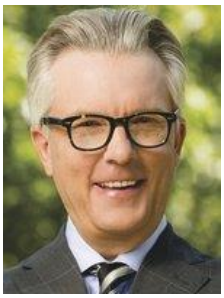
False Ad Considerations In The Time Of COVID-19

By **Mike Rounds and Alissa Gardenswartz**



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The coronavirus has enormously impacted the lodging, gambling, travel and leisure industries through cancellations of trade shows, conventions, concerts, vacations and travel in general. In Nevada, casinos are currently shut down for business.

Every new case throughout the world is reported by the media in near real time, and travel restrictions are more restrictive on a daily basis. Governmental measures to limit contact with one another are likely to continue.

Here are a few coronavirus-related false advertising and nondisclosure considerations for the entertainment and hospitality industries, as well as other types of businesses.

Liability for False Advertising

The logical impulse of many affected businesses will be to address the real and prospective threat of coronavirus through advertising and marketing. Certainly, companies will want to make assurances to their consumers and investors that, for example:

- They are taking adequate precautions to prohibit infection or spread of the disease;
- There are no known (or minimal) reported cases among their employees or customers;
- The city in which they are located has no known (or minimal) reported cases;
- The vast majority of coronavirus cases are nonfatal, and many have almost no symptoms or side effects; or
- 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 the 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 noncompetitor cases, statutory penalties and attorney 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 a West Virginia company may subject the company to potential liability in California. A California jury will be more sensitive to coronavirus issues than one from a state that has far fewer reported cases.

Best practices mean 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 the coronavirus, then the records should show an increase in time for the people tasked with the cleaning or the hiring of new employees, 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 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 addition to accurately representing steps they are taking to address coronavirus risk, companies should not be tempted to downplay risks around coronavirus exposure. Describing enhanced cleaning and sanitation measures is fine, but suggesting those measures make your establishment coronavirus-free or coronavirus-safe, for example, is a bridge too far. Similarly, implying that consumers have less risk of coronavirus exposure traveling to the warm climate where your establishment is located can leave you open to false advertising claims, as there is no definitive evidence to support that claim.

These affirmative misrepresentations about risk of coronavirus exposure could also attract the attention of state and federal regulators enforcing consumer protection statutes. These laws, commonly referred to as unfair and deceptive acts and practices, or UDAP, laws, all prevent companies from making false or misleading statements about their products or services. In recent weeks, both state and federal consumer protection authorities have publicly committed to taking action against any companies making misrepresentations about the coronavirus pandemic.

Liability for Concealing Coronavirus Exposure

What may be less obvious is that failure to report or disclose suspected coronavirus exposure could also lead to UDAP violations. All states, either expressly or impliedly, include the failure to disclose a material fact as a deceptive practice under their UDAP laws. The Federal Trade Commission's policy statement on deception similarly clarifies that deception can result from a misrepresentation or omission of a material fact that is likely to mislead the consumer.

According to the FTC's guidance, deception occurs if (1) a misrepresentation, omission or practice is likely to mislead the consumer; (2) the act or practice is examined through the lens of a consumer acting reasonably under the circumstances; and (3) the representation,

omission or practice is material.

Following this guidance, a hotel's failure to disclose coronavirus exposure in particular is arguably likely to mislead a consumer acting reasonably under the circumstances, as consumers generally believe that a hotel or resort does not present a risk to their health and safety. That this is a reasonable assumption is underscored by the fact that hotels have both a recognized duty to their guests to maintain a reasonably safe premises, and to warn of any unseen hazards.

And, as more events are canceled, schools are closed and emergency measures are declared, the argument that coronavirus exposure is a material fact in consumer decision-making grows stronger. As several state laws allow for private rights of action in addition to government enforcement, plaintiffs lawyers or government regulators could claim that a hotel, resort or restaurant that failed to disclose a coronavirus exposure failed to disclose a material fact to improperly induce sales.

Consequently, in addition to running afoul of laws requiring reporting to public health agencies of any suspected cases of coronavirus, lack of transparency on coronavirus exposure could also result in costly consumer class actions or government investigations.

It is worth noting that while federal false advertising under the Lanham Act does not have an affirmative duty of disclosure, omissions can be actionable if they render affirmative statements false or misleading. Thus, a failure to mention suspected coronavirus exposure, while at the same time advertising that your business is taking all adequate precautions, may lead to a claim by a competitor that your business is engaging in false advertising.

Companies can, and should, address coronavirus concerns in their marketing. However, they need to ensure they are not making representations they cannot support, and are not concealing or downplaying risks in an attempt to maintain sales. Doing so could end up being far costlier than accepting a temporary decrease in revenues.

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