

Inoculating Consumers Against “Unconscionable” Business Practices— Price Gouging & The Role of the State Attorneys General in the Vaccine Shortage of 2004

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* J.D. 2006, Columbia University School of Law. This Paper, submitted January 9, 2005, is the final written assignment for the seminar class, Multistate Litigation: The Role of the State Attorney General, taught by Professor James Tierney at the Columbia School of Law in the Fall Semester of 2004.

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No longer do we believe that fraud may be perpetrated by the cry of “caveat emptor.” We have reached the point where “Let the buyer beware” is a poor business philosophy for a social order allegedly based upon man’s respect for his fellow man. Let the seller beware, too! A free enterprise system not founded upon personal morality will ultimately lose freedom.¹

Introduction

There is little debate today over whether a pure caveat emptor regime—and with it, price gouging, profiteering and “unconscionable” business practices, in general, that are part-and-parcel of a seller’s marketplace—seems normatively unfair and immoral. The real question is whether it is possible to replace the outmoded, “buyer’s beware” framework with a robust account of “unconscionability” that will allow us to move past the old saw, “A fair exchange is no robbery.”² There is also, of course, the further question of enforcement—who will enforce the fairness and efficiency norms embodied in our principled version of price unconscionability? Against a legal backdrop where individual, private litigation is ineffective in deterring unconscionable practices and where federal authorities have abandoned their role of monitoring the marketplace for price unconscionability, the answer must be the state attorneys general.

Part I develops the thesis that price unconscionability, which has traditionally been understood in terms of “fairness,” can also be tentatively explained as a market failure that permits sellers to raise prices without regard to the costs of the good or service provided. Part II suggests that the state attorneys general are singularly well-positioned to extend their already broad consumer protection powers into the price unconscionability realm, an

¹ *State v. ITM, Inc.*, 275 N.Y.S.2d 303, 321 (N.Y. Sup. Ct. 1966).

² Robert Braucher, *The Unconscionable Contract or Term*, 31 U. PITT. L. REV. 337, 337 (1970).

area that lacks any federal presence and is not the subject of any serious private enforcement. Part III examines the evolution of the flu vaccine shortage and its culmination, for the purposes of this Paper, in the price gouging cases filed by the state attorneys general. The analysis suggests that the Attorneys General play an instrumental, market-reinforcing role by publicizing and acting on fairness norms; such public accountability for businesses is critical to the functioning of a “free” market, the breakdown of which is the essence of price unconscionability.

I. Defining Price Gouging—Price Unconscionability & Fairness in the Marketplace

a. Background & General Tensions

The theoretical underpinning of price gouging or profiteering is best understood through the lens of the unconscionability doctrine, which permits courts to intercede between two parties and reject or refuse to enforce an agreement between them. In price unconscionability cases, one of the parties to an action asserts that the price paid was “grossly disproportionate” to the value of the good or service received in exchange.³ In a successful case, the court determines that either the markup over the cost of the good or service was excessive in itself,⁴ or the price charged was higher than that usually charged for the same or similar goods.⁵

Price unconscionability, the most common and also the most controversial subset of general unconscionability jurisprudence, has its roots in the equitable power of courts to

³ Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1820 (1994).

⁴ *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (D. Ct. 1966); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (1964).

⁵ *Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303 (Sup. Ct. 1966); *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (Sup. Ct. 1969); *Toker v. Westerman*, 274 A.2d 78 (D. Ct. 1970).

set aside bargains and contracts that “in conscience...should not be binding.”⁶ Courts usually review transactions with an eye to whether the agreement was “oppressive,” resulted from the “unequal bargaining power” of the two parties, or was totally “one-sided.”⁷ Unfortunately, these indefinite and malleable guidelines do not offer any clear-cut rationale for distinguishing unconscionable from conscionable transactions.⁸ The incorporation of unconscionability into the U.C.C.⁹ and the Restatement¹⁰ as a defense to contract enforcement has not provided any additional guidance since the official comments of both compilations essentially refer back to the case law. Even legislation using the terms “unconscionable” or “unconscionability,” is of little avail since statutes are rarely explicit¹¹ in their definitions—more often than not, neither the language nor the legislative history is helpful in defining the scope of the unconscionability doctrine.¹² To be sure, the vagueness of statutory unconscionability has often reached unconstitutional proportions.¹³ In the absence of a consistent standard used by the courts and the indeterminate nature of the plain meaning of the term, many commentators have given up trying to define

⁶ Evelyn Brown, *The Uncertainty of U.C.C. Section 2-302: Why Unconscionability Has Become a Relic*, 105 COM. L.J. 287, 290 (2000).

⁷ *Ahern v. Knecht*, 563 N.E.2d 787 (Ill. App. Ct. 1990) (using all these terms to describe an unconscionable agreement). Judges have been all over the proverbial map in applying the unconscionability standard but seem to be implicitly relying on Arthur Leff’s now-famous distinction between procedural and substantive unconscionability. Arthur Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485 (1967).

⁸ “Although the results of the cases [on unconscionability] have a ring of conviction about them, the reasoning in support has frequently shown a want of analytical rigor.” M. P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 761 (1969).

⁹ U.C.C. § 2-302 (1996).

¹⁰ RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

¹¹ When explicitly defined by statute, inquiry into the meaning or scope of the term is preempted and replaced by statutory interpretation questions. “Unconscionable” is sometimes defined in emergency or natural disaster statutes, such as FLA. STAT. § 501.160, or consumer protection statutes directed towards a specific good or service, such as usury legislation. See also *infra* notes 61—63 and accompanying text.

¹² David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 FLA. BAR J. 49 (2000) (arguing that the meaning of “unconscionable” in the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is unclear).

¹³ See *Dept. of Business Regulation v. National Manufactured Housing Federation, Inc.*, 370 So.2d 1132, 1136 (Fla. 1979) (holding mobile home rent controls statute’s prohibition on unconscionable rent increases was an unconstitutional delegation of legislative authority to an administrative agency).

“unconscionability” and point the finger at the judiciary for manipulating the principle “in order to reach the equitable principles they desire.”¹⁴

This indeterminacy problem is only exacerbated by the fact that refusing to enforce agreements that seem unfair runs headlong into the bedrock principles of freedom of contract and *laissez faire* economics.¹⁵ Under traditional contract theory, it is axiomatic that courts are not to inquire into the adequacy of consideration in an agreement or market transaction. Furthermore, under classical economic theory, unconscionability doctrine has no role to play in a free market where parties to a transaction are themselves able to mitigate the potential for unconscionable pricing. In a perfectly competitive market, buyers can exercise their right to exit any particular relationship with a seller by refusing to pay the demanded price and by dealing with other sellers eager to gain market share.¹⁶

Economists are particularly outraged by judicial or legislative controls on the free market pricing of both commodities following an emergency and necessities in general. Prices, the argument goes, not only permit sellers to recover their costs, but also force buyers to restrict demand.¹⁷ In the case of a hotel, for example, that is unable to charge a higher room rate following a natural disaster in which homes are destroyed, those renters who get to the hotel first will fill it up not leaving any rooms for those who get there later. However, in a regime where prices are permitted to vary with supply and demand, “price

¹⁴ Brown, *supra* note 6 at 290.

¹⁵ See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 63 (1990); *but cf.* Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995).

¹⁶ Darr, *supra* note 3 at 1822-23.

¹⁷ Thomas Sowell, *BASIC ECONOMICS: A CITIZEN’S GUIDE TO THE ECONOMY* 21—39 (2000); Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1547 n.223 (1999) (applying the same argument to emergency supplies following a natural disaster).

gouging” forces a family that would have otherwise rented two rooms, one for parents and the other for children, to rent just one, leaving the other room for someone else.

Despite these powerful economic arguments, courts and legislatures continue to ban market transactions that charge “grossly excessive” or “unconscionable prices.” At least one commentator has suggested that, for the judiciary, “price unconscionability is [now] a part of the basic foundation of contract law.”¹⁸ Similarly, most state legislatures have enacted price-gouging laws¹⁹ and incorporated the unconscionability doctrine into already-broad consumer protection statutes.²⁰ Even though there doesn’t seem to be a principled reason for insisting that excessive prices are an undesirable consequence of free market transactions, the near-uniformity of opinion among government actors suggests that there must be something to the notion that such high prices are detrimental to the parties to the transaction, society, or both.

b. Fairness and Equity

One patently obvious reason to resist profiteering, especially in cases involving necessities and emergency situations, is that the brunt of “grossly excessive” pricing is disproportionately felt by those who cannot afford the essential good or service at issue.²¹ Thus, distributional concerns seem to be held in higher regard than the allocative efficiencies that might otherwise be attained under a completely free market. Taking the

¹⁸ Darr, *supra* note 3 at 1821; see also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 751—54 (1982) (discussing a paradigm shift in the law recognizing the invalidity of transactions that don’t comport with fairness norms).

¹⁹ See *infra* notes 61—63 and accompanying text.

²⁰ See *infra* notes 54, 56, 57 and accompanying text.

²¹ Jerry Shin, *Call it Profiteering, Not the Free Market, Price Gouging Distributes Vital Resources on the Basis of Who Has the Most Money, Not Who Has the Most Need*, CHARLOTTE OBSERVER, Sept. 7, 1992, at 13A.

hotel example, it is self-evident that permitting hotels to engage in profiteering²² following a natural disaster prices out of the market entire economic strata of the community. The critical factor ignored by market enthusiasts is that one component of “price” is the willingness or ability to pay, which is in turn reflective of the underlying distribution of wealth in a society.²³ Though arguably inefficient, a first-come-first-serve basis is at least an equitable solution that permits all consumers to have equal access to the resource when they need it the most.²⁴

A second concern not discussed in the literature or in court decisions is a moral hazard problem created by allowing profiteering. If businesses are permitted to raise prices during emergency situations, such as following natural disasters, then they have a positive incentive not to contribute to its abatement. Owners may not see fit to assist those in need or contribute positively to mitigating the impact of the disaster. At least in a regime where price gouging is illegal, business owners are more neutral, if not perfectly ambivalent, as to the state of affairs and do not have an economic incentive pulling them in the other direction of any moral inclinations.

The fairness norm presented here can be generalized and stated in terms cognizable by the law and economics ilk. In the words of one commentator:

“Conventional economic analyses assume as a matter of course that excess demand for a good creates an opportunity for suppliers to raise prices...[and] profit-seeking adjustments

²² *Florida Hotels Charged with Price Gouging*, at www.consumeraffairs.com/news04/fl_price_gouging.html (Aug. 17, 2004) (last visited Jan. 5, 1005).

²³ See generally Lateef Mtima, *Unconscionability and the Economically Disadvantaged: Towards a New Model*, 1 BLACKLETTER J. 47 (1984) (discussing the implications of caveat emptor regime for the poor and illiterate).

²⁴ Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1512—1513 (1998) (discussing, in the context of price gouging laws, the empirical preference of consumers for first-in-time distribution of scarce goods based on the principle of fairness).

that clear the market are...as natural as water finding its level—and as ethically neutral....[T]he lay public does not share this indifference.”²⁵

High market prices that are completely unrelated to the costs of the good or service are perceived as unfair and resulting in a sort of “windfall” for the seller.²⁶ Leaving such surpluses where they fall means that a few individuals receive large monetary gains while most get nothing; this realization stokes the redistributive urge.²⁷

c. The Not-So-Free and Not-So-Competitive Market

Interestingly enough, a free and perfectly competitive market usually reinforces these fairness norms automatically. The price of a commodity sold under perfect competition is normally equal to the seller’s opportunity cost and approximates the seller’s marginal cost. Such a price also achieves the goals of efficiency-based analyses by allocating supply to its highest-valued use and encouraging the appropriate amount of investment in productive capacity.²⁸ Furthermore, fairness norms are buttressed by the

²⁵ Daniel Kahneman et al., *Fairness as a Constraint on Profit-Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986); see also Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects’ Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259, 261 (1985).

²⁶ Darr, *supra* note 3 at 1835 (highlighting the importance of the fact that fairness concerns mean that cost-driven increases are acceptable but purely demand-driven ones may not be); Arthur M. Okun, *PRICES AND QUANTITIES: A MACROECONOMIC ANALYSIS* 134—40 (1981) (same); see also Kades, *supra* note 17 at 1496 (suggesting that people are risk-averse and would prefer, ex ante, to share in the windfall gains).

²⁷ Economic theorists would retort that they are not completely blind to distributional concerns once a normative commitment to fairness has been made. They would only prefer that once the optimal allocation of resources has been made in a free market setting, excess gains acquired through unconscionable pricing should be taxed and then redistributed to those affected. Such a rule would make “many people better off than they would be under the redistributive rule without making anyone else worse off.” Posner, *supra* note 15 at 284; see also Kades, *supra* note 17 at 1547 n.223. This perspective ignores that a simple rule of thumb, such as the unconscionability doctrine, is not only more precise but is also at a lower cost to society than a tax-and-redistribute regime, which would impose administrative, and transactional costs. Additionally, such a system, though cost-prohibitive in the general case, is almost impossible to administer when the event that triggers the “windfall” is not predictable as in the case of a natural disaster.

²⁸ Eisenberg, *supra* note 18 at 756.

sellers' fear of alienating customers and losing goodwill.²⁹ Thus, to the extent that there is a slight deviation from the perfectly competitive market regime, community norms can effectively regulate the extent to which a seller is capable of repricing its products due to variations in demand or bargaining power.³⁰

The previous discussion suggests that the market is actually an instrument for exacting fairness among buyers and sellers. This observation may carry some weight especially because economic theory and the freedom of contract mantra are both founded on the assumption of free and perfectly competitive markets. In the absence of such conditions, transactions in which the price is “grossly excessive” are definitely not supported by fairness norms and, additionally, may not be supported by efficiency concerns, which depend on efficient markets for their validation. Understanding the close relationship between market failures and price unconscionability certainly dissipates some of the tension between striking down uncoerced bargains and free market principles. To be sure, unconscionability may be the “mirror image” of what constitutes an efficient transaction, in that the grounds for a finding of unconscionability reflect the necessary conditions of a free market.³¹ Since there seems to be a strong relationship between perfectly competitive markets and transactions that can be seen as equitable,³² price unconscionability might be seen as the product of market failure and the willingness of

²⁹ Jolls, *supra* note 24 at 1513—14 (discussing “price stickiness” and the baffling resistance to price increases in a competitive market); *see also* Steve Lohr, *Lessons From a Hurricane: It Pays Not to Gouge*, N.Y. TIMES, Sept. 22, 1992, at D1.

³⁰ Darr, *supra* note 3 at 1835—36.

³¹ *Cf.* Jeffrey C. Fort, *Understanding Unconscionability: Defining the Principle*, 9 LOY. U. CHI. L.J. 765, 799 (1978) (discussing unconscionability as the “mirror image” of contract).

³² That market failure may be the sine qua non of unconscionability has some intuitive appeal. Indeed, some commentators have suggested that price terms may *only* be unfair or unconscionable in an imperfectly competitive market. Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 354 (2002); Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1529—30 (2003); Eisenberg, *supra* note 18 at 750.

sellers to exert market power to increase prices without regard to the underlying cost of the good or service sold.

Under this framework, probably the clearest example of unconscionable behavior is that of a monopolist engaging in price discrimination.³³ Price discrimination is the extraction of different prices from various segments of the market that value the good differently, without regard to the costs of providing or selling the good to those market segments.³⁴ An example of price discrimination is *Besta v. Beneficial Loan Co. of Iowa*,³⁵ where customers were first offered financing plans with higher payments over a 72-month period, and only if they refused, then offered lower payments over a 36-month period;³⁶ therefore, customers were not payer higher prices for higher risks but because they were perceived as price-insensitive and valuing the loan more than other customers. Another example of such behavior would be to charge men and women different prices for identical services.³⁷ The exertion of market power in this manner varies markedly from the operation of a perfectly competitive market regime, where individual firms are incapable of affecting the price of the good without regard to cost and cannot discriminate. Thus, from both efficiency and fairness perspectives, a price discriminating business that is capable of segmenting its market and charging different customers different prices *solely based on their identity* “may be regarded as universally unconscionable.”³⁸

³³ Klock, *supra* note 32. Market enthusiasts object to price discrimination in this manner, even where there are no economic inefficiencies generated, on the grounds that the social cost of a price-discriminating monopoly far outweighs its utility. Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* 282 (4th Ed. 1992).

³⁴ For more on price discrimination, see Edward H. Cooper, *Price Discrimination Law and Economic Efficiency*, 75 MICH. L. REV. 962, 964 (1997).

³⁵ 855 F.2d 532 (8th Cir. 1988) (finding the alternative pricing scheme unconscionable but on different grounds).

³⁶ Klock, *supra* note 32 at 376.

³⁷ See Ellen Perlman, *California Fights Service Prices Based on Gender*, PLAIN DEALER, Jan. 12, 1996, at 10A.

³⁸ Klock, *supra* note 32 at 376.

Another paradigmatic case under the unconscionability-as-market-failure model is the exertion of monopoly or market power to raise the price of a necessity such as a life-saving drug or medical procedure.³⁹ In a perfectly competitive market environment, the unconscionability doctrine might not have any role to play since individual providers of necessary goods or services would have to compete for buyers and the equilibrium price would roughly equal the equilibrium cost. The necessity case involves a price in excess of cost that excludes some consumers from the market who would have been able to afford the good under perfect competition.⁴⁰ This scenario further deviates from the usual monopoly scenario where the consumer is still able to rely on substitute goods (such as broadcast or satellite television where a hypothetical cable monopoly exists) to fulfill her desires. In the instant case, this is not an option for the buyer—there is only one drug or procedure that will save her life and the monopolist is the only one selling it.⁴¹

d. Tentative “Principles” of Unconscionable Pricing

There are, of course, too many examples of market failures that may give rise to unconscionable transactions to list here.⁴² But it should be enough to suggest, broadly, that

³⁹ Eisenberg, *supra* note 18 at 761—63.

⁴⁰ Arguably, this does not end the inquiry since all that has been proven is that perfect competition model is inadequate. This does not conclusively mean that transactions involving grossly over-priced necessities should be struck down. Eisenberg further suggests that, in the necessity case, enforcement of such transactions might lead to over-investment of societal resources in preventative medicine so that patients are less often in the scenario where they have to depend on overpriced medical procedures or drugs. *Id.* at 762.

⁴¹ *Cf.* Darr, *supra* note 3 at 1832 (stating “[e]xcept in the rare case of necessities, it is difficult to imagine that a party could not walk away from a transaction...so that the rules of unconscionability would come into play under traditional market assumptions”).

⁴² There are at least two more examples, each slightly more controversial than those already set forth. First, even under perfectly competitive conditions, sellers of homogeneous commodities may take advantage of prohibitively high information costs on consumers. Buyers of a fungible product may not want to engage in expensive searching (i.e. going from store to store) to find a reasonable price, and thus, the seller’s practice taking advantage of this tendency by charging excessive prices should be held unconscionable. Eisenberg, *supra* note 18 at 779—82. Second, community norms of fairness may not be enforced because the operative conditions are such that market players are not afraid of alienating customers or losing goodwill. This may

a strong potential for unconscionable business practices exists where: one of the underlying assumptions of a “free” market do not hold (i.e. perfect competition, substitution of goods, etc); *and* suppliers or sellers evince a willingness to exert their newfound market power by increasing prices without any concomitant increases in costs. Except maybe in the price discrimination case,⁴³ the second, “unrelated-to-costs” condition is difficult to establish and may be inferred from the difference between the sale price at the unconscionable dealer and either the price at similarly situated retailers or the price offered by the dealer himself in the near-past.⁴⁴

In the market failure context, limiting unconscionability to price increases not related to costs, is especially important and has three immediately apparent consequences. First, monopolistic conditions, though creating a host of other problems,⁴⁵ do not necessarily give rise to prices that are unconscionable.⁴⁶ Though monopoly prices exceed costs and output is lower than socially optimal, the monopolist does not behave any differently than any other profit-maximizing firm in a competitive environment.⁴⁷ To the extent that monopolies themselves should be the target of legal rules, antitrust law should be sufficient—unconscionability should ultimately be defined by the imposition of excessive prices unrelated to costs, rather than excessive prices alone.

occur when there is “limited likelihood of a future sale, difficult informational problems in determining either the need for the product or its quality relative to price, high relational effects between the parties that prevent the erosion of goodwill, or situations in which the future credibility of the seller is not relevant to the buyer.” Darr, *supra* note 3 at 1841.

⁴³ Klock, *supra* note 32 at 377.

⁴⁴ These are the two benchmarks often used by price gouging or anti-profiteering legislation. See Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability*, 31 HOUS. L. REV. 721, 757—59 (1994).

⁴⁵ Such as antitrust or anti-competitive practices issues subject to regulation by federal and state authorities, apart from any consumer protection mandates.

⁴⁶ Posner, *ECONOMIC ANALYSIS OF LAW*, *supra* note 33 at 102; Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535, 541—41 (1992).

⁴⁷ Klock, *supra* note 32 at 376—77.

Second, the “unrelated-to-costs” condition permits prohibitions on price gouging or profiteering to be distinguished from long-term price controls. The latter may be inefficient in the long run, effecting a diversion of resources away from the production of a socially useful activity or good.⁴⁸ The doctrine of unconscionability should not be used as a long-term solution to the problem of high prices because, over time, markets correct to the problem presented and may allocate resources inefficiently. This is probably best demonstrated by the interesting evolution of unconscionability doctrine in Florida, where the widespread price gouging and profiteering in necessities following Hurricane Andrew in 1992 was never really repeated.⁴⁹ Businesses, fearing loss of goodwill and other adverse reputational effects, increased inventories and raised prices gradually over time to reflect the increased demand. Prosecutions under the “unconscionable practices” prong of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) fell off sharply and even the remaining cases had much more of a fraud or duress element than unconscionability. This suggests that where the market failure is a surprise (i.e. triggered by a natural disaster or emergency), “market corrections” effected through the unconscionability doctrine should be temporary in nature and only used immediately following the initial triggering event (i.e. natural disaster). Competitive markets will react to a recurring event that was once a surprise, such as a severe hurricane, to reflect both the efficiency and fairness norms discussed so far.⁵⁰

The purpose of this discussion has really been to highlight a set of principles in an attempt to guide the price unconscionability inquiry *but not* to exhaust the concept. The

⁴⁸ Kades, *supra* note 17 at 1547 n.223.

⁴⁹ Interview with Richard Doran (October 2004); *see also* Jolls, *supra* note 24 at 1513—15; Lohr, *supra* note 29.

⁵⁰ Kades, *supra* note 17 at 1551.

stated prerequisites to unconscionable transactions—imperfect competition and the exertion of market power in an attempt to level increased prices that do not reflect increased costs—should not be seen as hard, fast rules because unconscionability is basically a stop-gap doctrine that is probably incapable of definition.⁵¹ Thus, perceived “unfairness” or “inequality of bargaining power” or any of the usual grounds for invoking unconscionability that are rooted in our desire for fair and egalitarian dealings in the marketplace should be sufficient to render a transaction invalid. The unconscionability-as-market-failure thesis only suggests a strong correlation between market failures and the potential for unconscionable business practices, which may lead to a more principled approach to a theoretically complex area of the law.

II. The Role of the State Attorneys General in Price Unconscionability

a. Institutional Competence & Legal Arsenal

The market failure approach suggests that the state attorneys general, given their antitrust responsibilities,⁵² are the right “branch of government,”⁵³ from an institutional choice perspective, to prosecute price gouging and profiteering cases—the state attorneys general already have the manpower and the “know-how” to determine whether a particular

⁵¹ Eisenberg, *supra* note 18 at 754; *see also* Ellinghaus, *supra* note 8 at 760 (discussing how unconscionability is, “by its very nature,” without bounds).

⁵² States can bring actions under state antitrust laws or under federal antitrust laws. Federal antitrust law permits states to file for injunctive relief and to recover damages in their capacities as direct purchasers and on behalf of their consumers under the *parens patriae* provisions of federal antitrust laws. 15 U.S.C. 15c (2004). Injunctive relief can also be sought by the states under section 26 of the Clayton Act. 15 U.S.C. 26 (2004).

⁵³ James Tierney, *The State Attorney General: the Fourth Branch of Government*, in Justin Sadowsky, THE STATE ATTORNEY GENERAL AS DETERMINER OF DRUG REIMPORTATION POLICY: AN EXAMINATION OF THE POWERS AND DUTIES OF THE STATE ATTORNEY GENERAL TO CREATE PUBLIC POLICY AS VIEWED THROUGH THE LENS OF THE CANADIAN PHARMACEUTICAL ISSUE (January 2004) (on file with author); *See also* Walter Olson, Big Guns, REASON, Oct. 1999, *available at* <http://reason.com/9910/co.wo.reasonable.shtml> (last visited January 2, 2005).

market deviates from a perfectly competitive regime. Though the exact relationship between antitrust and price unconscionability is not crystal clear, theoretically speaking, vigorous prosecution of price gouging seems to provide a safety net against the failure of antitrust policies. It is certainly imaginable that prices rise above competitive levels due to a perceptible market failure, but antitrust-style litigation or prosecutions are not possible either because imperfect knowledge about the operation of markets is unable to suggest a principled reason for the lack of competition, or because imperfect competition was the market equilibrium result that naturally followed from the background legal and regulatory regime. Thus, enforcement of fairness and efficiency norms through price gouging litigation may naturally complement the state attorney general's antitrust responsibilities by providing a backstop against the inability to bring an antitrust suit.

The attorney general's arsenal to combat price unconscionability features a vast array of legal weapons, one of which is the state's general consumer protection statute.⁵⁴ Unfair and deceptive practices laws are intentionally vague and open-ended, granting the attorney general "a broad swath of authority to ensure that businesses are run fairly and honestly."⁵⁵ Most codifications provide potent remedies for unconscionable conduct, such as fixed recovery of a consumer penalty⁵⁶ or trebling of actual damages.⁵⁷ Even if a general

⁵⁴ For examples of statutes under which price unconscionability claims might be brought, *see* the unfair trade practices statutes adopted by states such as Kansas, Ohio, Texas, Florida, and Utah; the Uniform Consumer Sales Practices Act provides:

In determining whether an act or practice is unconscionable, the court shall consider circumstances such as the following of which the supplier knew or had reason to know:

...

(2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers.

Unif. Consumer Sales Practices Act, section 4, 7A U.L.A. 241 (1971).

⁵⁵ Aaron Snow, MULTISTATE RULEMAKING, at 5, *available at* <http://www.stateag.org/aglibrary> (last visited Jan. 4, 2004).

⁵⁶ *See, e.g.*, UTAH CODE ANN. § 13-11-19(2) (Supp. 1993) (providing for actual damages or \$2000 whichever is greater).

consumer protection statute does not expressly prohibit “unconscionable” practices,⁵⁷ state courts are often willing to read price unconscionability into the broad “unfair or deceptive” prong of the statute.⁵⁸ State attorneys general may be capable of invoking Section 2-302 of the U.C.C. or the common law of unconscionability for similarly broad class or class-type remedial action.⁶⁰ Attorneys general also often have at their disposal more specific legislation targeting sellers who charge “grossly excessive” or “unconscionable” prices during emergencies, such as natural disasters,⁶¹ or for specific commodities, such as gasoline⁶² and theater tickets.⁶³

In twenty-seven states, the attorney general is empowered to “create regulations adding meat to the bones of the state’s [unfair and deceptive trade practices] statute.”⁶⁴ At least one commentator has suggested that price gouging prosecutions under consumer

⁵⁷ See, e.g., TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon Supp. 1994) (providing for treble damages).

⁵⁸ For an example of a consumer protection statute that was recently amended, in 1993, to extend its prohibitions to unconscionable, as well as deceptive and unfair, acts or practices, see the Florida Deceptive and Unfair Trade Practices Act (FDUPTA), FLA. STAT. § 501.204(1) (1993).

⁵⁹ See, e.g., *People ex. rel. Hartigan v. Knecht Services, Inc.*, 575 N.E.2d 1378 (Ill. App. Ct. 1991) (finding excessive prices charged by home repair company to be “unfair” or “deceptive” under the state consumer protection statute, in action brought by the Attorney General of Illinois); *Wernly v. Anapol*, 91 B.R. 702, 704 (E.D. Mich. 1988) (holding a check-cashing fee five times the industry norm violated Pennsylvania’s unfair trade practice statutes).

⁶⁰ See *Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303, 322 (1966) (upholding the standing of the Attorney General of New York to invoke the U.C.C.); for class actions and the standing of attorneys general, see generally *State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866 (Me. 1981); *Commonwealth v. De Cotis*, 316 N.E.2d 748 (Mass. 1974). As noted earlier, this strategy is less favored because the remedies available might be limited and the standard of proof required slightly higher.

⁶¹ See, e.g., ALA. CODE 8-31-3 (1997); 1997 ARK. ACTS 376; CAL. PENAL CODE 396 (West 1998); CONN. GENN. STAT. 42-232 (1997); FLA. STAT. ANN. 501.160 (West 1998); GA. CODE ANN. 10-1-393.4 (1997); LA. REV. STAT. ANN. 29:732 (West 1998); N.Y. GEN. BUS. LAW 396-r (McKinney 1997—1998); TEX. BUS. & COMM. CODE ANN. 1746(25) (1998).

⁶² See, for example, IND. CODE §§ 4-6-9.1-2 to 7 (Supp. 2002), which targets fuel price gouging and was enacted by the Indiana General Assembly in response to the drastic increases in gasoline prices following the September 11th attacks. Matthew W. Conrad, 36 Ind. L. Rev. 991, 998 (2003).

⁶³ For example, see N.Y. ARTS & CULT. AFF. LAW 25.13 (McKinney 1984 & Supp. 1998); MASS. GEN. LAWS CH. 140 185A, 185D (West 1994).

⁶⁴ Snow, *supra* note 55 at 5.

protection or emergency statutes result in an “extremely arbitrary” standard.⁶⁵ The suggestion is that state attorneys general should use their rule-making power to add “uniformity, as well as objectivity, to an enforcement process that is all too subjective and has created unnecessary legal costs to innocent persons.”⁶⁶ Though the argument for *ex ante* rules that reduce litigation costs is powerful,⁶⁷ highly particularized rules may significantly reduce the attorney general’s ability to pursue creative litigation strategies. The latter is an especially important goal when the nature of the enemy—unconscionable business practices—is vague and unknowable.⁶⁸ Thus, while an attorney general’s rule making power presents an additional enforcement mechanism, in the context of unconscionability, it should be used sparingly.

Multistate litigation—i.e. coordination and parallel prosecution of price gouging defendants with other state attorneys general—presents the most powerful tool available to an attorney general.⁶⁹ The multistate model has often been employed in the price unconscionability context. Following the September 11th attacks, the state attorneys general launched a concerted campaign against price gouging gasoline retailers.⁷⁰ Similarly, during the Flu Vaccine Emergency of 2004, a nationwide multistate campaign was launched warning businesses against profiteering in the influenza vaccine and coordinating litigation against one defendant in particular who had raised vaccine prices

⁶⁵ Gary E. Lehman, *Price Gouging: Application of Florida’s Deceptive and Unfair Trade Practices Act in the Aftermath of Hurricane Andrew*, 17 NOVA L. REV. 1029, 1050 (1993).

⁶⁶ *Id.*

⁶⁷ See generally, Snow, *supra* note 55.

⁶⁸ See *supra* notes 7—14 and accompanying notes.

⁶⁹ See generally, Jason Lynch, *Federalism, Separation of Powers, and the Role of the State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2003 (2001) (discussing the scope and impact of multistate litigation brought by the state attorneys general).

⁷⁰ NAAG PROJECT: CONSUMER PROTECTION, National Ass’n of Attorneys General (2001), at <http://www.naag.org/issues/issue-consumer.php> (last visited Jan. 2, 2005).

exorbitantly in several states.⁷¹ In a more regional multistate collaboration, the Gulf Coast state attorneys general agreed to cooperate on a long-term basis against price gouging following natural disasters such as hurricanes.⁷² Cost-savings and information-sharing aside, multistate litigation is an especially potent enforcement mechanism in the price-gouging context where businesses feel immune from the repercussions of violating fairness norms. Preliminary review of the facts surrounding both the post-9/11 gasoline and flu vaccine price gouging suggests that the multistate nature of the reactions contributed to immediate reinforcement of fairness norms by forcing businesses to be publicly accountable for their actions in a manner that was not previously possible.⁷³

b. The Need for Attorneys General Action—Inadequacy of Private & Federal Enforcement

The case for state activism in the price unconscionability realm is particularly powerful given that private and federal enforcement are ineffectual in deterring such behavior. The threshold concern facing private consumer litigation is the “negative value” problem. Small, individual claims do not justify the costs associated with protracted litigation against businesses or companies where “expensive problems of proof are at stake.”⁷⁴ Though class actions and similar aggregative devices may remedy the “negative value” issue, there are other reservations to the effectiveness of private enforcement.

Private actions in the excessive-price context, brought under state codifications of the U.C.C. or under the common law of unconscionability governed by the Restatements, suffer from two drawbacks. First, unconscionability under the U.C.C. and the Restatements

⁷¹ See *infra* notes 117-130 and accompanying text.

⁷² *Gulf Coast Attorneys General Launch Alliance*, AG BULLETIN, NATIONAL ASS’N OF ATTORNEYS GENERAL (Summer 1996).

⁷³ See *infra* notes 133—141 and accompanying text.

⁷⁴ Bender, *supra* note 44 at 769.

is a *defense* to breach of contract.⁷⁵ The implication of this legal anachronism is that unconscionability is not a basis for recovery of compensatory damages, e.g. restitution or disgorgement, or punitive damages.⁷⁶ The two-fold effect is: consumers are not recompensed for losses suffered as a result of business practices that violate fairness norms; and businesses remain undeterred from persisting in such practices in the future. Second, individual actions under the U.C.C. or the common law are particularly unlikely to prevent even individual businesses from engaging in unconscionable behavior since the invalidation of a single transaction does not effect all the other unconscionable transactions the business may have engaged in. Furthermore, even if the price term can be isolated as being “unfair,” businesses are free to manipulate the other terms of a contract or transaction to reach the same unconscionable outcome.⁷⁷

Private litigation under state consumer protection statutes, where possible, faces serious hurdles. Even if price unconscionability is actionable under the statute, the most significant obstacle is the standard of “injury” or “loss” that must be met for private litigants. The standard of proof in consumer fraud actions by private plaintiffs is often higher than the standard for the attorney general’s enforcement proceeding. Whereas an attorney general need not prove that a victim was damaged by the unlawful practice to

⁷⁵ See *supra* note 3.

⁷⁶ See, e.g., *Cowin Equipment Co. v. GMC*, 734 F.2d 1581, 1583 (11th Cir. 1984) (holding unconscionability under the UCC is not a basis for damages); *Bennett v. Behring Corp.*, 466 F. Supp. 689, 700 (S.D. Fla. 1979) (same); see also Bender, *supra* note 44 at 757 (discussing the limited remedies under the UCC). There is an argument to be made that subsequent consumer protection statutes that include “unconscionability” or “unconscionable” practices within their purview can graft a damages remedy onto a law, which only establishes a defense. For such an analysis, see Federbush, *supra* note 12 at 52 n.33.

⁷⁷ See Klock, *supra* note 32 at 377—78 (suggesting the U.C.C. unconscionability defense is an inadequate enforcement mechanism against price unconscionability).

warrant an award of treble damages, a private plaintiff must show ascertainable loss—and this can mean all the difference between deterrence and not.⁷⁸

Federal authorities, mainly the Federal Trade Commission (FTC), seem to have abdicated any role they might have to play in protecting consumers from price gouging. The FTC has broad statutory authority to enforce and interpret the broad standards of “deceptive” or “unfair” practices as set forth in the governing Federal Trade Commission Act (FTCA).⁷⁹ Though the terms “unconscionability” or “unconscionable” are not explicitly used in the governing statute, price unconscionability (i.e. price gouging) may, as some courts have suggested, logically be included within the scope of “unfair” or “deceptive” trade practices.⁸⁰ This view is clearly not embraced by the FTC, which does not seem to have promulgated any rules or issued much guidance on the matter.

One form of unconscionability under the market failure framework presented earlier—price discrimination⁸¹—is explicitly addressed by federal legislation. The Robinson-Patman Act makes it illegal to charge different prices for commodities of like qualities in commerce within the United States, subject to several conditions and defenses.⁸² In a recent resurgence of interest, the Act has come under fire for being under inclusive—the Act is limited to commodities and does not extend to service and labor markets.⁸³ Also, the concept of price discrimination under the Act does not comport

⁷⁸ Compare *Cox v. Sears Roebuck & Co.*, 647 A.2d 454 (N.J. 1994) (granting recovery because plaintiff demonstrated “ascertainable loss”) with *Weinberg v. Sprint Corp.*, 801 A.2d 281 (N.J. 2002) (denying recovery because plaintiff could not prove “ascertainable loss”).

⁷⁹ 15 U.S.C. §§41 et. seq. (2004).

⁸⁰ See *supra* note 59.

⁸¹ See *supra* notes 33—38.

⁸² 15 U.S.C. § 13(a) (2004).

⁸³ Richard A. Posner & Frank H. Easterbrook, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 945 (1981) (stating “the Act applies only to the sale of commodities...[and] does not cover the provision of services or labor”).

exactly with economic notions of price discrimination.⁸⁴ Despite its shortcomings, Robinson-Patman has become somewhat of a darling of legal commentators who insist that price discrimination, even under the allegedly flawed version of price discrimination under the Act, should be enforced.⁸⁵ The Department of Justice (DOJ) and the Federal Trade Commission (FTC), however, have not aggressively pursued price discrimination the Act.⁸⁶

Though the FTC is clearly charged with enforcing price discrimination and consumer protection laws, such as the FTCA which grants the Commission broad powers to prevent “unfair or deceptive acts or practices in or affecting commerce,”⁸⁷ the FTC seems focused on what it believes to be its primary responsibility—preventing “unfair methods of competition.” Commissioner Starek remarked that the goal of protecting consumers from price gouging could be achieved through “continued refinement and explication” of the FTC’s Statement on Merger Enforcement;⁸⁸ the idea being that prices will not exceed competitive levels given rigorous enforcement of the FTC’s competition and merger guidelines.⁸⁹ The Commission’s prophylactic stance is obviously better than no stance at all. But the FTC has not evinced a willingness to extend its consumer protection

⁸⁴ *Id.* at 944 (noting “price discrimination defined by the statute is not price discrimination in an economic sense, although the concepts overlap”).

⁸⁵ See Klock, *supra* note 32 at 358—64 (suggesting, with some legislative or judicial modifications, the Robinson-Patman Act is a powerful tool against price unconscionability); see also Paul Krugman, *What Price Fairness?*, N.Y. TIMES, Oct. 4, 2000, at A35 (suggesting price discrimination “is about to become a major consumer issue”).

⁸⁶ Posner & Easterbrook, *supra* note 83 at 988 (stating that neither the DOJ nor the FTC are aggressively enforcing the Act).

⁸⁷ 15 U.S.C. §§ 41—58 (2004).

⁸⁸ Neal R. Stoll & Shepard Goldfein, *Confirmation of FTC Commissioner, Antitrust and Trade Practice*, N.Y. LAW JOURNAL, January 22, 1991, at 3.

⁸⁹ *Id.*; see also Debra Hazel, *What’s Next for Retail Mergers?* CHAIN STORE AGE EXECUTIVE WITH SHOPPING CENTER AGE, August 1997, at 35 (stating “the FTC ensures that consumers are protected from price gouging due to lack of competition”).

mandate and aggressively pursue price unconscionability when competition-reinforcing strategies fail and antitrust enforcement is precluded.⁹⁰

If the FTC were to take seriously its consumer protection role, preemption of state enforcement would probably not be an issue.⁹¹ But quite the opposite scenario is suggested by the previous discussion—*price unconscionability does not even register on the federal radar*. Since private litigation is plagued by higher burdens of proof, “negative value” problems, and overall ineffectiveness in deterring such unconscionable business practices, the responsibility for filling the void created by the reduced federal presence in this area falls squarely on the shoulders of the state attorneys general.

III. Case Study: The Attorneys General and the Vaccine Shortage of 2004

a. The Fragile Flu Vaccine Market

Over the last several decades, the vaccine industry in the United States has seen numerous manufacturers and distributors exiting the market, leaving behind only a handful of licensed vaccine producers. Vaccines have a “public good” character that makes profiting in vaccine production more problematic than with other commodities. Vaccination protects both the one vaccinated and others who are less likely to contract the disease, because the pool of potential carriers is smaller. Since the effect of sales of a vaccine cannot be confined only to those who pay for them, profitability is theoretically

⁹⁰ This might happen for the reasons suggested earlier, *see supra* Part II.

⁹¹ *See Am. Fin. Servs. v. F.T.C.*, 767 F.2d 957, 989 n.41 (D.C. Cir. 1985) (“The expansion of the FTC’s jurisdiction [over unfair and deceptive trade practices] is not intended to occupy the field or in any way preempt state or local agencies from carrying out consumer protection or other activities” (quoting legislative history of 15 U.S.C. § 45)); *Double-Eagle Lubricants, Inc. v. Texas*, 248 F. Supp. 515, 518 (N.D. Tex. 1965) (“State laws providing for regulation of unfair or deceptive practices in commerce are valid unless they conflict with [15 U.S.C. 45] to the extent that both cannot stand in the same area.”); *but cf. State v. Strong Oil Co.*, 87 A.D.2d 374 (N.Y. App. Div. 1982) (holding price gouging enforcement preempted by federal law).

more difficult.⁹² On top of the “public good” problem vaccine producers face lengthy FDA approval processes, rigorous requirements on vaccine production facilities, unpredictable tort liability, and extremely low prices paid by the federal government, the largest bulk purchaser of vaccines.⁹³ The generally unprofitable nature of vaccine production has resulted in industry consolidation and an increase in the shortages of vaccines and other critical pharmaceutical products in the last few years.⁹⁴

The influenza vaccine industry is no exception to the overwhelming problems facing the vaccine market. In fact, the typical regulatory and products liability issues facing the industry⁹⁵ are compounded by the particularly risky nature of influenza vaccine production. On the one hand, flu vaccine has to be reformulated and remade each year.⁹⁶ Besides being contagious and potentially deadly, the flu virus mutates easily. The effect of this seemingly insignificant fact is that unused inventory at the end of each flu season is wasted and essentially a sunk cost.⁹⁷ Additionally, the research and development of influenza vaccine presents an ongoing process, season after season, of replacing and “updating” the vaccine formula. Waste and costly research are particularly problematic in the influenza vaccine industry where profit margins are small and manufacturers rely

⁹² Ellen Dannin, *To Market, To Market: Legislation on Privatization and Subcontracting*, 60 MD. L. REV. 249, 261 (2001).

⁹³ Lars Noah, *Triage in the Nation’s Medicine Cabinet: The Puzzling Scarcity of Vaccines and Other Drugs*, 54 S.C. L. REV. 371 (2002) (discussing all of these factors as resulting in the demise of the vaccine industry).

⁹⁴ *Id.* at 402.

⁹⁵ See *supra* notes 92—94 and accompanying text.

⁹⁶ David Brown, *How U.S. Got Down to Two Makers of Flu Vaccine*, WASH. POST, Oct. 17, 2004, at A01; Santa Mendoza, *We Should Protect Against Hysteria*, CONNECTICUT LAW TRIBUNE, Nov. 1, 2004, at 18.

⁹⁷ When supply and demand are roughly evenly matched, as in 1999 when only 400,000 doses of 77 million were unused, waste is not a problem. However, in 2000, 8 million were thrown out; in 2001-02, 10 million doses were pitched; in 2002-03 the number was 13 million. Over three seasons, Wyeth lost \$50 million from unsold flu vaccine, and eventually withdrew from the market in April 2003. Brown, *supra* note 96.

heavily on volume sales.⁹⁸ The second flu vaccine production issue that tends to exacerbate the problems of the market in general is the reliance of most of the industry on costly and outmoded technologies. Flu vaccine is made by injecting virus into fertilized chicken eggs, each of which must be hand-inspected and hand-injected.⁹⁹ Though other techniques exist,¹⁰⁰ the fragile nature of the current market seems to have precluded companies from investing heavily in new production facilities and research staff.

Public officials in almost every walk of civil service have come to the realization that “the current system [of influenza vaccine production] is fatally flawed.”¹⁰¹ Secretary Thomson, in the midst of the vaccine shortage, seemed to confirm that the root causes of the ongoing crisis lie in the market itself by pointing the finger at “[t]he high risks of complex vaccine production, unpredictable consumer demand and low profit margins, coupled with the lack of liability protection from costly lawsuits.”¹⁰² In the 1960s there were twenty-six manufacturers of injectable influenza vaccine.¹⁰³ That number dwindled down to five by 1994.¹⁰⁴ There are currently only two manufacturers of the injectable influenza vaccine for the U.S. market—Aventis Pasteur and Chiron.¹⁰⁵

⁹⁸ This is largely a result of the fact that the injectable influenza vaccine is essentially a commodity, *see* Brown *supra* note 96, and currently subject to government price controls. *See supra* notes 92—94 and accompanying text.

⁹⁹ Brown *supra* note 96; Mendoza, *supra* note 96.

¹⁰⁰ Michael S. Rosenwald, *Flu Crisis Sparks Fresh Look at Vaccine Production*, WASH. POST, November 27, 2004, at A01.

¹⁰¹ *The Nation's Flu Shot Shortage: How it Happened and Where We Go From Here*, Hearing Before the House Comm. on Gov't Reform, 108th Cong. 2 (2004) (statement of Tom Davis, Chairman, House Comm. on Gov't Reform); *see also* Jerry Knight, *Got the Flu? Blame the Free Market*, WASH. POST, Nov. 1, 2004, at E01 (discussing the failure of the privatized vaccine market to yield a consistent and affordable influenza vaccine supply); *but cf.* Andrew Pollack, *Sometimes, Vaccines Can Be Good For Business*, N.Y. TIMES, Oct. 29, 2004, at C2.

¹⁰² Tommy G. Thompson, Secretary of Health and Human Services, Speech at Hubert H. Humphrey Building (Oct. 20, 2004).

¹⁰³ Mendoza, *supra* note 96.

¹⁰⁴ Maureen Martin, *Flu Vaccine Shortage May Not Be a Real Crisis*, HEALTH NEWS, Jan. 1, 2005.

¹⁰⁵ Thompson, *supra* note 102.

b. The Vaccine Shortage & the Federal Response

On October 5, 2004, British health authorities suspended production of the Fluvirin vaccine at Chiron Corporation's facility in Liverpool, due to sterility problems. The suspension prohibited Chiron from manufacturing, shipping, or marketing its entire vaccine supply, of which 46-48 million flu shots were to be shipped to the United States. The Department of Health and Human Services (HHS) had planned for a national vaccine supply of about 100 million doses—the contaminated vaccine represented just under half of the nation's seasonal demand.¹⁰⁶ As the Center for Disease Control (CDC) issued strict guidelines for rationing the remaining flu vaccine supply among “priority groups” especially susceptible to influenza,¹⁰⁷ panic set in across the country and the globe.¹⁰⁸

Almost immediately after the announcement that Chiron's supply was unavailable for release into the U.S. market, reports of sharply increased vaccine prices began to trickle in. The projected wholesale price for a single dose of injectable influenza vaccine was \$8 to \$10, with consumers being able to purchase the same for about \$11—20.¹⁰⁹ By mid-October distributors were charging upwards of \$90 a dose.¹¹⁰ The manufacturers of flu vaccine, and most pharmaceuticals, maintain distribution chains where larger distributors are free to sell to smaller companies. The smaller distribution companies target niche

¹⁰⁶ *Vaccine shortage threatens HIV-positive*, AIDS POLICY AND LAW, Oct. 22, 2004.

¹⁰⁷ *Who Should Get Flu Vaccine This Season*, CENTER FOR DISEASE CONTROL, October 25, 2004, available at <http://www.cdc.gov/flu/protect/0405shortage.htm> (last visited Jan. 2, 2005); see also Ceci Connolly, *CDC Announces Plan to Ration Flu Vaccine: States to Get Doses Based on Risk*, WASH. POST, Nov. 10, 2004, at A06.

¹⁰⁸ Robert D. McFadden, *Frustration and Fear Reign Over Flu Shots*, N.Y. TIMES, Oct. 16, 2004, Section B, P. 1, Col. 5; Marilyn Marchione, *Pandemic Risk Spurs Flu Vaccine Planning*, WASH. POST, Nov. 1, 2004, at A10; Anita Manning, *Vaccine Shortage Points to Global Risk*, USA TODAY, Nov. 1, 2004, available at http://www.usatoday.com/news/health/2004-11-01-flu-worries_x.htm (last visited Jan. 1, 2005).

¹⁰⁹ Rosenwald, *supra* note 100; Knight *supra* note 101.

¹¹⁰ McFadden, *supra* note 108; Mary Pat Flaherty, *Some Suppliers Jack Up Flu Vaccine Price*, WASH. POST, Oct. 14, 2004, at A02; Denise Grady, *Before Shortage of Flu Vaccine, Many Warnings*, N.Y. TIMES, Oct. 17, 2004, Sec. 1, Col. 1, P.1.

geographical markets and often stockpile influenza vaccine earlier in the season with the specific intent of waiting for shortages in mid-February to raise prices.¹¹¹

The initial reports of profiteering engendered confusion over which, if any, federal government agencies would be clamping down on the high prices being charged. Federal health officials were clearly aware of price gouging but did not appear to know which agency would be responsible for countering it or even if anything could be done.¹¹²

Although the Center for Disease Control (CDC) maintains an advisory group on immunizations that looks at distribution problems, it has no authority to intervene in alleged price gouging.¹¹³ Congress looked to the Federal Trade Commission (FTC) for answers and demanded an inquiry to determine if price gouging was pervasive and whether there was any justification for price increases for the vaccine.¹¹⁴ The letter sent to FTC chief, Deborah Platt Majoras, also requested that the FTC provide a list of enforcement actions the FTC plans to take or has taken regarding reports of flu vaccine price gouging and suggestions the Commission believes should be taken to prevent future instances of price gouging during a vaccine shortage.¹¹⁵ Despite the powerful rhetoric, to date, the only federal response to the rampant profiteering during the emergency seems to have been the proposal of a bill in the House targeting *future* vaccine price gouging.¹¹⁶

¹¹¹ Grady, *supra* note 110.

¹¹² Lawrence K. Altman, *U.S. Inquiry in Price Rises for Flu Shots*, N.Y. TIMES, Sec. A, Col. 6, P. 23.

¹¹³ Flaherty, *supra* note 110.

¹¹⁴ Letter from Tom Davis & Henry A. Waxman, Chairman & Ranking Minority Member, Comm. on Gov't Reform, to Deborah Platt Majoras, Chairman, Federal Trade Commission 1 (Oct. 15, 2004), available at <http://reform.house.gov/GovReform/News/DocumentSingle.aspx?DocumentID=6071> (last visited Jan. 2, 2004).

¹¹⁵ *Id.*

¹¹⁶ Fair Vaccine Price Act of 2004, H.R. 5404, 108th Cong. (2004) (setting forth imprisonment and treble damages penalties for charging 150% over the baseline price, which is set as the market price sixty days prior to a declaration or reasonable knowledge of vaccine emergency).

c. Immediate Response by the Attorneys General

The lack of action on the federal level, even three months after the initial reports of profiteering, is in sharp contrast to the lightning-quick response of the state attorneys general. One week after the initial incidents, on October 12, Kansas Attorney General Phil Kline filed suit against Meds-Stat, a Florida flu vaccine distributor, for violations of the Kansas Consumer Protection Act alleging that Meds-Stat offered to sell a Kansas City pharmacy a vial of flu vaccine listed at \$85 for \$900.¹¹⁷ The next day, Florida Attorney General Charlie Crist filed a similar complaint in Broward County against Meds-Stat for “unconscionable” pricing, requesting an injunction preventing Meds-Stat from selling vaccines at such prices and damages and/or penalties permitted under the Florida Deceptive and Unfair Trade Practices Act.¹¹⁸ In the weeks following the contamination of Chiron’s vaccine supply, at least a dozen more Attorneys General warned consumers of the excessive prices of influenza vaccine and threatened litigation against offenders.¹¹⁹

On October 18, Secretary Tommy Thompson sent a letter to the Attorney General of each state urging each to fully investigate and prosecute price gouging in the flu vaccine,¹²⁰ and announcing the CDC would be sharing its reports of price gouging with the states.¹²¹ Secretary Thompson also joined the Florida litigation against Meds-Stat and filed a Statement of Interest of the United States in the Broward County, Florida Circuit Court

¹¹⁷ Press Release, Attorney General State of Kansas, *Attorney General Kline Files Suit For Alleged Flu Vaccine Price Gouging* (Oct. 12, 2004).

¹¹⁸ Press Release, Attorney General Charlie Crist, *Attorney General Sues Flu Vaccine Distributor* (Oct. 13, 2004); Plaintiff’s First Amended Complaint and Application for Relief, *Florida v. Asap Meds, Inc.* (Fla. Cir. Ct. 2004) (04-16032 (09)).

¹¹⁹ *Attorneys General Take Action Against Flu Vaccine Supplier for Price Gouging—Warn Consumers to Take Caution*, AG Bulletin, National Ass’n of Attorneys General, October 2004.

¹²⁰ Press Release, HHS Press Office, *HHS Secretary Urges States to Aggressively Prosecute Flu Vaccine Price Gouging* (Oct. 14, 2004).

¹²¹ *Id.*

denouncing profiteering in flu vaccines.¹²² The Secretary offered similar assistance to all the Attorneys General in protecting consumers against price gouging.¹²³

Soon after, Texas Attorney General Greg Abbott sued ASAP Meds Inc. (doing business as Meds-Stat) of Fort Lauderdale, Florida,¹²⁴ for unconscionable pricing and for perpetrating fraud in the face of a health care challenge in Texas.¹²⁵ The suit sought disgorgement of all profits realized from this unconscionable pricing scheme and civil penalties under the Texas Deceptive Trade Practices Act, as well as temporary and permanent injunctions.

Connecticut Attorney General Richard Blumenthal, much more activist in his approach to vaccine price gouging, called on the Connecticut Governor to declare a flu vaccine supply emergency¹²⁶ which would permit prosecutions for profiteering in the vaccine under Connecticut General Statute 42-232.¹²⁷ After a vaccine supply emergency was declared,¹²⁸ Attorney General Blumenthal filed two actions, one against Meds-Stat¹²⁹

¹²² Press Release, Attorney General Charlie Crist, *Thompson to Join Crist in Flu Vaccine Pricing Lawsuit* (Oct. 18, 2004); *see also* Statement of Interest of the United States, *Florida v. Asap Meds, Inc.* (Fla. Cir. Ct. 2004) (04-16032 09) [hereinafter HHS Brief].

¹²³ Letter from Tommy Thompson, Secretary, Health and Human Services, to Attorneys General of the States (Oct. 27, 2004).

¹²⁴ Texas Attorney General Greg Abbott also sued Dubin Medical, Inc., which was recently cleared of all charges. *Attorney general's lawsuit against flu shot distributor dismissed*, Associated Press, January 8, 2005.

¹²⁵ News Release, Attorney General of Texas, *Attorney General Abbott Sues Drug Distributors Alleging Exorbitant Prices for Flu Vaccine* (Oct. 21, 2004).

¹²⁶ CONN. GEN. STAT. § 42-231 (2003) (empowering the Governor to declare such an emergency when an “abnormal market disruption” resulting from an “extraordinary adverse circumstance” causes a product or service shortage); *see also* Press Release, Connecticut Attorney General’s Office, *Attorney General Urges Governor to Declare Vaccine Emergency; Calls for Federal Vaccine Purchasing* (Oct. 21, 2004).

¹²⁷ CONN. GEN. STAT. § 42-232 (2003).

¹²⁸ Press Release, Connecticut Attorney General’s Office, *Attorney General’s Office Statement on Declaration of Flu Vaccine Supply Emergency* (Oct. 21, 2004).

¹²⁹ Press Release, Connecticut Attorney General’s Office, *State Sues Wholesale Pharmaceutical for Price Gouging Flu Vaccines* (Oct. 21, 2004); Complaint, *Connecticut v. Asap Meds, Inc.* (Conn. Super Ct. 2004), available at <http://www.cslib.org/attygenl/press/2004/health/ASAP%20Meds%20complaint.pdf> (last visited Jan. 2, 2005).

and the other against a NY physician and clinic,¹³⁰ seeking civil penalties, disgorgement and restitution pursuant to violations of the Connecticut Unfair Trade Practices Act.

d. The Effect of Intervention

The Florida suit against Meds-Stat included a request for an injunction that was concluded with a consent order on October 27.¹³¹ The scope of the consent order was remarkable. Meds-Stat not only agreed to stop purchasing or selling vaccine in the state of Florida but also agreed to *surrender its entire inventory* of flu vaccine to the State. Under a similarly shocking settlement in Kansas, Meds-Stat agreed to: affirm that they sold no vaccine in Kansas at the record prices; alter any future solicitations to comply with Kansas law; reimburse the state for the cost of the investigation, litigation, and other legal fees and expenses; *and work with* Attorney General Phil Kline’s Consumer Protection and Antitrust Division to identify problems inherent in the vaccine distribution network to prevent future instances of price gouging of pharmaceuticals.¹³² Though the actions in Connecticut, Texas, and Florida (where the issue of “unconscionable pricing” is still to be litigated) are still ongoing, the settlement in Kansas and the consent order in Florida are clearly indicative of a successful campaign against individual price gougers.

With respect to the broader market, the impact of the litigation initiated by the Attorneys General is less clear. There does not seem to be any empirical evidence that vaccine prices have returned to their projected prices across the country. However, after

¹³⁰ Press Release, Connecticut Attorney General’s Office, *Attorney General Sues Connecticut Clinic, New York Company for Flu Vaccine Price Gouging* (Oct. 21, 2004).

¹³¹ Press Release, Attorney General Charlie Crist, *Med-Stat Agrees To No Longer Buy or Sell Vaccine* (Oct. 27, 2004); Consent Order, *Florida v. Asap Meds, Inc.* (Fla. Cir. Ct. 2004) (04-16032 09).

¹³² Press Release, Attorney General State of Kansas, *Attorney General Kline Announces Settlement With Flu Vaccine Distributor* (Nov. 2, 2004).

the Kansas and Florida suits were filed, suppliers and distributors clearly seemed aware of the pending actions and were afraid to get “lumped in with people who are price gougers.”¹³³ If the latter is, in fact, the prevailing attitude among vaccine distributors, the most powerful antidote against rampant profiteering would seem to be the “public-shaming” aspect of concerted action by the Attorneys General. Unless there were some serious factual inaccuracies in reports collected by the Attorney General’s office, this is probably what Attorney General Kline had in mind when he first filed suit because, as per the settlement terms, Meds-Stat *did not sell any vaccine in Kansas at the inflated price*.¹³⁴

The only other nationwide price-gouging incident in recent memory followed the September 11th attacks. Gasoline retailers, taking advantage of the panic and pandemonium, markedly increased the price paid by consumers at the pump.¹³⁵ Attorneys General across the country filed dozens of actions to obtain civil penalties and restitution for consumers from gas retailers, many of whom raised gas prices by 300%.¹³⁶ The effect was that prices returned to “normal” almost immediately after the nationwide effort on the part of the Attorneys General.¹³⁷ Admittedly, the scale of the response was much less in the vaccine price gouging case—to date, only four Attorneys General have filed civil suits against vaccine distributors.¹³⁸ But even if this limited reaction does not reflect the actual

¹³³ Flaherty, *supra* note 110.

¹³⁴ See *supra* note 132 and accompanying text.

¹³⁵ Timothy Egan, *After the Attacks: The Profiteers—Tragedy Spawns Charity Fraud and Price Gouging at the Gasoline Pumps*, N.Y. TIMES, Sec. 1, Col. 1.

¹³⁶ NAAG Project: *Consumer Protection*, NATIONAL ASS’N OF ATTORNEYS GENERAL (2001), at <http://www.naag.org/issues/issue-consumer.php> (last visited Jan. 2, 2005).

¹³⁷ Richard Cauchi, NCSL Health Program, *States Maintain Pharmacy Emergency Controls & Price Gouging Laws* (Oct. 17, 2001), available at <http://www.ncsl.org/programs/health/rxemerg.htm> (last visited Jan. 2, 2005).

¹³⁸ See *supra* notes 117—130 and accompanying text.

scope of the price gouging, the outcry was definitely nationwide—most, if not all, the Attorneys General came out powerfully and publicly against profiteering in flu vaccines.¹³⁹

If there is one lesson to be learned from the post-9/11 gas price hikes it is that the “public shaming” and accountability-reinforcing aspects of multistate litigation against profiteering are powerful market-correction mechanisms. From a market perspective this makes complete sense. If a well-functioning market is an “instrument of fairness,” as suggested earlier,¹⁴⁰ then deviations from the fairness norms already embodied in the marketplace are remedied through public accountability. The previously surreptitious and back-door profiteering of businesses is brought to light and individual businesses are permitted to first, judge for themselves whether or not excessive prices are “fair” as judged by public norms, and second, evaluate whether the loss of goodwill is sufficiently costly compared to the “windfalls” gained through profiteering.¹⁴¹ Multistate action is more likely than individual litigation by a single attorney general to pierce the “market-power shield” of price gouging businesses and provide them with a greater sense of public accountability. This is not an unfamiliar outcome and the tactic is sometimes, though not always, consciously employed by the Attorneys General in numerous other consumer protection contexts.

e. Excessive Prices for Flu Vaccines—Price Gouging or Fair Dealing?

Despite the successes of Attorneys General Crist and Kline in securing vastly favorable terms in their dealings with Meds-Stat, the theoretical question still remains: were the prices charged for influenza vaccine “unconscionable”? From fairness and public

¹³⁹ See *supra* note 119 and accompanying text.

¹⁴⁰ See *supra* notes 28—30 and accompanying text.

¹⁴¹ See *supra* notes 29—32 and accompanying text.

policy perspectives, if the price increases were not related to increased costs, there is no question that vaccine distributors were engaging in unconscionable business practices. The price charged for a vial or a dose of flu vaccine was often ten times the fair market value prior to the supply emergency.¹⁴² Though courts have warned of reducing unconscionability to “a mathematical formula,”¹⁴³ a ten-to-one ratio is extreme by any measure. Legal commentators suggest, and courts seem to agree, at least empirically, that a two-to-one ratio between price and fair market value is sufficient to trigger prima facie unconscionability.¹⁴⁴ The magnitude of the price increase aside, the excessively priced commodity was a strict necessity, which, because the price gouging took place at the height of its need, makes the unconscionable practices only more damning. The effect of profiteering at such a critical juncture was to risk the health of the public at large and threaten the lives of vulnerable populations most in need of influenza vaccine.¹⁴⁵

The real, and obviously more complicated, issue is whether a principled, market-based argument can be made against profiteering in the flu vaccine. One of the necessary conditions for a finding of unconscionability, understood as a constraint on business practices that deviate from those in free market conditions, is market failure.¹⁴⁶ There is certainly a strong case that the vaccine market in general, and particularly the influenza vaccine industry, was not competitive. Stringent regulatory control, tort liability, low profit margins, and the high costs of flu vaccine production all resulted in companies exiting

¹⁴² See *supra* notes 117 and accompanying text.

¹⁴³ *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 267 (1969).

¹⁴⁴ Richard E. Speidel, *Unconscionability, Assent and Consumer Protection*, 31 U. PITT. L. REV. 359, 372—74 (1969) (arguing for a two-to-one ratio); 1 James White & Robert S. Summers, *UNIFORM COMMERCIAL CODE* 222 (4th ed. 1995) (suggesting that a two-to-one or three-to-one ratio is sufficient); Bender, *supra* note 44 at 766 (noting “the disparity ratio must exceed two-to-one for the claimant to succeed”); see also Brown *supra* note 6 at 301.

¹⁴⁵ HHS Brief, *supra* note 122.

¹⁴⁶ See *supra* notes 42—51 and accompanying text.

from the market over the years.¹⁴⁷ There are also some suggestions that the rapid decline in the number of players in the vaccine industry was more due to consolidations, mergers, and joint ventures than market conditions.¹⁴⁸ This observation means not only that state and federal authorities might have failed in their antitrust enforcement duties, but also that the remaining players in an imperfectly competitive, quasi-monopoly vaccine market were capable of exerting substantial market power. Regardless of whether external or internal factors contributed to the shrinking number of flu vaccine manufacturers, the fact remains that at the time of the vaccine crisis, there was only one manufacturer of injectable vaccines for the U.S. market.¹⁴⁹

Scratching beneath the surface reveals a caveat to the conclusion that profiteering in flu vaccines was made possible by imperfect, and maybe nonexistent, competition in the relevant market. The only manufacturer of vaccines, Aventis Pasteur, was not selling the vaccines directly to consumers. Unless Aventis was itself charging excessive prices, which were then passed on to the consumer, Aventis is probably not culpable. A complicated network of larger and smaller distributors acted as an intermediary between Aventis Pasteur and the public.¹⁵⁰ Thus, the existence of a competitive market may turn on the nature of the distribution channel employed: if each distributor was granted a geographical monopoly, then, the market was clearly noncompetitive; however, if distributors retained substantially overlapping markets, then the conclusion of imperfect competition is tentative at best. Absent horizontal or vertical collusion in the distribution chain, consumers and

¹⁴⁷ See *supra* notes 92—99 and accompanying text.

¹⁴⁸ Martin, *supra* note 104; F.M. Scherer, *An Industrial Organization Perspective on the Influenza Vaccine Shortage*, AAI WORKING PAPER #04-03 (October 2004) (on file with author).

¹⁴⁹ See *supra* notes 105 and 106. Medimmune produced a nasal spray vaccine that was also marketed within the United States but represented a nominal share of the total doses of vaccine available.

¹⁵⁰ See *supra* note 111.

health care providers might have been able to bargain for the lowest price as among all the distributors.¹⁵¹

Given that substantially imperfect competition existed in the flu vaccine industry, there is little question that at least a few market players unconscionably priced their goods. Under the price discrimination framework, which evaluates whether sellers are pricing their goods relative to the perceived value of the good to the buyer, regardless of cost,¹⁵² some sellers were gauging the value of the vaccine to various buyers and thus, clearly engaged in unconscionable business practices. "They were shopping for takers," said one pharmacist after a vendor had asked \$700 for a vial of ten doses that usually costs \$67.¹⁵³ Under the necessity framework, where the strictly necessary character of the commodity makes substitution and bargaining impossible,¹⁵⁴ the result is no different. The influenza vaccine is clearly vital to individual and public health and there was only one manufacturer. Consumers, and buyers in general, had no meaningful choice but to deal with unconscionable businesses. In a perfectly competitive market, buyers would not have been "gouged" since the presence of other sellers competing for the same buyer would have led to substantial reductions in price. In the flu vaccine scenario, an imperfectly competitive market provided unconscionable sellers with remarkable market power, enabling them to pose a "double threat" by price discriminating in a necessity.

¹⁵¹ The exact structure of Aventis Pasteur's distribution channel is probably outside the scope of this Paper, but clearly more research needs to be done in this area to reach a definitive conclusion.

¹⁵² See *supra* notes 33—38.

¹⁵³ Altman, *supra* note 112.

¹⁵⁴ See *supra* notes 39—41.

Conclusion

The lack of federal presence in the price unconscionability realm and the ineffectiveness of private enforcement of fairness norms have left a sizable void to be filled by the state attorneys general. Given the broad statutory consumer protection powers wielded by the attorneys general and the suggestion that price unconscionability complements and provides a backstop to antitrust enforcement, which is already a state priority, there is little doubt that the burden will be easily borne. The latter conclusion rings especially true if the multistate action against flu vaccine price gougers is as paradigmatic as this Paper suggests.

The unconscionability doctrine, which provides the theoretical framework for price gouging, is founded on the principles of fairness and efficiency. Not only does profiteering in vaccines evoke a powerful and visceral reaction against sellers willing to endanger the lives of so many for profit—the unfairness in pricing out of the market most of the at-risk population is manifest—but the specific facts of the Flu Vaccine Emergency of 2004 are exemplary of unconscionability-as-market failure. The noncompetitive influenza vaccine market may have permitted individual distributors to exert market power by price discriminating in a strictly necessary commodity.

The vaccine price gouging cases also point to the extraordinary role and singular importance of the attorneys general in protecting the public against unconscionable business practices, particularly price gouging. In the face of federal inaction—first, in laying down inadequate regulatory and legal schemes to ensure competition in the vaccine market, and second, in failing to address widespread profiteering—the Attorneys General reacted to clear injustice against the consuming public with lightning-quick speed.

Preliminary indications provide further evidence that, in addition to preventing individual businesses from engaging in unconscionable practices, the Attorneys General serve a public accountability function—by voicing and publicizing fairness norms embodied in the principle of “unconscionability”—which is critical to the operation of a “free” market.