

Using Trademark Law to Combat Reputational Harm from Third-Party Price Gouging

The COVID-19 outbreak has created unforeseeable, yet critical, need for certain products. Unfortunately, some see shortages in the supply of these products as an opportunity to generate profit. Such is the situation in which manufacturing giant 3M finds itself.

3M manufactures N95 respirators, which are crucial pieces of personal protective equipment. The number of needed N95 respirators is in the hundreds of millions, and some bad actors are seizing the moment to enter contracts for millions of the disposable masks at artificially inflated prices, sometimes to the tune of a 600% increase. These price-gouging efforts not only hurt the general public, but, given the universal disgust in the practice, can hurt the reputation of all associated, or believed to be associated, with the wrongdoing. This situation can lead to significant damage to a company's brand image and goodwill, through no fault of their own. 3M recently filed multiple lawsuits seeking injunctive relief to thwart such profiteers.

As trademark law deals with the goodwill associated with a company's marks, trademark law presented a logical starting part. 3M's complaints seek relief under a variety of trademark theories of liability, including deceptive business practices, false advertising, trademark dilution and trademark infringement. To be clear, purchasing a 3M-branded N95 respirator and then reselling it at an inflated price is not necessarily an infringement of 3M's trademark rights. In trademark and copyright law, the First Sale Doctrine generally provides that the rightsholder's ability to control the product ends after it sells the product. As a result, we can, for example, resell used products on eBay or at a garage sale without fear of facing allegations of infringement. This is because we are not holding ourselves out to be the source of the goods but are merely reselling the goods. 3M's situation is different in that the Defendants are seeking large-scale contractual sales with public and private entities by implying an authorization or relationship with 3M. 3M alleges that these suggestions of a connection are patently false, that it neither has authorized nor endorsed the transactions, and that the sellers are not authorized distributors of 3M-branded N95 masks.

3M's claims demonstrate that trademark rights can be wielded offensively in a variety of settings, not just the standard infringement claims. 3M asserted its trademark rights in the 3M brand, logo and slogan, all of which are registered trademarks, under the Lanham Act for:

- Trademark infringement;
- False association;

- Unfair competition;
- False advertising; and
- Trademark dilution (if the trademark is famous).

Early results have been promising, as 3M recently obtained a preliminary injunction. *3M Co. v. Performance Supply, LLC*, Case No. 1:20-cv-02949 (S.D.N.Y. May 4, 2020). Further, even if ultimately unsuccessful on the trademark infringement claims, their efforts to date in simply filing the suits have helped accomplish the goals of distancing themselves from the price-gouging activity and protecting the goodwill associated with their brands. 3M has received significant positive press surrounding the lawsuits and they have allowed them to get their story out to the general public.

In cases involving critical goods and times of crisis, situations similar to 3M's will arise. It is important to keep all potential avenues of attack open and remedies available.

Registration of a trademark with the U.S. Patent & Trademark Office will secure valuable evidentiary benefits should trademark rights ever need to be asserted. Additionally, a trademark registration can be recorded with the Customs and Border Protection Agency to protect against the importation of counterfeit goods and gray market goods. These benefits ensure that a company's products and reputation are as secure as possible and provide weapons in potential litigation should the need ever arise.

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