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We Don't Have Coronavirus Here – How to Avoid False Advertising Claims

The coronavirus has enormously impacted the lodging, gambling, travel and leisure industries through cancellations of trade shows, conventions, concerts, vacations and travel in general. Every new case throughout the world is reported by the media in near real time, and travel restrictions are more restrictive and common on a daily basis. Things will likely continue to get worse before they get better.

The logical impulse of many affected businesses will be to address the real and prospective threat of the coronavirus through advertising and marketing. Certainly, companies will want to make assurances to their consumers and investors that, for example: (1) they are taking adequate precautions to prohibit infection or spread of the disease; (2) there are no known reported cases among their employees or customers; (3) the city in which they are located has no known (or minimal) reported cases; (4) the vast majority of coronavirus cases are nonfatal, and many have almost no symptoms or side effects; or (5) travel is not restricted or prohibited to your city or property.

Before any advertising or marketing plans are finalized, however, it is important to recognize that there are many unknowns about coronavirus. The relevant data changes daily as more cases are reported, and advertising that is true today may be wrong tomorrow. We've litigated dozens of false advertising cases, and the importance of being factually accurate in real time or near real time, and providing disclaimers where appropriate, cannot be overstated.

A quick refresher on the badges of a false advertising claim. The typical elements under the federal Lanham Act and common law are: (1) a false or misleading statement of fact; (2) used in a commercial advertising or promotion; that (3) deceives or is likely to deceive in a material way; and (4) has caused or is likely to cause competitive or other injury to the plaintiff. A false advertising claim is often combined with common law fraud or negligent misrepresentation claims and, depending on the jurisdiction, can be brought by either competitors or consumers. In non-competitor cases, statutory penalties and attorneys' fees can often be the drivers of this litigation.

It is important to remember that most of the advertising that affected companies will engage in in response to the virus is national or at least nationally accessible. That means that companies can be subject to the laws of states around the country. For example, an advertising claim from an Ohio company may subject the company to potential liability in California. A California jury will be more sensitive to the coronavirus issues than one from Ohio that has no reported cases.

Best practices means recording (and taking) the steps that companies are claiming in connection with their advertising.

For example, if a hotel or an airline claims that they are doing additional “wipe downs” to eliminate coronavirus, then the records should show an increase in time for the people tasked with the cleaning or the hiring of new employee(s), an increase in the use of requisite cleaning supplies, and the like. If a concert venue advertises that they have hand sanitizer stations, then those stations need to be available for more than just the VIP section or in a sufficient number to serve the volume of guests. A diligent plaintiff is going to look under the rocks to show that a claim is false or misleading and it is important to have records and activities that support the advertising at issue.

In short, most affected businesses will want to quell concern or even hysteria about their consumers contracting coronavirus. That makes good business sense, but you must ensure that you use good legal sense as well. To adequately protect your company, ensure that your representations are factual and based upon reliable sources, and be ready to change them quickly as necessary. And, call us if you have any questions about whether your advertising or marketing passes muster under federal or common law.

[Click here](#) to read more Brownstein alerts on the legal issues the coronavirus threat raises for businesses.

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