Companies around the world are scrambling to respond to the unprecedented challenges posed by the COVID-19 pandemic. We have all received many emails and seen a plethora of ads and social media posts by manufacturers, retailers and service providers about steps they are taking to respond to COVID-19 related challenges. The messaging is vital for keeping touch with customers and clients and supporting the public’s confidence that current circumstances are not spiraling out of control. While critical, however, the rush to provide messaging about the availability of products and services can be a litigation trap for the unwary. False advertising investigations or enforcement actions by governments, and false advertising litigation spawned by consumer plaintiffs or competitors can dog those who fail to message with care.

The federal government’s primary watchdog regarding false advertising is the Federal Trade Commission (FTC). Section 5(a) of the FTC Act declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” When the FTC has “reason to believe” that a violation may have occurred, it may launch a civil investigation or sue the alleged transgressor.

Likewise, companies making statements about their products and services vis-à-vis COVID-19 should keep in mind the many state laws that govern advertising. For
example, California’s False Advertising Law (“FAL”) prohibits advertising that contains “any statement . . . which is untrue or misleading, and which is known, or . . . should be known, to be untrue or misleading.” Cal. Bus. & Prof. Code § 17500. The FAL not only prohibits advertising that is false, but also advertising which, “although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.” Chapman v. Skype Inc., 220 Cal. App. 4th 217, 226 (2013). These state laws are often used by the plaintiffs’ bar as fodder for lawsuits.

Meanwhile, Section 43(a)(1)(B) of the Lanham Act authorizes false advertising claims by competitors that are injured by a defendant’s false or misleading representation in commercial advertising. The challenged representation can be any statement, term, symbol, or device that conveys a false or misleading message to consumers about the nature, qualities, characteristics, or geographic origin of any person’s goods or services. See 15 U.S.C. § 1125(a)(1)(B).

The FTC (and given healthcare claims, the FDA) have already taken note of COVID-19 related advertising, issuing warning letters regarding commercial representations about products and COVID-19. State Attorney General offices are also monitoring representations concerning products being sold at this time. The plaintiffs’ bar, always quick to monitor these actions, may soon follow suit.

The overarching takeaway here is the old adage about an ounce of prevention saving a pound of cure – while quick statements in response to the fast-moving nature of the current crisis are necessary, reviewing such statements with a sober eye before their release is important.

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