller engages in unfair leverage of market position, as provided by 13 N.Y.C.R.R. § 600.5.

Regulatory Impact Statement

Statutory Authority

G.B.L. § 396-r(5), authorizes the Attorney General to promulgate rules to effectuate and enforce the price gouging statute.

Legislative Objectives

The primary objective of the price gouging statute, and thus the regulations promulgated pursuant to G.B.L. § 396-r(5), is to protect the public from firms that profiteer off market disruptions by increasing prices. The objectives of the rules are to ensure the public, business, and enforcers have guideposts of behavior that constitutes price gouging and clarify the grounds for the affirmative defense in a *prima facie* case.

The Attorney General has concluded that the rules are necessary because they are the most effective means available to educate the public as to what constitutes price gouging, to deter future price gouging, to protect New Yorkers from profiteering, and to effectuate the Legislature's goals.

Statutory History

New York passed General Business Law § 396-r, the first anti-price gouging statute of its kind in the nation, in 1979.[9] G.B.L. § 396-r was enacted in response to price spikes following heating oil shortages in the winter of 1978–1979.[10] The Legislature imposed civil penalties on merchants charging unconscionably excessive prices for essential goods during an abnormal disruption of the market.[11]

The statute originally established that an unconscionably excessive price would be established *prima facie* when, during a disruption, the price in the scrutinized sale was either an amount that represented a gross disparity from the pre-disruption price, or an amount that grossly exceeded the price of other similar goods available in the trade area, and the amount charged was not attributable to additional costs imposed on the merchant by its suppliers.[12] The Legislature stated that the goal of G.B.L. § 396-r was to "prevent merchants from taking unfair advantage of consumers during abnormal disruptions of the market" and to ensure that during disruptions consumers could access goods and services

[9] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

[10] *Id.*

[11] L. 1979, ch. 730 §§ 2, 4, eff. Nov. 5, 1979.

[12] L. 1979, ch. 730 § 3, eff. Nov. 5, 1979.

vital and necessary for their health, safety, and welfare.[13]

Price gouging during disasters and other market disruptions continued to be a major problem for New Yorkers, and the Legislature has amended the statute multiple times since its passage. In 1995, the statute was amended to include repairs for the vital and necessary goods covered by the statute as well as to increase the maximum penalty from $5,000 to $10,000.[14]

In 1998, the statute was updated in several significant ways.

First, it was rewritten to explicitly cover every party in the supply chain for necessary goods and services.[15]

Second, the Legislature added military action as one of the enumerated examples of an abnormal market disruption.[16] The amendment sponsor's memorandum explained that the amendments were needed because the pricing activities of oil producers in the wake of the Iraqi invasion of Kuwait and the Exxon Valdez oil spill were not clearly covered.[17]

Third, the 1998 amendment clarified that a price could violate the statute even without a gross disparity or gross excess in price, building on the language used by the Court of Appeals in *People v. Two Wheel Corp*.[18] In that case, the Attorney General sought penalties and restitution for the sale of 100 generators sold by defendant at an increased price after Hurricane Gloria. Five of the 100 sales included price increases above 50%; two-thirds greater than 10%; the remaining third, less than 10% (including some under 5%).

The defendant argued that the price gouging statute did not cover the lower price increases. The Court of Appeals rejected the argument, explaining "[a] showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that the merchant used the leverage provided by the market disruption to extract a higher price. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness."[19] The Court went on:

> the term "unconscionably excessive" does not limit the statute's

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[13] L. 1979, ch. 730 § 1, eff. Nov. 5, 1979.

[14] L. 1995, ch. 400, §§ 2, 4, eff. Aug. 2, 1995.

[15] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[16] L. 1998, ch. 510, § 2, eff. July 29, 1998.

[17] Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[18] 71 N.Y.2d 693 (1988); *see* Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[19] 71 N.Y.2d at 698.

> prohibition to "extremely large price increases", as respondents would have it. The doctrine of unconscionability, as developed in the common law of contracts and in the application of UCC 2-302, has both substantive and procedural aspects. Respondents' argument focuses solely on the substantive aspect, which considers whether one or more contract terms are unreasonably favorable to one party. The procedural aspect, on the other hand, looks to the contract formation process, with emphasis on such factors as inequality of bargaining power, the use of deceptive or high-pressure sales techniques, and confusing or hidden language in the written agreement. Thus, a price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors.[20]

Although the statute as it stood when *Two Wheel* was decided had included only a definition of what constituted a *prima facie* case, and not a mechanism for proving price gouging outside the *prima facie* case, the 1998 amendments redefined "unconscionably excessive price" to be satisfied by evidence showing one or more of the following: (1) that the amount of the excess of the price was unconscionably extreme; (2) that there was an exercise of unfair leverage or unconscionable means; (3) that there was some combination of (1) or (2); (4) that there was a gross disparity between the pre- and post-disruption prices of the good or services at issue not justified by increased costs; or (5) that the price charged post-disruption grossly exceeded the price at which the goods or services were readily available in the trade area, and *that* price could not be justified by increased costs.[21]

Fourth, in a change from the 1979 structure, the burden on providing evidence of costs was shifted from the Attorney General to the defendant: where previously the Attorney General had to prove that the increase in prices was not justified by increased costs, the burden was now on the defendant to show that a price increase *was* justified by increased costs.[22]

Fifth, in another change, where the *Two Wheel* opinion referenced "unconscionable means" as a method of establishing price gouging, the legislature added "unfair leverage" as another method by which price gouging could be established.

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[20] *Id*. at 698-99 (citations omitted).

[21] L. 1998, ch. 510, § 3, eff. July 29, 1998.

[22] *Ibid*.

Setting aside a 2008 amendment increasing maximum penalties from $10,000 to $25,000,[23] the next major substantive amendment to the statute was made in 2020, when the law was amended after thousands of price gouging complaints were made to the Attorney General during the early days of the COVID-19 market disruption.[24] In this amendment the Legislature expanded the scope of the statute to explicitly cover medical supplies and services as well as sales to hospitals and governmental agencies, expanded the scope of potentially harmed parties, replacing "consumer" with "the public" in several instances, and enhanced penalties by requiring a penalty per violation of the greater of $25,000 or three times the gross receipts for the relevant goods and services, whichever is greater.[25]

Alongside these expansions of the statute's scope, the Legislature added a defense to rebut a *prima facie* showing of price gouging: in addition to showing that the increase was attributable to increased costs imposed on the seller, a seller could show that the increased prices preserved the seller's pre-disruption profit margin.[26] Finally, these amendments gave the Attorney General the rulemaking authority being exercised here to effectuate and enforce the statute.[27]

Finally, in 2023, the law was further amended to expand the list of triggering events for a statutory abnormal market disruption to include a "drug shortage," defined to mean "with respect to any drug or medical essential product intended for human use, that such drug or medical essential product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration."[28]

The Department of Law (better known as the Office of the Attorney General or "OAG"), of which the Attorney General is the head,[29] has extensive expertise in administering the price gouging law, as well as the many other multi-sector economic statutes entrusted to its jurisdiction by the Legislature.[30] OAG has been the agency responsible for administering and

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[23] L. 2008, ch. 224, eff. July 7, 2008.

[24] Press Release, *Attorney General James' Price Gouging Authority Strengthened After Governor Cuomo Signs New Bill into Law*, Office of the New York State Attorney General (June 6, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-price-gouging-authority-strengthened-after-governor-cuomo.

[25] L. 2020, ch. 90, eff. June 6, 2020.

[26] *Ibid*.

[27] *Ibid*.

[28] L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.

[29] N.Y. Const, art V, § 4.

[30] *See, e.g.*, G.B.L. § 340, 343 (Donnelly Act, New York's general antitrust statute); G.B.L. § 349 (general deceptive business practices statute). Over 200 statutes regulating business, ranging from regulations on

enforcing this statute for 43 years, complimenting over a century of experience in the enforcement of cross-sector economic regulations.[31] Like the FTC, its federal counterpart in this area, OAG employs a staff of economists, data scientists, and other experts to aid tis enforcement efforts. In 2011, OAG conducted a statewide investigation leading to a major report examining gasoline prices.[32] OAG regularly issues guidance regarding price gouging and provides technical advice to the Legislature when amendments to the law are proposed.[33] The Attorney General has also engaged in multiple enforcement actions.[34] Over nearly five decades, OAG has received and processed thousands of price gouging complaints, sent thousands of cease-and-desist letters, negotiated settlements, and worked with retailers and advocacy groups to ensure that New Yorkers are protected from price gouging.[35]

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purveyors of Torah scrolls, G.B.L. § 863, to prize boxes, G.B.L. § 369-eee, to dangerous clothing articles, G.B.L. § 391-b, are entrusted to the attorney general's enforcement. This wide collection of laws is entrusted to OAG because of its expertise in cross-sector enforcement of economic regulations.

[31] Indeed, many major cross-sector business laws now enforceable in private rights of action were initially entrusted exclusively to the Attorney General. *See, e.g.*, L. 1899, ch. 690 (first enactment of Donnelly antitrust laws designating Attorney General sole enforcement agency); L. 1970, ch. 43 § 2 (first enactment of G.B.L. § 349, providing only for OAG enforcement).

[32] *See* Press Release, *Report on New York Gasoline Prices*, Office of the New York State Attorney General (December 11, 2011), https://ag.ny.gov/sites/default/files/pdfs/bureaus/consumer_fraud/REPORT-ON-NEW-YORK-GASOLINE-PRICES.pdf.

[33] *See, e.g.*, Press Release, *Consumer Alert: Attorney General James Warns Against Price Gouging During Winter Storm*, Office of the New York State Attorney General (Dec. 23, 2022), https://ag.ny.gov/press-release/2022/consumer-alert-attorney-general-james-warns-against-price-gouging-during-winter; Press Release, *Consumer Alert: Attorney General James Warns About Price Gouging in Aftermath of Hurricane Henri*, Office of the New York State Attorney General (Aug. 23, 2021), https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-warns-about-price-gouging-aftermath; Press Release, *Consumer Alert: Attorney General James Issues Warnings to More than 30 Retailers to Stop Overcharging for Baby Formula*, Office of the New York State Attorney General (May 27, 2022), https://ag.ny.gov/press-release/2022/attorney-general-james-issues-warnings-more-30-retailers-stop-overcharging-baby.

[34] *See, e.g.*, *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988); *People v. Chazy Hardware, Inc.*, 176 Misc. 2d 960 (Sup. Ct., Clinton County 1998); *People v. Beach Boys Equipment Co*, 273 A.D.2d 850 (4th Dep't 2000).

[35] *See, e.g.*, Press Release, *Attorney General James Delivers 1.2 Million Eggs to New Yorkers*, Office of the New York State Attorney General (Apr. 1, 2021), https://ag.ny.gov/press-release/2021/attorney-general-jam L. 2023, ch. 725 (S. 608C), eff. Dec. 13, 2023.es-delivers-12-million-eggs-new-yorkers; Press Release, *Attorney General James Sues Wholesaler for Price Gouging During the Coronavirus Pandemic*, Office of the New York State Attorney General (May 27, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-sues-wholesaler-price-gouging-during-coronavirus-pandemic; Press Release, *Ice Storm Price Gouging Victims to Receive Refunds*, Office of the New York State Attorney General (Dec. 11, 2000), https://ag.ny.gov/press-release/2000/ice-storm-price-gouging-victims-receive-refunds; Press Release, *Fifteen Gas Stations Fined In Hurricane Price Gouging Probe*, Office of the New York State Attorney General(Dec. 19, 2005), https://ag.ny.gov/press-release/2005/fifteen-gas-stations-fined-hurricane-price-gouging-probe; Press Release, *A.G. Schneiderman Announces Agreement with Uber to Cap Pricing During Emergencies and Natural Disasters*, Office of the New York State Attorney General (July 8, 2014), https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-agreement-uber-cap-pricing-during-emergencies-and.

Current Statutory Terms

General Business Law § 396-r(2)(a) sets out the central prohibition of the price gouging statute. Much of the rest of the statute is given over to defining the underlined terms in this sentence:

> During any abnormal disruption of the market for goods and services vital and necessary for the health, safety and welfare of consumers or the general public, no party within the chain of distribution of such goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price.[36]

An "abnormal disruption of the market" is defined in G.B.L. § 396-r(2)(b) as "any change in the market, whether actual or imminently threatened, resulting from" two sets of enumerated events: (1) "stress of weather, convulsion of nature, failure or shortage of electric power or other source of energy, strike, civil disorder, war, military action, national or local emergency, drug shortage"; or (2) any cause of an abnormal disruption of the market that results in the Governor declaring a state of emergency.[37] The word "disruption" used in this Regulatory Impact Statement should be taken to mean this statutory definition, rather than the broader colloquial meaning of the word "disruption."

The "goods and services" covered by the statute are defined in G.B.L. § 396-r(2)(d) and (e) as "(i) consumer goods and services used, bought or rendered primarily for personal, family, or household purposes, (ii) essential medical supplies and services used for the care, cure, mitigation, treatment or prevention of any illness or disease, . . . (iii) any other essential goods and services used to promote the health or welfare of the public,"[38] and "any repairs made by any party within the chain of distribution of goods on an emergency basis as a result of such abnormal disruption of the market."[39] A "party within the chain of distribution" includes "any manufacturer, supplier, wholesaler, distributor or retail seller of goods or services or both sold by one party to another when the product sold was located in the state prior to the sale."[40] For brevity, throughout this rule vital and necessary goods and services are called "essential products."

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[36] G.B.L. § 396-r(2)(a) (emphasis added).

[37] A "drug shortage" is defined by G.B.L. § 396-r(2)(c) to arise when "such drug or medical product is publicly reported as being subject to a shortage by the U.S. Food and Drug Administration."

[38] G.B.L. § 396-r(2)(d).

[39] G.B.L. § 396-r(2)(e).

[40] G.B.L. § 396-r(2)(e).

G.B.L. § 396-r(3) sets out several means by which OAG may provide evidence that the defendant has charged an "unconscionably excessive price."

G.B.L. § 396-r(3)(a) provides that an unconscionably excessive price may be established with evidence that "the amount of the excess in price is unconscionably extreme" or where the price was set through "an exercise of unfair leverage or unconscionable means,"[41] or a combination of these factors. By separately stating that a G.B.L. § 396-r(3)(a) case may be stablished by such a combination of factors, the statute allows an unconscionably excessive price to be established with evidence of only one of the two factors; by adding "unfair leverage" to "unconscionable means," with the disjunctive "or," the statute allows for evidence of unfair leverage alone to establish a violation of the statute.[42]

Although the statute prefaces these definitions with the phrase "whether a price is unconscionably excessive is a question of law for the court," this language does not prevent the Attorney General from making regulations effectuating the definitions (nor could it, given the express rulemaking authority granted in G.B.L. § 396-r(5)). The phrase "question of law for the court" when applied to the element of a civil offense is a term of art that has invariably been read by the Court of Appeals to mean that a judge and not jury decides the issue, and that the determination can be appealed to the Court of Appeals, as that Court's jurisdiction is limited to "questions of law."[43]

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[41] G.B.L. § 396-r(3)(a).

[42] *See generally Sisters of St. Joseph v. City of New York*, 49 N.Y.2d 429, 440 (1980); McKinney's Cons Laws of NY, Book 1, Statutes §§ 98, 235. This treatment contrasts to conventional unconscionability analysis, which "generally requires a showing that the contract was both procedurally and substantively unconscionable when made—i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (citing *Williams v. Walker-Thomas Furniture Co*., 350 F.2d 445, 449 (D.C. Cir. 1965)). When the price gouging statute applies, either procedural or substantiative unconscionability is sufficient to satisfy 3(a). *See People v. Two Wheel Corp*., 71 N.Y.2d 693, 699 (1988) ("[A] price may be unconscionably excessive because, substantively, the amount of the excess is unconscionably extreme, or because, procedurally, the excess was obtained through unconscionable means, or because of a combination of both factors."). In addition to the unconscionability factors recited in *Two Wheel*, the 1998 amendment added an additional concept, that of "unfair leverage," which necessarily sweeps beyond common-law unconscionability to encompass a wider range of circumstances where a seller takes unfair advantage of a buyer during an abnormal disruption of the market. L. 1998, ch. 510, eff. July 29, 1998.

[43] NY Const, art VI § 3(a). *See, e.g., White v. Cont. Cas. Co*., 9 N.Y.3d 264, 267 (2007) ("unambiguous provisions of an insurance contract must be given their plain and ordinary meaning . . . and the interpretation of such provisions is a question of law for the court"); *Silsdorf v. Levine*, 59 N.Y.2d 8, 13 (1983) ("Whether [allegedly defamatory] statements constitute fact or opinion is a question of law for the court to decide"); *Hedges v. Hudson R.R. Co*., 49 N.Y. 223, 223 (1872) ("the question as to what is reasonable time for a consignee of goods to remove them after notice of their arrival, where there is no dispute as to the facts, is a question of law for the court. A submission of the question to the jury is error, and, in case the jury finds different from what the law determines, it is ground for reversal"). *Contrast* Statute Law § 77 ("construction of

G.B.L. § 396-r(3)(b) provides that "*prima facie* proof that a violation of this section has occurred"—that is, that an unconscionably excessive price has been charged—shall include evidence that "a gross disparity" between the price at which a good or service was sold or offered for sale during the disruption and "the price at which such goods or services were sold or offered for sale by the defendant in the usual course of business immediately prior to the onset of the abnormal disruption of the market."[44] Alternatively, a *prima facie* case may be established with evidence that the price of the goods or services in question sold or offered for sale during the disruption "grossly exceeded the price at which the same or similar goods or services were readily obtainable in the trade area."[45]

A *prima facie* case may be rebutted by a seller employing the affirmative defense provided in G.B.L. § 396-r(3)(c) by showing that the price increase "preserves the margin of profit that the [seller] received for the same goods or services prior to the abnormal disruption," or that "additional costs not within the control of the [seller] were imposed on the [seller] for the goods or services."[46] Not every cost can be used to rebut a *prima facie* case; G.B.L. § 396-r(3)(c) requires any cost used as a defense must be additional, out of the seller's control, imposed on the seller, and be associated with the specific essential product at issue in the *prima facie* case.[47] This language underscores that even if a business were to account for an item as a "cost," unless that item satisfies the statutory criteria it is not relevant to the rebuttal.

Statutory Economic and Policy Framework

The price gouging statute forbids sellers "from taking unfair advantage of the public during abnormal disruptions of the market" by "charging grossly excessive prices for essential goods and services."[48] The statute "excises the use of such advantage from the

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a statute is a question of law for the court") *with Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 391 (1995) ("[t]he general administrative law principle is that a regulation adopted in a legislative rule-making proceeding . . . can apply to foreclose litigation of issues in any individual adjudicatory proceeding provided for under the enabling legislation.").

[44] G.B.L. § 396-r(3)(b)(i). Although the Appellate Division characterized this showing of a gross disparity to establish *prima facie* that the unconscionably extreme/unconscionable means factors in G.B.L. § 396-r(3)(a) were satisfied, *see Matter of People v. Quality King Distribs., Inc.*, 209 A.D.3d 62, 79 (1st Dep't 2022), this additional step in the analysis is academic. For clarity of analysis, given that the (3)(a) factors are capable of being proven directly without a *prima facie* case, in addition to being proven through the burden-shifting (3)(b) *prima facie* case procedure, this rulemaking and the rule treats these showings as separate evidentiary paths to the same "unconscionably excessive" destination.

[45] G.B.L. § 396-r(3)(b)(ii).

[46] G.B.L. § 396-r(3)(c).

[47] *Id.*

[48] G.B.L. § 396-r(1).

repertoire of legitimate business practices."[49] By focusing on fairness, the statutory text and legislative intent pay special attention to buyers' vulnerabilities and to sellers' power, and especially to their interaction.[50]

The price gouging statute represents a decision by the Legislature to penalize a form of unfair business conduct, protect against the unique harms that can result from price increases for essential products during an abnormal disruption, and balance values differently during an abnormal market disruption than during a normal economic period.[51] The Legislature decided that the imbalances of power that either result from, or are exacerbated by, an abnormal market disruption should not lead to either wealth-based rationing of essential products, on the one hand, or windfalls, on the other.[52] Indeed, research on consumer perceptions indicates that most consumers intuitively believe demanding a higher price in the service of profit increase during a disaster is inherently unfair.[53]

The price gouging law protects the most vulnerable people. Poor and working-class New Yorkers are the most likely to be harmed by price increases in essential items and the

[49] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988).

[50] *See* Professor Luke Herrine, ANPRM Comments at 193-204. For a broader discussion of fairness considerations underlying price gouging laws, s*ee generally* Elizabeth Brake, *Price Gouging and the Duty of Easy Rescue*, 37 ECON. & PHIL. 329 (2021), *and* Jeremy Snyder, *What's the Matter with Price Gouging?*, 19 BUS. ETHICS Q. 275 (2009), as well as the seminal article by Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking*, 76 AM. ECON. REV. 728 (1986). Although these arguments have been critiqued, mostly on consequentialist grounds that themselves rest on accepting empirical claims made by economists skeptical of price gouging laws, s*ee, e.g.*, Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347 (2008), it was the distinctly *non*-consequentialist theory of fairness that was accepted by the Legislature, *see* G.B.L. § 396-r(1).

[51] *See* Governor's Approval Mem., Bill Jacket, L. 1979, ch. 730 at 4-5; Sponsor's Mem., Bill Jacket, L. 1998, ch. 510 at 5-6.

[52] *See* Governor's Approval Mem., Bill Jacket, L. 1979, ch. 730 at 5 ("These price increases must be justified; the State cannot tolerate excessive prices for a commodity which is essential to the health and well-being of millions of the State's residents"); Sponsor's Mem., Bill Jacket, L. 2020, ch. 90 at 6 ("This legislation would be a strong deterrent to individuals seeking to use a pandemic or other emergency to enrich themselves at the expense of the general public....").

[53] *See, e.g.*, Bruno S. Frey & Werner W. Pommerehne, *On the Fairness of Pricing: An Empirical Survey Among the General Population*, 20 J. ECON. BEHAV. & ORG. 295 (1993) (revealing price increases in response to excess demand is considered unfair by four-fifths of survey respondents), Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking*, 76 AM. ECON. REV. 728, 733 (1986) (price increases during disruptions for goods purchased at normal pre-disruption rates are regarded as unfair by most respondents); Ellen Garbarino & Sarah Maxwell, *Consumer Response to Norm-Breaking Pricing Events in E-Commerce*, 63 J. BUS. RSCH. 1066 (2010) (discussing how consumers perceive company price increases that break with pricing norms to be unfair).

least likely to have savings or disposable income to cover crises.[54] The law ensures that market disruptions do not cause essential products to be rationed based on ability to pay. When there is a risk of New Yorkers being priced out of the markets for food, water, fuel, transportation, medical goods, and other essentials like diapers, soap, or school supplies, the stakes are especially high. The law addresses the urgency created by this risk by putting limitations on the degree to which participants can raise prices during disruptions, limitations that would not apply under ordinary circumstances.[55]

OAG has conducted an analysis of economic data and scholarship relevant to these rules and has compiled these analyses in a separate document ("OAG Staff Report") alongside this rulemaking. In the Staff Report, OAG staff review economic analyses of price gouging statutes, including studies suggesting that price gouging laws may be economically beneficial when they acts to restrain profit increases in the aftermath of abnormal market disruptions when supply cannot be ramped up to meet sudden demand no matter what price is charged. The Staff Report also examines mounting evidence that price gouging is exacerbated by market concentration.

Finally, the Staff Report sets out the results of OAG staff's examination of price data collected by the Bureau of Labor Statistics, indicating that the price of essential products varies by less than 10% on a month-to-month basis except in abnormal market disruptions. This finding is consistent across multiple types of essential products and over several decades. A special section of the Staff Report considers data pertaining to for-hire ground transportation service providers, and also concludes that once two market participants who design their systems to increase prices during periods of high demand are excluded, that market too exhibits striking price stability.

In considering this economic evidence, the Attorney General remained mindful that the regulations must effectuate the statute. The Legislature's primary concern in adopting the statute was eliminating "unfair advantage," and fairness concerns are not necessarily

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[54] *See* Press Release, *8 Months and 10,000+ Complaints Later: Department of Consumer and Worker Protection Analysis Shows Price Gouging Preys on Vulnerable New Yorkers*, N.Y.C. DEP'T OF CONSUMER & WORKER PROTECTION (Nov. 9, 2020), https://www.nyc.gov/site/dca/news/042-20/8-months-10-000-complaints-later-department-consumer-worker-protection-analysis-shows ("[T]he neighborhoods with the most [price gouging] complaints are [those] already financially vulnerable and [that], with median household incomes of approximately $30,000, can least afford to be gouged on lifesaving items . . . .").

[55] *See* Kaitlin Ainsworth Caruso, *Price Gouging, the Pandemic, and What Comes Next*, 64 B.C. L. REV. 1797, 1851 (2023) ("[A]nti-gouging laws may help impose some legal constraint on the different burdens that communities already challenged by corporate disinvestment face in an emergency. . . . If so, anti-gouging laws may be a reasonable attempt to protect poorer communities from being disparately impacted by price increases.")

the same as the goal of maximizing economic efficiency.[56] To put it another way, the Legislature decided that any negative economic consequences that may result from effectuation of the price gouging statute were outweighed by the positive social consequences of preventing "any party within the chain of distribution of any goods from taking unfair advantage of the public during abnormal disruptions of the market."[57] It is that policy choice that the Attorney General must respect and effectuate in these rules.

This background informed the rulemaking, along with comments on a past Advanced Notice of Proposed Rulemaking, comments on a prior set of rules treating many of the same subjects as the present rule (the "First NPRMs"), and three additional considerations:

First, the heart of the statute is a prohibition on firms taking advantage of an abnormal market disruption to unfairly *increase* their per-unit profit margins. Firms are allowed to *maintain* prior profit margins during an abnormal market disruption, and even increase overall gross profit by increasing sale volume. None of the rules limits any firm from maintaining the per-unit profit margin it had for an essential product prior to the market disruption, even where that means increasing prices to account for additional costs not within the control of the firm imposed on the firm for the essential product. While the statute bans profiteering, the statute does not put any seller in a worse off position than they were in prior to the disruption.

Second, the rules are designed to encompass upstream price gouging, and not merely the retail-level price gouging that may be more noticeable to consumers. New York's retailers employ over 800,000 workers and are central to communities around the State as providers of essential products, participants in local affairs, and significant taxpayers.[58] Yet although many if not most retailers are price takers, not makers, as the point of contact for most consumers, retailers are the most likely to get blamed when prices increase due to an abnormal market disruption, even if they are trying to themselves stay afloat after being the victims of upstream price gouging. By aiding enforcement efforts against upstream firms, and by clarifying that retailers themselves are not liable for merely passing on upstream costs imposed on them, OAG expects that New York's small businesses will benefit from the guidance provided by these rules.

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[56] *See generally* Casey Klofstad & Joseph Uscinski, *Expert Opinions and Negative Externalities Do Not Decrease Support for Anti-Price Gouging Policies*, RES. & POL. 1 (Jul-Sept 2023), https://journals.sagepub.com/doi/pdf/10.1177/20531680231194805; Justin Holz, et al., *Estimating the Distaste for Price Gouging with Incentivized Consumer Reports*, 16 AM. ECON. J.: APPLIED ECON. 33 (2024) (arguing that popular opposition to price gouging is at least partially driven by "distaste for firm profits or markups, implying that the distribution of surplus between producers and consumers matters for welfare")

[57] G.B.L. § 396-r(1).

[58] *See* New York Dep't of Labor, *Current Employment Statistics*, https://dol.ny.gov/current-employment-statistics-0 (last accessed January 14, 2026); *Fiscal Year Tax Collections: 2022-2023,* NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, https://www.tax.ny.gov/research/stats/statistics/stat_fy_collections.htm.

Third, OAG was informed by comments by the Groundwork Collaborative, the American Economic Liberties Project, the Institute for Local Self Reliance, and Professor Hal Singer, as well as data and studies discussed in the OAG Staff Report, that identified multiple ways in which corporate concentration can encourage price gouging.[59] Corporate concentration can exacerbate the effect of demand or supply shocks caused by an unexpected event, and firms in more concentrated markets may be more willing to exploit the pricing opportunity that a disruption offers.

Big actors in concentrated markets already have more pricing power than small actors, and a market shock can amplify that pricing power. In a concentrated market, participants may be more accustomed to engaging in parallel pricing and preserving market share than in less concentrated markets, where firms compete more vigorously. It may be easier for big actors to coordinate price hikes during an inflationary period, even without direct communication between them.[60]

Needs and Benefits

This rule sets out examples of acts that constitute "unfair leverage or unconscionable means," as that term is used in G.B.L. § 396-r(3)(a)(ii). It responds to comments on previous proposed rules that expressed concerns about the perceived ambiguity of the terms "unfair leverage or unconscionable means" and sought clarification as what acts are proscribed by this part of the statute.[61] It collects caselaw, statute, and empirical analysis to identify some of the more egregious indicative examples of unconscionable means and unfair leverage.

As discussed above, the phrase "unconscionable means" was added to the price gouging statute by the Legislature in 1998 to codify the holding in *Two Wheel* that an "unconscionably excessive price" can be found with evidence (among other things) of the seller's use of "unconscionable means."[62] Determination of "unconscionable means," the Court explained, requires examination of "the procedural aspect" of unconscionability, "look[ing] to the contract formation process, with emphasis on such factors as inequality of bargaining power, the use of deceptive or high-pressure sales techniques, and confusing or

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[59] *See* Groundwork Collaborative, ANPRM Comments at 47-161; American Economic Liberties Project, ANPRM Comments at 1-7; Institute for Local Self Reliance, ANPRM Comments at 13-15; Hal Singer, ANPRM Comments at 223-35.

[60] *See* Hal Singer, ANPRM Comments at 227 ("It is easier to coordinate with three rivals in an oligopoly than with thirty in a competitive industry . . . Inflation [allows firms to coordinate on prices] by giving firms a target to hit—for example, if general inflation is seven percent, we should raise our prices by seven percent. Inflation basically provides a 'focal point' that allows firms to figure out how to raise prices on consumers without communicating.").

[61] *See, e.g.*, American Fuel & Petrochemical Manufacturers, First NPRM Comments at 74-75; American Petroleum Institute, First NPRM Comments at 89-90.

[62] *People v. Two Wheel*, 71 N.Y.2d 693, 699 (1988).

hidden language in the written agreement."[63]

The statute goes beyond this language, however, to also prohibit the use of "unfair leverage."[64] In two places in *Two Wheel*, the Court of Appeals discussed the applicability of unfair leverage to a price gouging case. First, in discussing what is now the separate *prima facie* case provided by G.B.L. § 396-r(3)(b), the Court explained that "a showing of a gross disparity in prices, coupled with proof that the disparity is not attributable to supplier costs, raises a presumption that *the merchant used the leverage provided by the market disruption to extract a higher price*. The use of such leverage is what defines price gouging, not some arbitrarily drawn line of excessiveness."[65] Second, discussing the seller's inadequate showing of cost justification for their generator price increases, the Court determined that "respondents' submissions, even if true, did not rebut the inference that the price increases were attributable to respondents' *use of the leverage provided by the market disruption* and were *therefore* unconscionably excessive."[66]

In other words, the leverage of one party over another in a transaction for essential products is unfair when the leverage is supplied by the market disruption, even if the exercise of that leverage is not a deployment of unconscionable means. Conversely, the use of unconscionable means during a market disruption is independently sufficient to establish an unconscionably excessive price even if those unconscionable means are not employment of unfair leverage.

The expansion of liability beyond the bounds of common-law unconscionability or economic duress during disruptions recognizes that an abnormal market disruption itself supplies many of the conditions depriving a buyer of meaningful choice, a touchstone of unconscionability doctrine.[67] Hurricanes are not conducive to comparison shopping.[68] And, in the words of the Court of Appeals, market disruptions are situations "ripe for overreaching by the merchant, who enjoys a temporary imbalance in bargaining power by virtue of an abnormal level of demand, in terms of both the number of consumers who desire the item

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[63] *Id*. at 699.

[64] G.B.L. § 369-r(3)(a).

[65] *Id*. at 698 (emphasis added).

[66] *Id*. at 700 (emphasis added).

[67] *See generally* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1107-16 (2006).

[68] *See* Lindsay R. L. Larson & Jyunju Shin, *Fear During Natural Disaster: Its Impact on Perceptions of Shopping Convenience and Shopping Behavior*, 39 SERVICES MARKETING Q. 293 (2018).

and the sense of urgency that increases that desire."[69]

Subdivision (a) restates the statutory language in G.B.L. § 396-r(3)(a)(ii) and underlines that the list of exemplars of unconscionable means and unfair leverage is illustrative and not exhaustive. It is common for agencies charged with enforcing statutes that set out prohibitions against unfair conduct to adopt regulations setting out specific exemplars of such conduct.[70] By doing so, the agency assists consumers and enforcers by laying out with more specificity conduct that violates the law; it also assists regulated parties by identifying specific examples of unconscionable means or unfair leverage to avoid. Nonetheless, the doctrine of unconscionability, "which is rooted in equitable principles, is a flexible one"[71] and cannot be reduced to a defined list of examples. The items provided here are not exhaustive.[72]

Finally, many examples set out in this rule involve conduct directed only to consumers, which per rule 600.1 includes small businesses. Small businesses are seldom if ever are able to engage in the proscribed use of leverage against large businesses absent abuse of market position (they are, after all, a small business),[73] and courts have generally

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[69] *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 697 (1988).

[70] *See, e.g.*, 11 N.Y.C.R.R. §§ 216.1(b), 216.6 (elucidating unfair claims settlement practices rules provided by Insurance Law § 2601 pursuant to the Commissioner's regulatory powers in Insurance Law § 301); 12 C.F.R. § 1006.22 (elucidating examples of "unfair or unconscionable means of debt collection" outlawed by 15 U.S.C. § 1692f pursuant to the Consumer Financial Protection Bureau's regulatory powers in 15 U.S.C. § 1692*l*(d) and elsewhere).

[71] *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988).

[72] The rule is structured similarly to a comparable regulation issued by the Consumer Financial Protection Bureau interpreting 15 U.S.C. § 1692f's prohibition against unconscionable conduct and, like that regulation, emphasizes that its list of prohibited acts is exemplary rather than exclusive. *See* 12 C.F.R. § 1006.22(a).

[73] For discussion of how larger businesses coerce smaller ones, *see, e.g.*, FED. TRADE COMM'N., FEEDING AMERICA IN A TIME OF CRISIS THE UNITED STATES GROCERY SUPPLY CHAIN AND THE COVID-19 PANDEMIC (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p162318supplychainreport2024.pdf (describing how some of the largest retailers subjected their often smaller suppliers to fines and fees to pressure them to fill their orders during the pandemic); Denise Hearn, Nidhi Hegde & Matt Stoller, *The Other Red Tape: Market Concentration and the Rise of Private Gatekeepers,* AM. ECON. LIBERTIES PROJECT (Jun. 14, 2021), https://www.economicliberties.us/wp-content/uploads/2021/06/AELP_TheOtherRedTape_Final_Clean.pdf (outlining tactics large corporations use to undermine small business); STAFF OF SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2020) (examining how the power of a few major corporations impacts the economy and small businesses, including evidence that Amazon replicates and sells essential products marketed on the platform by small manufacturers); Maureen Tkacik*, Rescuing Restaurants: How to Protect Restaurants, Workers, and Communities from Predatory Delivery App Corporations*, AM. ECON. LIBERTIES PROJECT WORKING PAPER SERIES ON CORP. POWER, Working Paper No. 7, 2020, https://www.economicliberties.us/wp-content/uploads/2020/09/Working-Paper-Series-on-Corporate-Power_7.pdf (highlighting the large commissions food delivery apps charged restaurants during the pandemic).

refused to apply unconscionability doctrine to large business-large business disputes.[74] Narrowing the examples set out in the rule in this way permits stronger enforcement focus on the statute's core concern to penalize sellers "tak[ing] unfair advantage of the public,"[75] recognizing that it is the public includes small businesses, who are "are merely a subclass of consumers."[76] This removal from the list of examples does not, of course, finally determine that unfair leverage could not be used by a small business against a large one; such leverage is possible but would depend on the specific facts and circumstances of the employment of leverage.

Deceptive Acts and Practices

Procedural unconscionability includes "the use of deceptive . . . sales techniques,"[77] including "deceptive practices and language in the contract."[78] Subdivision (b) restates this common-law language in the specific context of price gouging, focusing on the deceptive presentation of the price term that facilitates gouging by making a consumer believe they are paying less for a product than in fact they are.

"No other provision of an agreement more intimately touches upon the question of

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[74] *See Jet Acceptance Corp. v. Quest Mexicana S.A. de C.V.*, 87 A.D.3d 850, 856 (1st Dep't 2011) ("the doctrine of unconscionability rarely applies in a commercial setting, where the parties are presumed to have equal bargaining power"); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Actio*n, 33 FLA. ST. U. L. REV. 1067, 1077 (2006) ("There are few cases that have found unconscionability to the benefit of a merchant" but "in merchant-to-merchant transactions, the lack of sophistication of one of the merchant parties renders that party susceptible to the type of overreaching found in consumer unconscionability cases," citing *Industrialease Automated & Sci. Equip. Corp. v. R.M.E. Enterprises, Inc*., 58 A.D.2d 482, 488 (1st Dep't 1977)). *See also People v. Richmond Cap. Grp. LLC*, 80 Misc. 3d 1213(A) (Sup. Ct., N.Y. County 2023) (finding contracts agreed to by merchants unconscionable).

[75] G.B.L. § 396-r(1).

[76] *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc*., 37 N.Y.3d 169, 178 (2021).

[77] *Two Wheel*, 71 N.Y.2d at 699.

[78] *People v. Wolowitz*, 96 A.D.2d 47, 67 (2d Dep't 1983); *accord Sablosky v. Edward S. Gordon Co*., 73 N.Y.2d 133, 139 (1989); *People v. N. Leasing Sys., Inc*., 169 A.D.3d 527, 530 (1st Dep't 2019). Notably, many judicial discussions of "high pressure sales tactics," another common item in the procedural unconscionability litany, emphasize the role of false or deceptive statements made while pressuring buyers to purchase the essential product. *See, e.g.*, *People v. Richmond Cap. Grp. LLC*, 80 Misc. 3d 1213(A) (Sup. Ct., N.Y. County 2023); *Commodity Futures Trading Comm'n v. A.S. Templeton Grp., Inc.*, No. 03-cv-4999 (ILG), 2008 WL 5662079, at *3 (E.D.N.Y. Dec. 11, 2008); *People v. City Model & Talent Dev., Inc*., 29 Misc. 3d 1205(A) (Sup. Ct., Suffolk County 2010) ("through a series of false statements and high pressure sales tactics, they are tricked into purchasing expensive photo shoots based on false promises of future work"); *Rossi v. 21st Century Concepts, Inc*., 162 Misc. 2d 932, 934 (City Ct. 1994) ("Through high pressure sales tactics the plaintiff was induced to pay nearly $200.00 a pot for cookware of dubious and undocumented nutritional, medical or technical value").

unconscionability than does the term regarding price."[79] This is why "New York courts have rejected the argument that a generalized disclaimer as to 'additional fees' bars claims asserting the non-disclosure of fees that a reasonable consumer would not expect."[80] The widespread understanding that deceptive prices, or prices expressed in terms that are not readily understandable, are procedurally unconscionable is codified in subdivision (b).[81]

The rule does not attempt to catalogue the myriad other ways in which deceptive practices might constitute unfair leverage—such as bamboozling consumers with limited

[79] *Jones v. Star Credit Corp*., 59 Misc. 2d 189, 191 (Sup. Ct., Nassau County 1969) (Wachtler, J.).

[80] *Carovillano v. Sirius XM Radio Inc.*, No. 23-cv-4723, 2024 WL 450040, at *6 (S.D.N.Y. Feb. 6, 2024) (collecting cases). *See also Lonner v. Simon Prop. Grp., Inc*., 57 A.D.3d 100, 110–11 (2d Dep't 2008) (failure to disclose fee except in small print was a deceptive trade practice); *Sims v. First Consumers Nat. Bank*, 303 A.D.2d 288, 289 (1st Dep't 2003) (same); *De Santis v. Sears, Roebuck & Co*., 148 A.D.2d 36, 38 (2d Dep't 1989); *Watts v. Jackson Hewitt Tax Serv. Inc*., 579 F. Supp. 2d 334, 352 (E.D.N.Y. 2008) (failure to disclose hidden tax preparation fees constituted common-law fraudulent inducement); *People v. Richmond Cap. Grp. LLC*, 80 Misc. 3d 1213(A) (Sup. Ct., N.Y. County 2023); *Jermyn v. Best Buy Stores, L.P.*, No. 08-cv-214-CM, 2011 WL 2119725, at *2 (S.D.N.Y. May 24, 2011); *Diaz v. Paragon Motors of Woodside, Inc*., 424 F. Supp. 2d 519, 530-31 (E.D.N.Y. 2006); *Geismar v. Abraham & Strauss*, 109 Misc. 2d 495, 496-98 (Dist. Ct., Suffolk County 1981) (collecting cases); Press Release, *The New York State Attorney General Andrew M. Cuomo Investigating 22 Popular Online Retailers For Linking Consumers To Discount Clubs That Charge Hidden Fees*, https://ag.ny.gov/press-release/2010/new-york-state-attorney-general-andrew-m-cuomo-investigating-22-popular-online (Jan 27, 2010); Press Release, *New York State Attorney General's Office, Pre-Paid Phone Card Sweep Cleans Up Deceptive Posters*, https://ag.ny.gov/press-release/2001/pre-paid-phone-card-sweep-cleans-deceptive-posters (Apr. 12, 2001).

[81] *See Sandford v. Handy*, 23 Wend. 260, 1840 WL 3463 (N.Y. 1840) (Nelson, C.J.) ("I am also inclined to think that any misrepresentation as to the actual cost of the property, is a material fact, and naturally calculated to mislead the purchaser. . . . Misrepresentation of the cost of an article . . . is a material fact, which not only tends to enhance the value, but gives to it a firmness and effect beyond the force of mere opinion. The vendor is not bound to speak on the subject, but if he does, I think he should speak the truth."); *State v. ITM, Inc.*, 52 Misc. 2d 39, 54 (Sup. Ct., N.Y. County 1966) ("We also believe that it is right, proper, just and equitable to tell the consumer, clearly and adequately, that he is entering into a contract and that he is personally liable for the entire contract price and that he will be required to make stipulated monthly payments, plus carrying charges, etc., in language that the least educated person can understand."); *F.T.C. v. Crescent Publ'g Grp., Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) ("Information concerning prices or charges for goods or services is [considered] material"); Dee Pridgen & Jolina C. Cuaresma, CONSUMER PROTECTION AND THE LAW §§ 3:13, 11:31-39; Colleen McCullough, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779, 806 (2016) (collecting cases for the proposition that "[c]ourts increasingly look at whether the contract was understandable, rather than understood, as part of the procedural unconscionability analysis").

English proficiency[82] or hiding material terms in fine print[83]—recognizing that these behaviors have already received judicial and statutory condemnation.[84]

Unlawfully Burdensome Payment Terms

The use of unlawfully burdensome payment can constitute unfair leverage. Subdivision (c) lists three examples. First are "penalty" clauses, defined by the Court of Appeals as "a provision which requires, in the event of contractual breach, the payment of a sum of money grossly disproportionate to the amount of actual damages."[85] The Court of Appeals has condemned such clauses as the epitome of unfair leverage: "[a] clause which provides for an amount plainly disproportionate to real damage is not intended to provide fair compensation but to secure performance by the compulsion of the very disproportion. A promisor would be compelled, out of fear of economic devastation, to continue performance and his promisee, in the event of default, would reap a windfall well above actual harm sustained."[86]

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[82] *See, e.g.*, *Perez v. Hempstead Motor Sales, Ltd*., 173 Misc. 2d 710, 716 (Dist. Ct. 1997), *aff'd*, 176 Misc. 2d 314 (App. Term 1998) (buyer requested seller's Spanish-speaking employee read contract terms to her in Spanish; evidence that seller's employee mistranslated material terms); *Jefferson Credit Corp. v. Marcano*, 60 Misc. 2d 138 (Civ. Ct. 1969); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 26–28 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119 (App. Term 1967); *Albert Merrill Sch. v. Godoy*, 78 Misc. 2d 647, 650 (Civ. Ct. 1974). This tendency is not confined to unsophisticated parties. *See Matter of New York State Dep't of Health*, 74 Misc. 3d 1205(A) (Sup. Ct., Albany County 2022) (refusal to enforce arbitration clause when Chinese company that delivered defective masks during pandemic surreptitiously inserted the arbitration clause into Chinese but not English version of contract).

[83] *See Lonner v. Simon Prop. Grp., Inc*., 57 A.D.3d 100, 103 (2d Dep't 2008) ("New York Courts have repeatedly held that the use of small print in commercial documents may undercut the enforceability of terms that are set forth in such print"); *Seabrook v. Commuter Hous. Co*., 72 Misc. 2d 6, 10 (Civ. Ct. 1972), *aff'd*, 79 Misc. 2d 168 (App. Term 1973); CPLR 4544 (barring reception of small-print contracts into evidence).

[84] *See id.; see generally DeAngelis v. Timberpeg E., Inc*., 51 A.D.3d 1175, 1178 (3d Dep't 2008); *Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest*., 169 A.D.2d 829, 830 (2d Dep't 1991); *Matter of Friedman*, 64 A.D.2d 70, 85 (2d Dep't 1978); *Industralease Automated & Sci. Equip. Corp. v. R.M.E. Enterprises, Inc*., 58 A.D.2d 482, 489–90 (2d Dep't 1977); *Velez v. Lasko Prod., LLC*, No. 1:22-cv-08581 (JLR), 2023 WL 8649894, at *3 (S.D.N.Y. Dec. 14, 2023); *People v. Richmond Cap. Grp. LLC*, 80 Misc. 3d 1213(A) (Sup. Ct., N.Y. County 2023); *In re Currency Conversion Fee Antitrust Litig*., 361 F. Supp. 2d 237, 251–52 (S.D.N.Y. 2005); *D & W Cent. Station Alarm Co. v. Yep*, 126 Misc. 2d 37, 38 (Civ. Ct. 1984); *State v. Gen. Motors Corp*., 120 Misc. 2d 371, 374 (Sup. Ct., N.Y. County 1983); *Bogatz v. Case Catering Corp*., 86 Misc. 2d 1052, 1055 (Civ. Ct. 1976); *U. S. Leasing Corp. v. Franklin Plaza Apartments, Inc.*, 65 Misc. 2d 1082, 1086–87 (Civ. Ct. 1971); *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620, 620–21 (Civ. Ct. 1967); *Am. Home Imp., Inc. v. MacIver*, 105 N.H. 435, 439, 201 A.2d 886, 889 (1964); G.B.L. §§ 349, 350.

[85] *Truck Rent-A-Ctr., Inc. v. Puritan Farms 2nd, Inc*., 41 N.Y.2d 420, 424 (1977).

[86] *Ibid*. Courts often refuse to enforce contractual clauses that impose damages for breach disproportionate to the harm suffered by the non-breaching party. *See Trustees of Columbia Univ. in City of New York v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 77 (2020) (penalties in business to business commerical lease); *Gordon v.*

Such penalties may include, for example, excessive late payment fees in residential leases that would likely be triggered during a disruption,[87] or clauses providing for attorneys' fee shifting even for trivial breaches of the contract.[88] Indeed, one way to conceptualize penalties are as contingent price increases, and their alternative characterization as secondary obligations cannot and should not exempt them from price gouging scrutiny when they are already condemned as excesssive under a different doctrinal label.

Another well-known example are usurious contracts, which are unenforceable, and frequently induced by unconscionable means, as vividly shown in recent OAG investigations.[89] Usury is unfair leverage and is appropriate to include here given usury laws' similar "focus[] on the protection of persons in weak bargaining positions from being taken advantage of by those in much stronger bargaining positions."[90]

A final example is a classic of unconscionability doctrine: grossly excessive security requirements in leases. A clause granting a furniture retailer security interests in all prior purchases until all balances were paid was the heart of the lease agreement declared unenforceable in the leading case *Williams v. Walker-Thomas Furniture Co*.,[91] one of the cases relied upon by the Court of Appeals in its discussion of unconscionability in *Two Wheel*.[92] Such agreements have repeatedly been held to be procedurally unconscionable

Eshaghoff, 60 A.D.3d 807, 808 (2d Dep't 2009) (penalties in residential leases); *Bogatz v. Case Catering Corp*., 86 Misc. 2d 1052, 1055 (Civ. Ct. 1976); *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 143 (Civ. Ct. 1973) ("the use of a penalty clause requiring full payment where no services were performed instead of compensatory damages are all examples of either procedural or substantive unconscionability"); *Educ. Beneficial, Inc. v. Reynolds*, 67 Misc. 2d 739, 744 (Civ. Ct. 1971).

[87] *See, e.g.*, *Knudsen v. Lax*, 17 Misc. 3d 350, 358 (Co. Ct., Jefferson County 2007); *Spring Valley Gardens Assocs. v. Earle*, 112 Misc. 2d 786, 787 (Co. Ct., Rockland County 1982).

[88] *State v. Wolowitz*, 96 A.D.2d 47, 66–68 (2d Dep't 1983); *Weidman v. Tomaselli*, 81 Misc. 2d 328, 334 (Co. Ct., Rockland County), *aff'd*, 84 Misc. 2d 782 (App. Term 1975).

[89] *See, e.g.*, *People v. N. Leasing Sys., Inc.*, 60 Misc. 3d 867, 876–77 (Sup. Ct., N.Y. County 2017), *aff'd as modified*, 169 A.D.3d 527 (1st Dep't 2019); *People v. Richmond Cap. Grp. LLC*, 80 Misc. 3d 1213(A) (Sup. Ct., N.Y. County 2023).

[90] *Adar Bays, LLC v. GeneSYS ID, Inc*., 37 N.Y.3d 320, 332 (2021). *See also Hammelburger v. Foursome Inn Corp*., 76 A.D.2d 646 (2d Dep't 1980) ("It is not difficult to ascertain that the criminal usury statutes fall within the class of rules created for the protection of society as a whole. They were enacted in an effort to protect the public from loansharking . . . . Accordingly, it would seem to follow that a party cannot waive his right to be protected from criminally usurious loans. This right is not personal to the borrower, so as to be waivable by it. Rather, the right exists for the benefit of everyone.")

[91] 350 F.2d 445 (D.C. Cir. 1965).

[92] *People v. Two Wheel Corp*., 71 N.Y.2d 693, 699 (1988).

and an exercise of unfair leverage.[93]

Refusing to Honor Previously Contracted Prices

A concerning form of unfair leverage is the exploitation of an abnormal market disruption by an economically powerful seller to compel a weaker buyer to pay a higher price than the parties bargained for prior to the disruption, all to increase the seller's profits. When the seller's new demanded price modification coincides with an abnormal market disruption, it is reasonable to infer that the previous contract price reflected the parties' pre-existing leverage such that a demand for a higher price is being made only because of the additional leverage gained by the seller from the abnormal market disruption, exploited to increase the seller's profits—the core of unfair leverage.[94]

Use of the leverage gained from an abnormal market disruption to demand a higher price than previously contracted for might be thought of as a special case of the doctrine of economic duress. A contract is voidable under this doctrine "when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will."[95] Economic duress is itself part of a larger family of doctrines, including unconscionability, declining to enforce contracts and contract modifications when doing so is deemed particularly unfair.[96] The rule uses the framework of economic duress with appropriate modifications to reflect the statutory prohibition not merely on leverage so extreme and wrongful as to preclude the exercise of free will, but *all* exploitation of leverage gained by an abnormal market disruption.

In the context of price gouging, a necessary condition for the unfairness of the demanded modification—which, as discussed above, is fundamentally about preventing the

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[93] *See, e.g.*, *People v. N. Leasing Sys., Inc*., 60 Misc. 3d 867, 876–77 (Sup. Ct., N.Y. County 2017), *aff'd as modified*, 169 A.D.3d 527 (1st Dep't 2019); *Lazan v. Huntington Town House, Inc*., 69 Misc. 2d 1017, 1019 (Dist. Ct. 1969), *aff'd*, 69 Misc. 2d 1019 (App. Term 1972); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 26–28 (Dist. Ct. 1966), *rev'd on other grounds*, 54 Misc. 2d 119 (App. Term 1967). *See also* 15 U.S.C. § 1667b (outlawing "unreasonable" security requirements in consumer leases).

[94] *People v. Two Wheel*, 71 N.Y.2d 693, 699 (1988).

[95] *Austin Instrument, Inc. v. Loral Corp*., 29 N.Y.2d 124, 130 (1971) (Fuld, C.J.).

[96] *See Rowe v. Great Atl. & Pac. Tea Co*., 46 N.Y.2d 62, 68 (1978); *Graf v. Hope Bldg. Corp*., 254 N.Y. 1, 8 (1930) (Cardozo, C.J., dissenting) ("There is no undeviating principle that equity shall enforce the covenants of a [contract], unmoved by an appeal *ad misericordiam*, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course."). In particular, economic duress is closely related to the somewhat older doctrine of duress of goods. *See Scholey v. Mumford*, 60 N.Y. 498, 501 (1875) ("If a party has in his possession goods, or other property, belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and, in order to obtain possession of his property, he pays that sum, the money so paid is a payment made by compulsion, and may be recovered back."). *See generally* 22 N.Y. Jur. 2d Contracts § 130.

making of windfall profits—is that the seller's demand is one that will result in higher profits for the seller rather than recoup newly incurred costs. After all, the demand for a higher price might in truth originate from the price increase imposed on the seller by *its* supplier. It is not fair to penalize a seller for passing on costs imposed on it by the unfair leverage of another.

Thus a threat to withhold lawfully due performance under a contract until the buyer pays more than the contract calls for merely creates a presumption of unfair leverage that may be rebutted by showing additional costs or profit margin maintenance as G.B.L. § 396-r(3)(c) permits in gross disparity cases.[97] This structure distinguishes these coerced bargains from other forms of unconscionable means or unfair leverage, such as threats of violence, deception, and other forms of misconduct (described below), where the unfairness arises from the act itself rather than the act's relationship to profit increases.

Subdivision (d) requires that the seller's demanded modification be a price increase from the "contracted-for price." If the original contracted-for price is "floating," that is, derived from variables outside the contract and outside the parties' control, a mere change in the variables *without* a change to the contract itself will not implicate this subdivision (d). The demand must be to *modify* the *contracted*-for price term on pain of the seller outright breaching the contract. Thus, a contract that sold gasoline according to the daily Argus Index price would not implicate subdivision (d) if, following an abnormal disruption in the market for gasoline, the Argus Index price increased and thus the price of the contracted-for gasoline increased. But if the seller demanded that the price term incorporating the Argus Index be altered to replace the Argus Index with a different index that returned a higher price (or that the buyer now pay the Argus Index price plus $X per gallon), that demanded modification would create a presumption of unfair leverage.

Subdivision (d)(1) provides more detail on how to evaluate a demand from a seller for a new price term that is more contingent than a sum certain. It incorporates principles from the Court of Appeals' usury jurisprudence, which have the identical goal of detecting surreptitious unlawful price increases and like the price gouging statute "focus[] on the protection of persons in weak bargaining positions from being taken advantage of by those in much stronger bargaining positions."[98] When determining whether the demanded modification represents an increase, subdivision (d)(1) clarifies that the determination is

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[97] This distinguishes the rule from economic duress doctrine, where this defense is not available. Thus in *Austin Instrument*, 29 N.Y.2d at 129, where the smaller supplier justified its demanded price increase by pointing to increased costs imposed on it and not within its control, *see* Meredith R. Miller, *Revisiting Austin v. Loral: A Study in Economic Duress, Contract Modification and Framing*, 2 HASTINGS BUS. L.J. 357, 370 (2006), there would be a claim of common-law economic duress but no claim of unfair leverage under subdivision (d).

[98] *Adar Bays, LLC v. GeneSYS ID, Inc*., 37 N.Y.3d 320, 332 (2021) (Wilson, then-J.)

made at the time of the seller's demand and turns on whether it is more likely than not that the resulting term will generate a higher price than the term it replaces.[99]

Often this will be self-explanatory: a demand that a contract term calling for a payment of $100 per unit be changed to a payment of $200 per unit is, of course, a demand for a price increase. Subdivision (d)(1) will play a larger role in situations where the demand calls for a price with some degree of variability: for example, a demand that a price term that was previously set at the Argus Index be now set at the Platts Index would require proof that at the time of the demand it was more likely than not that Platts would yield a higher price than Argus.

Because subdivision (d) draws from elements of the economic duress doctrine but applies those elements in the specific context of the price gouging statute's text and history, subdivision (d)(2) underlines that the various defenses that may be pled to common-law economic duress do not apply in the context of determining the presence of unfair leverage and unconscionable means.

First, the buyer's acquiescence to the threat is irrelevant. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."[100] This includes subsequent ratification, whether directly or in the form of a waiver of affirmative rights.[101] Ratification may be highly relevant to the question of whether the covered party ought to be excused from performance on the grounds of duress, but does not implicate the public's interest in eliminating the use of unfair leverage and unconscionable means in the pricing of essential products during periods of abnormal market disruption.

The public is harmed from an upstream seller's exercise of unconscionable means even if the direct victim (such as a retail seller acting as a downstream buyer) can find a way to live with the wrongful price increase or is disincentivized from objecting because of the

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[99] In making this determination, the Court of Appeals' opinion in *Adar Bays* sets out helpful principles on the valuing of contingent and uncertain pricing options. *Adar Bays*, 37 N.Y.3d at 338–41. Given the context of a demanded price modification during an abnormal market disruption, it is highly likely that the demanding party has already modeled the likely impact of the demand: "projections made by one or both parties as to the expected profits or range of profits, assumptions of likelihood of future events, or negotiation history that imputes equivalence to certain of the negotiated terms, all … might be used to construct a reasonable valuation of an [price term] having a contingent component." *Id*. at 341.

[100] *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67, 70 (1918) (Holmes, J.).

[101] A waiver or dispute resolution agreement has no effect on proceedings brought by the Attorney General, who may seek relief even "specific to a victim who agreed to arbitrate claims, because, as here, that relief is best understood as part of the vindication of a public interest." *People v. Coventry First LLC*, 13 N.Y.3d 108, 114 (2009).

seller's relatively greater market power.[102] Subdivision (d)(2) allows for such an instance to still constitute unfair leverage, despite any acquiescence by the downstream buyer.

That the buyer would not be irreparably harmed by nonperformance, could have launched a breach of contract action, or in the case of a refusal to deliver contracted-upon goods, could find an alternative source of supply, may likewise alter the equities of excusing performance on the part of the buyer or of other remedies available in private commercial litigation, but does not alter the fact that the seller has employed unfair leverage in a sale or offer for sale.[103] Indeed, for many small businesses recourse to the courts, especially in the midst of a crisis, is not practical—particularly if the price increase acquired by the use of unfair leverage is lower than the transaction costs associated with litigation.[104] The Attorney General is committed to protecting small business from price gouging; as the Court of Appeals recently explained, small businesses "are merely a subclass of consumers."[105]

Subdivision (d) is limited to situations where there is a pre-disruption contract for essential products that by its terms requires provision of the essential products in accordance with the contracted-for price and the seller threatens to breach the contract unless a higher price is paid. It does not cover situations where a contract expires during a disruption and the parties negotiate a new contract, or renews on a regular basis but allows a party to forgo renewal at its discretion, or expressly allows the seller to impose a price increase. This is not to say any of these actions are beyond the contemplation of the statute: price increases permitted by a contract may frequently fail the "gross disparity" test of G.B.L. § 396-r(3)(b)(i), for example, given the proper understanding of the word "sale" from rule 600.1. They simply do not implicate subdivision (d) of the rule.

High-Pressure Sales Tactics, Abuse, and Undue Influence

Procedural unconscionability has long been described as encompassing "high

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[102] For a discussion of the comparative market power dynamics, *see* Isabella Weber & Evan Wasner, *Sellers' inflation, profits and conflict: why do large firms hike prices in an emergency?*, 11 REV. KEYNESIAN ECON. 183 (2023).

[103] *See, e.g.*, *Ranieri v. Bell Atl. Mobile*, 304 A.D.2d 353, 354 (1st Dep't 2003); *Walbern Press, Inc. v. C.V. Commc'ns, Inc.*, 212 A.D.2d 460, 461 (1st Dep't 1995).

[104] *See* Gregory Meyers, *When the Small Business Litigation Cannot Afford to Lose or Win*, 39 WILLIAM MITCHELL L. REV. 140 (2012). In the COVID-19 pandemic the State court system ceased taking cases of this kind while still allowing "essential" cases such as certain OAG enforcement actions. *See State Courts Close for Non-Essential Functions*, SPECTRUM NEWS (Mar. 16, 2020, 6:06 AM ET); Noah Goldberg & Molly Crane-Newman, *NYC Courts Back in Session Facing Two Years of COVID-19 Backlog*, N.Y. DAILY NEWS (Mar. 13, 2022, 11:34 PM ET).

[105] *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169, 178 (2021).

pressure sales tactics,"[106] sometimes, particularly in the context of fraudulent securities sales, called "boiler room tactics."[107] The rule's subdivision (e)(1) identifies the common thread linking these activities: they are all tactics that materially diminish the buyer's ability to comparison shop or adequately review the terms of the sale agreement.[108] Two obvious examples of such tactics are threats of violence or the use of abusive language, but these examples are of course not exhaustive. The language employed is that used in 16 C.F.R. § 1006.14(c)-(d), which describes the use of violence and abusive language in connection with debt collection.

Subdivision (e)(2) covers a related high-pressure sales tactic: conditioning the sale of an essential product on the buyer not filing a complaint with the Attorney General complaining about the tactics or, worse still, not complying with lawful process issued by the Attorney General or any law enforcement agency. Agreements not to complain about business conduct—whether to a regulator or to the community at large—are already void from their inception under federal law and subject to penalties.[109] Such agreements are also void as against public policy.[110]

A final catchall in subdivision (e)(3) includes "undue influence," another ground for

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[106] *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10–11 (1988); *State v. Wolowitz*, 96 A.D.2d 47, 66–68 (2d Dep't 1983).

[107] *See* Securities & Exch. Comm., *Portrait of a Boiler Room*, https://www.sec.gov/investor/links/toptips.htm#boiler (last accessed January 14, 2026).

[108] *See, e.g.*, *Sec. & Exch. Comm'n v. Shah*, No. 22-cv-3012 (LJL), 2022 WL 17979812, at *2 (S.D.N.Y. Dec. 28, 2022); *People v. N. Leasing Sys., Inc.*, 60 Misc. 3d 867, 876–77 (Sup. Ct., N.Y. County 2017), *aff'd as modified*, 169 A.D.3d 527 (1st Dep't 2019) (did not provide copies of contract to lessees); *People v. City Model & Talent Dev., Inc.*, 29 Misc. 3d 1205(A) (Sup. Ct., N.Y. County 2010) (luring children and parents into office with promises of glamorous photography); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377 (S.D.N.Y. 2002) (forced to sign contract, on threat of termination, in less time than a reasonable person would take to read it); *United States v. Shkolir*, 17 F. Supp. 2d 263 (S.D.N.Y. 1998); *Rossi v. 21st Century Concepts, Inc.*, 162 Misc. 2d 932, 934 (City Ct. 1994); *Niemiec v. Kellmark Corp.*, 153 Misc. 2d 347 (Tonawanda City Ct. 1992); *Commodity Futures Trading Comm'n v. U.S. Metals Depository Co.*, 468 F. Supp. 1149 (S.D.N.Y. 1979); *Donnelly v. Mustang Pools, Inc.*, 84 Misc. 2d 28 (Sup. Ct., Onondaga County 1975); *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140, 141 (Civ. Ct. 1973) (unspecified "extreme sales pressure"); *DeRouville v. E.F.G. Baby Prods. Co.*, 69 Misc. 2d 252 (Co. Ct., Albany County 1972).

[109] 15 U.S.C. § 45b. *See Washington v. Alderwood Surgical Ctr., LLC*, No. 2:22-cv-01835-RSM, 2024 WL 1606143 (W.D. Wash. Apr. 12, 2024).

[110] *People v. McQueen*, 203 A.D.3d 447 (1st Dep't 2022); *Quinio v. Aala*, 344 F. Supp. 3d 464, 476 (E.D.N.Y. 2018); *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1377–78 (Fed. Cir. 2001) (collecting cases for proposition that "it is a long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party . . . from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution"); *see also* Corbin on Contracts § 1421, at 355-56 (1962); *Cosby v. American Media, Inc.*, 197 F. Supp. 3d 735 (E.D. Pa. 2016).

voiding a contract for procedural unconscionability.[111]

Unfair Leverage of Market Position

Subdivision (f) is a cross-reference to rule 13 N.Y.C.R.R. § 600.5.

Costs

a. Costs to regulated parties: OAG does not anticipate any additional costs to regulated parties because the rule merely provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties. It does not impose any additional obligations. Almost all the examples of unfair leverage or unconscionable means are of contracts that would be unenforceable in any event or separately actionable as a violation of other laws. The only "costs" to be incurred are those incurred in complying with laws already in existence.

b. Costs to agency, the State, and local governments: OAG does not anticipate that it will incur any additional costs as a result of this rule. OAG foresees no additional costs to any other state or local government agencies.

c. Information and methodology upon which the estimate is based: The estimated costs to regulated parties, the agency, and state and local governments are based on the assessment of the Attorney General.

Local Government Mandates

The regulatory revisions do not impose any new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district, or other special district.

Paperwork

No paperwork requirements will be imposed upon regulated parties under the rule.

Duplication

There is no federal price gouging statute. None of the provisions of the rule conflicts with federal law.

[111] *See Matter of Friedman*, 64 A.D.2d 70, 85 (2d Dep't 1978).

Alternatives

The Attorney General considered no action, but, in light of evidence of the use of unconscionable means and unfair leverage in past disruptions and expressed desire by commentators for greater clarity on this statutory phrase, determined that the regulation would be beneficial to both consumers and businesses.[112]

The Attorney General considered retaining the formulation in a previous now-expired rule (LAW-12-23-00009-P), which would limit the exemplar list to "the use of unequal bargaining power, high-pressure sales techniques, [and] confusing or hidden language in an agreement or in price setting," a formulation derived from *Master Lease Corp v. Manhattan Limousine, Ltd*, which used that phrase to elaborate on the definition of "unconscionable" as used in N.Y.U.C.C. § 2-302.[113] The Attorney General rejected this alternative in favor of the present rule, which provides more detail and references the leading cases on unconscionability in New York.

The Attorney General was persuaded by the comment of a trade association that there was a risk that inclusion of the *Master Lease* formulation could be read as limiting the statutory language to mean procedural unconscionability alone to the exclusion of "unfair leverage," in derogation of the statutory text.[114] As discussed above, just as "unfair leverage" sweeps beyond common-law concepts of unconscionability, "unconscionable means" when read in context with "unfair leverage" may also sweep beyond common-law unconscionability.

One trade association argued that any action by the Attorney General that seeks to penalize unconscionable conduct will deter "legitimate market transactions."[115] But asserting that the price gouging law deters "legitimate market transactions" is circular: it is the role of statutes to delimit what is and is not legitimate, and the statute declares the use

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[112] In rejecting taking no action, the Attorney General considered the comment of the American Fuel & Petrochemical Manufacturers, First NPRM Comments at 74-75, who argued that any regulation was *ultra vires* because the doctrine of unconscionability was itself not compatible with "the common law of contract" as explicated by a law review article, Richard A Epstein, *Unconscionability: A Critical Reappraisal*, 18 J. L. & ECON. 293 (1975). This 1975 article cites no New York cases and repeatedly stresses that it describes how Prof. Epstein believes the law *should* operate rather than does operate. *See, e.g.*, *id*. at 294. The Court of Appeals has found "the doctrine of unconscionability [to be] developed in the common law of contracts," *People v. Two Wheel*, 71 N.Y.2d 693, 699 (1988). The Attorney General agrees, however, with the commentator's proposal that "unconscionable" should expressly include "situations involving common law fraud, duress, or undue influence." First NPRM Comments at 74-75. These suggestions have been incorporated into the present draft.

[113] 177 A.D.2d 85, 89 (2d Dep't 1992). *Master Lease* in turn relied on the leading case *State v. Wolowitz*, 96 A.D.2d 47, 67 (2d Dep't 1983) (interpreting "unconscionable" in the context of Executive Law § 63(12)).

[114] American Petroleum Institute, First NPRM Comments at 89-90.

[115] American Fuel & Petrochemical Manufacturers, First NPRM Comments at 74-75.

of unfair leverage and unconscionable means to charge higher prices for essential products during a disruption to be illegitimate.

In determining the examples that would be appropriate to include in the first promulgation of the rule, the Attorney General was confronted with the inevitable problem of selection: it is impossible to list every conceivable example of unfair leverage. Accordingly the Attorney General limited this first edition to those cases where, in the words of Chief Judge Cardozo, "the hardship is so flagrant, the misadventure so undoubted, the oppression so apparent, as to justify" inclusion.[116]

The Attorney General considered listing as an example of unconscionable means the act of charging different prices on the basis of the consumer's protected characteristics, such as race, age, or sex. The Attorney General rejected including this example because the necessary regulatory language became excessively complex given pre-existing laws concerning gender-based pricing and age-based pricing,[117] as well as concern that any such rules might be read to conflict with rules promulgated by the Division of Human Rights.[118] The exclusion of this listing does not preclude a determination that discriminatory pricing is an exercise of unfair leverage or unconscionable means, merely that inclusion as an illustration in this regulation was deemed improvident at the present time.

Specific alternative proposals suggested by commentators are discussed in the Assessment of Public Comment, which is available on the Attorney General's website and on file with the Department of State.[119] It is incorporated herein by reference.

Federal Standards

The regulatory revisions do not exceed any minimum standards of the federal government for the same or similar subject. There is a strong presumption against preemption when states and localities use their power to protect public health and welfare.

Compliance Schedule

The rule will go into effect 60 days after the publication of a Notice of Adoption in the New York State Register.

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[116] *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 14 (1930) (Cardozo, C.J., dissenting).

[117] *See* Executive Law § 296(2)(a) (public accommodations); Civil Rights Law § 40-c; General Business Law § 391-u (gender-based pricing); *cf.* 47 N.Y. Admin. C. §§ 30-1, 30-02.

[118] *See, e.g.*, 9 N.Y.C.R.R. § 466.8.

[119] *See* Office of the New York State Attorney General, *Rulemaking on laws governing price gouging in New York*, https://ag.ny.gov/rulemaking-laws-price-gouging.

Regulatory Flexibility Analysis for Small Businesses and Local Governments

The Attorney General determined that a Regulatory Flexibility Analysis for the rule is not necessary because it is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on small businesses or local governments. The rule provides guidance regarding the existing standard in a manner that reduces uncertainty for regulated parties, including small businesses. It does not impose any additional compliance requirements or reporting obligations. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[120]

Nonetheless, the Attorney General has elected to provide such an analysis. It is included below.

1. Effect of Rule. The effect of the rule is to identify specific examples of unfair leverage and unconscionable means. The rule collects existing law concerning procedural unconscionability, economic duress, undue influence, and deceptive acts and practices, providing greater clarity as to conduct that would violate the statute. This rule does not affect local governments, which may continue to enforce their own price gouging laws as before. Because the law and this rule are statewide in effect, to the extent it affects them at all, this rule affects all small businesses and all local governments in the State.

2. Compliance Requirements. Because this rule lists conduct that is already unlawful or would result in the voiding of the resulting sale or agreement, the rule imposes no additional compliance requirements that do not already exist. Local government would not be required to take any affirmative action to comply with this rule.

3. Professional Services. Neither small business nor local government is likely to need additional professional services to comply with this rule. It has no impact on local government and thus provides no cause for engagement of professional services by local government. As for small businesses, the rule will create either the same or less demand for professional services. Legal advice may be indicated for a small business to determine the presence or absence of "unfair leverage or unconscionable means," but the rule provides guidance for understanding that term that will either clarify the application of the term (thus leading to less need for professional services) or require comparable legal services to those required to advise on the meaning of "unfair leverage or unconscionable means."

4. Compliance Costs. This rule will impose no compliance costs on small businesses or local governments for the reasons stated above: insofar as any obligations are imposed on small

[120] *Seneca Nation of Indians v. State*, 89 A.D.3d 1536, 1538 (4th Dep't 2011).

businesses, they already existed under the statute and merely have become more concrete as a result of this rule.

5. **Economic and Technological Feasibility**. Compliance with this rule requires no new investment or technology that does not presently exist.

6. **Minimizing Adverse Impact**. The rule has a positive impact on small business and no impact on local government. Small business is already subject to a requirement to avoid exercising unfair leverage and unconscionable means and may be a *victim* of unconscionable means at the hands of economically powerful suppliers that use unfair leverage from disruptions to extract higher prices.[121] This rule would protect small businesses by clarifying that such conduct is an exercise of unfair leverage or unconscionable means.

To the extent that this rule has an adverse impact on small businesses, the Attorney General has considered, and applied, the approaches prescribed in section 202-b of the State Administrative Procedure Act. The Attorney General has taken account of limited resources available to small businesses and local governments in the design of the regulation.

Insofar as businesses would have previously considered it appropriate to engage in unconscionable conduct or exercises of unfair leverage based on interpretations of the statute that are not consistent with its text or purpose and will be economically harmed given their diminished ability to exploit their customers, this adverse impact is the intentional effect of the statute in its efforts to curb profiteering and unfair conduct during abnormal market disruptions.

The Attorney General considered creating exemptions from coverage of the rule for small businesses and local governments. The Attorney General determined any blanket small business exception would be in derogation of the text and purpose of the statute and would impinge on the general welfare, which is advanced by the eradication of price gouging from all parts of the marketplace.

7. **Small Business and Local Government Participation**. OAG has actively solicited the

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[121] FED. TRADE COMM'N., FEEDING AMERICA IN A TIME OF CRISIS THE UNITED STATES GROCERY SUPPLY CHAIN AND THE COVID-19 PANDEMIC (2024), https://www.ftc.gov/system/files/ftc_gov/pdf/p162318supplychainreport2024.pdf (describing how some of the largest retailers pressured their often smaller suppliers with fines and fees to pressure them to fill their orders during the pandemic); Maureen Tkacik, *Rescuing Restaurants: How to Protect Restaurants, Workers, and Communities from Predatory Delivery App Corporations* (Am. Econ. Liberties Project Working Paper Series on Corp. Power, Working Paper No. 7, 2020), https://www.economicliberties.us/wp-content/uploads/2020/09/Working-Paper-Series-on-Corporate-Power_7.pdf (highlighting the large commissions food delivery apps charged restaurants during the pandemic)

participation of small businesses and local government in the rulemaking by providing direct notification of the notice of proposed rulemaking to local governments and associations representing small businesses. The Attorney General has relaxed all applicable rules of comment format, instead permitting comments be sent in any form to the email address stopillegalprofiteering@ag.ny.gov.

Rural Area Flexibility Analysis

The Attorney General determined that a Rural Area Flexibility Analysis for the rule need not be submitted because the rule will not impose any adverse impact or significant new reporting, record keeping, or other compliance requirements on any public or private entities in rural areas. Inasmuch as any person will experience an adverse impact, that impact "is a direct result of the relevant statutes, not the rule itself."[122]

Nonetheless, the Attorney General has elected to provide such an analysis. It is included below.

1. **Type and Estimated Number of Rural Areas.** The statute, and therefore necessarily the rule, applies to all rural areas in the State.

2. **Reporting, Recordkeeping, and Other Compliance Requirements and Professional Services.** As described in the regulatory flexibility analysis above, no affirmative reporting, recordkeeping, or other compliance requirements are imposed on rural areas as a result of this rule; the effect of the rule will be either maintain reliance on professional services at present levels or to decrease reliance on professional services.

3. **Costs.** None; see regulatory flexibility analysis above.

4. **Minimizing Adverse Impact.** As discussed above, the Attorney General concludes that as to all rural businesses this rule has no adverse impact, and may well be beneficial by restraining unconscionable practices by the suppliers of rural businesses.

5. **Rural Area Participation.** OAG has taken reasonable measures to ensure that affected public and private interests in rural areas have been given an opportunity to participate in this rulemaking. The Attorney General has relaxed all applicable rules respecting the form and format of comments; comments may be in any form and emailed to stopillegalprofiteering@ag.ny.gov.

[122] *Seneca Nation of Indians v. State*, 89 A.D.3d 1536, 1538 (4th Dep't 2011).