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Federal Crackdown on Hoarding and Gouging During COVID-19 Crisis

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STORAGE AND HAULING COMPANIES TAKE NOTE

Imagine that it's Spring 2020 and you run a warehousing company, in which it is common for your customers to store container-loads of goods in both the short-term (while awaiting a move to the container's next destination) and long-term (perhaps while the entity holding title to the goods in the container finds a buyer). Now imagine you discover that your warehouse contains containers of goods that could help combat the spread of the COVID-19 virus — masks, medical gowns, gloves or other personal protective equipment (PPE).

Or imagine this slightly different scenario: You own a trucking company and learn that your drivers are delivering pallets of hand sanitizer and disinfectants to a residential address. Perhaps they have delivered several pallets in a single delivery, or they are repeatedly bringing goods to the same place.

What, if any, obligations might you have in these scenarios? And importantly, what, if any, liability might you have if it turns out a customer is hoarding PPE?

TODAY'S LEGAL LANDSCAPE

The possibility of these types of scenarios is all too real, and so are the potential criminal and civil penalties that could flow forth from them. The Defense Production Act of 1950 (50 U.S.C. §4512) generally prohibits individuals and entities from hoarding materials that have been deemed to be scarce, or which would be made scarce by hoarding. Specifically, it prohibits accumulation of such materials "in excess of the reasonable demands of business, personal, or home consumption" or if such accumulation is "for the purpose of resale at prices in excess of prevailing market prices." 50 U.S.C. §4512. Recently, an Executive Order (Executive Order 13910) was issued under which several categories of goods have been designated as "scarce" or "threatened." They include, among other things:

- N-95 respirators, other respirators, and component parts;
- Portable ventilators, stationary ventilators, and other positive pressure breathing devices modified for use as ventilators;
- Drug products in which the active ingredient is either chloroquine phosphate or hydroxychloroquine HCl;
- Sterilizers;
- Disinfectant products;
- Medical gowns and apparel;
- PPE coveralls, face masks, face shields, and gloves; and
- Surgical gloves.

Items designated as "scarce" have been determined to be critical so that the government and society are equipped "to respond to the spread of COVID-19." (Department of Health and Human Services, *Notice of Designation of Scarce Materials or Threatened Materials Subject to COVID-19 Hoarding Prevention Measures Under Executive Order 13910 and Section 102 of the Defense Production Act of 1950*.) And they have been determined to be in short supply, to likely be in short supply, or to otherwise be the types of goods for which supply "would be threatened by hoarding." *Id.*

The Department of Justice is taking possible violations of the Defense Production Act very seriously. Attorney General William Barr has formed a COVID-19 Hoarding and Price Gouging Task Force to address COVID-19-related hoarding, market manipulation and price gouging. The task force, which will be led by the U.S. Attorney for the District of New Jersey, has been authorized to "aggressively pursue bad actors who amass critical supplies either far beyond what they could use or for the purpose of profiteering." Attorney General Barr, Mem. for all Heads of Department Components and Law Enforcement Agencies (Mar. 24, 2020).

Attorney General Barr has unequivocally stated that "the Department must remain vigilant in deterring, detecting, investigating, and prosecuting wrongdoing related to the COVID-19 pandemic," as his office "will not tolerate bad actors who treat the crisis as an opportunity to get rich quick." *Id.* As the DOJ has reiterated on its website: "'Scarce medical supplies need to be going to hospitals for immediate use in care, *not to warehouses for later overcharging*.'" (U.S. Dep't of Justice, *Coronavirus (COVID-19)*) (emphasis added).)

The penalties for violating the Defense Production Act are all too real. Any person or entity that willfully violates the Act (or any rule, regulation, or order thereunder, including the President's recent Executive Order) is subject to a $10,000 fine and a year of imprisonment. *See*, 50 U.S.C. §4513. Other possible criminal sanctions, such as conspiracy to commit offense or to defraud the United States, 18 U.S.C. §371, carry imprisonment for up to five years. Other statutes potentially implicated provide for even longer possible prison sentences.

FINDING THE WAY FORWARD IN THIS ENVIRONMENT

What does this mean for transportation and warehousing companies, and related entities? First and foremost, these types of companies should pay close attention to what they are hauling, what they are storing, how long they are storing it, for whom they are transporting or storing, and to whom they are delivering. If they are not scrupulous in their oversight, they run the risk of civil suits (if not criminal charges) for, at a minimum, closing their eyes to the possibility of hoarding.

Even if charges or lawsuits are not filed, transportation and warehouse companies should have real concern about the potential interruption of their business if law enforcement executes search warrants or seizes goods. Warehouses could be temporarily shut down, trailers and goods seized, and business ground to a halt. What's more, if charges are filed, the company could face charges that would harm its reputation and cause it to spend both time and energy in defense.

Think about the first example above, in which a warehousing company discovers one of its customers is storing containers of PPE. The warehousing company could find itself on the wrong end of a grand jury subpoena, or, even worse, a search warrant if the DOJ believes there is a possibility that goods covered by the Executive Order are being hoarded in the warehouse.

To protect itself, the warehousing company absolutely should determine and consider what exactly is being stored, how long it has been stored, when it last received instructions from its customer, and whether it can proactively request new instructions. Each of these inquiries is a subject the DOJ could investigate. And the answers to those inquiries might lead the DOJ to charge the warehousing company with "accumulating" goods in violation of the Defense Production Act, or, short of that, aiding and abetting someone else's violations of the Act.

Any company with concerns about the storage of the goods should contact counsel and, with the assistance of counsel, consider contacting the local U.S. Attorney's office, to ward off the possibility of becoming a task force target. Counsel should also be consulted before any steps are taken to ask the customer to remove goods from the warehouse — again because of the possibility that such action may violate any operative criminal statutes.

The transportation company in the second example is no less responsible for monitoring its own activities. The freight company absolutely should determine and consider: what is being transported; how many similar deliveries it has made to the same residential address; and whether that residence accepted similar deliveries before the COVID-19 crisis began.

If a suburban resident regularly receives a pallet of PPE every month, and has accepted such deliveries for the last two years, then the transportation company might have good reason to believe that one pallet per month is not "in excess of the reasonable demands of … personal … consumption." By contrast, a record that reveals a household began receiving PPE in February or March 2020, and has received dozens of pallets of PPE since that date, raises questions about whether the recipient might either hoard or resell the PPE at a markup. Under either circumstance, a transportation company should consult counsel to ensure there has been no violation of the recent Executive Order, or other law or regulation.

Should the transportation company have that information and not act on it, it cannot necessarily rely on the notion that it did not know that its customer was doing anything illegal. Under criminal law, if one consciously avoids learning something, then he or she can be deemed to know the facts he or she has consciously avoided learning. *See, e.g., United States v. Lange*, 834 F.3d 58, 76 (2d Cir. 2016) (discussing jury instructions and factual predicate necessary for finding of "conscious avoidance"). Put another way, closing one's eyes does not solve the problem.

As the Government attempts to repair the supply chain for PPE and related commodities, it has focused on reallocating hoarded goods to hospitals and care centers in need. Transportation and warehousing companies should remain wary of potential liability, and take all reasonable steps to avoid being the target of the COVID-19 task force's attention. Once the country emerges from this pandemic, law enforcement will undoubtedly turn its focus to wrongdoers who may have escaped scrutiny during the crisis.

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