

An ANA and Reed Smith Legal Guide  
**The Impact of COVID-19 on  
Brand Advertising and Marketing**

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The unprecedented disruption caused by the novel Coronavirus (COVID-19) pandemic has created challenges for ANA members at every level. Temporary and perhaps permanent changes to advertising and marketing strategies and executions have occurred and will continue to do so. In response, we asked our General Counsel and Strategic Law Partner, Reed Smith, to prepare this Legal Guide addressing member concerns and offer guidance and suggestions on how to deal with them. This document is not meant to provide legal advice. All members are encouraged to consult with their own legal counsel before embarking on any actions in response to the crisis. Reed Smith is also available should a member wish to independently consult with them.

# Chapter 1 Contractual Issues and Force Majeure

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Many of the issues facing brands will be contractual in nature and brands will need to review their contracts to determine what, if any, rights and remedies they have. Brands may want to terminate contracts, delay performance under a contract, obtain makegoods or otherwise modify a contract. Typical contract provisions to consider are termination, makegood policies and provisions addressing modification or rescheduling of services, these issues are addressed throughout this guide. However, in unprecedented times such as these, many brands are first looking to the force majeure clause in their contracts.

## Force majeure and COVID-19

A force majeure clause may excuse a party's performance of a contract if an unforeseen event outside the party's control prevents the party from performing its contractual obligations. However, such clauses do not excuse performance simply because fulfillment is difficult. Furthermore, not every force majeure provision is clear as to whether only delay or modification of the performance is permissible or whether a party can terminate the contract all together. At times, a force majeure provision will give the non-performing party a window of time to fulfill its obligations (e.g., ten days); if the force majeure event continues past that amount of time, then the other party can terminate the agreement. A party invoking a force majeure clause may face multiple hurdles in the event that the invocation of the force majeure clause is challenged by the other party.

- *First*, a court or arbitrator will typically only enforce a force majeure clause to the extent it specifically identifies the event that prevents performance. The party invoking force majeure must show that the event at issue falls within the scope of the force majeure clause. Thus, brands facing non-performance of a contract should look at the applicable force majeure provision to determine whether the contract specifically references diseases, epidemics or quarantines as triggering events. If so, the chances of enforcement are greater. If not, then the brand should consider whether there is more general language that could be construed to include the impact of COVID-19, such as "government action" or "other events that make performance impossible or impractical".
- *Second*, the party invoking force majeure may have to show that the precise event preventing full performance under the agreement was unforeseeable in light of the contract at issue and that the risk of the triggering event could not have been allocated in the contract.
- *Third*, the party may have to demonstrate that it could have performed but for the triggering event. In other words, a party is not excused from performance by a force majeure event when it otherwise was unable to perform. Brands should ask themselves; did the outbreak of COVID-19 cause the inability to perform? If the brand would not have been able to perform even in the absence of the outbreak, it will be harder to rely on force majeure as an excuse.
- *Fourth*, the party must show that, despite the event in question; its failure to perform could not have been avoided or overcome through alternative means. Is the brand able to overcome the effects of COVID-19 through alternative means? The ability to mitigate the effects of COVID-19 through alternative means can cut against the application of force majeure as a valid defense to non-performance. Some courts may also consider modified or delayed performance as permissible under the agreement, rather than outright termination, if the force majeure provision does not provide clear guidance.
- *Fifth*, the party invoking force majeure must show that it complied with any notice requirements set forth in the controlling contract. Brands should promptly look at their applicable contracts and force majeure provisions and ensure that they complied with the applicable notice requirements. Even if all other elements establishing a force majeure defense are met, it is unlikely that a court or arbitrator will excuse failure to timely notice that a force majeure event has been triggered.

In addition to analyzing force majeure provisions, brands should prepare for potential litigation and take (and document) reasonable steps to mitigate the impact of COVID-19 (see also Chapter 17, Insurance Recovery). While these steps may prove futile, they are essential predicates to mounting a valid force majeure defense.

## Suggested force majeure clause

The following template force majeure provision is intended to provide general guidance and ideas. It should be adopted only after consultation with legal counsel.

Force majeure clauses must be carefully drafted and are generally limited to extraordinary events outside the control of the contracting parties. Moreover, these clauses evolve over time as new events raise concerns. In light of the COVID-19 pandemic, here is a suggested clause:

FORCE MAJEURE. Neither party will be liable under, or deemed to be in breach of, this Agreement for any delay or failure in performance under this Agreement or the applicable SOW that is caused by any of the following events: acts of God (including, without limitation, fire, earthquakes, floods, hurricanes, tornadoes, droughts, unusually severe weather), civil or military authority, the public enemy, or war; riots; accidents; explosions; power surges; strikes or labor disputes (excluding Provider's subcontractors); delays in transportation or delivery; epidemics; pandemics; public health emergency of international concern (as defined by the World Health Organization); terrorism or threats of terrorism; national or regional emergency; and any similar event that is beyond the reasonable control of the non-performing party ("Force Majeure Event"). The party affected by the Force Majeure Event must diligently attempt to perform (including through alternate means). During a Force Majeure Event, the parties will negotiate changes to this Agreement in good faith to address the Force Majeure Event in a fair and equitable manner. If a Force Majeure Event continues for ten (10) days or longer, and the non-performing party is delayed or unable to perform under this Agreement or any SOW as a result of the Force Majeure Event, then the other party will have the right to terminate this Agreement or the SOW, in whole or in part, upon written notice to the non-performing party.

## United Kingdom view

For brands facing force majeure issues in the United Kingdom, here are some additional considerations. These considerations may also apply in the United States depending upon basic principles of common law.

### Frustration: Where force majeure is not an option under English Law

The above guidance regarding force majeure clauses applies equally to the situation under English law. Force majeure will not be implied into contracts under English law, and so cannot be relied on where there is no express force majeure clause included.

In circumstances where there is no specific force majeure clause, a business may need to rely on the doctrine of frustration in order to discharge its contractual obligations.

Under common law (law as set out by courts, based on the outcome of court cases, as opposed to statute), a frustrating event must generally:

- Occur after the contract has been formed;
- Have been entirely beyond what was contemplated by the parties when they entered the contract;
- Be the fault of neither party (case law has found fault where a party has, for example, failed to obtain a license required under law, but not in situations such as a response by an organizer to a pandemic or similar emergency);
- Render further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract; and
- Be so fundamental as to defeat the sole "commercial purpose" of the contract (contrast *Krell v Henry*, where a Pall Mall flat was rented so that the renter could watch the coronation procession of Edward VII, which was frustrated because the sudden cancellation of the coronation was deemed to deprive the contract of its "commercial purpose," with *Herne Bay v*

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*Hutton*, where a contract for the hire of a steamship for “viewing the (subsequently cancelled) naval review and a day’s cruise around the fleet” was not frustrated, because the latter purpose was still achievable).

Whether frustration is available will depend on the circumstances of each particular contract, and is likely to be disputed. However, case law has established that legal changes, which make performance of an obligation impossible, are also likely to amount to frustration. As such, COVID-19-related emergency legislation and measures may render performance of certain obligations effectively “impossible” (e.g. if performance requires a ‘mass gathering’).

### **Consequences of frustration**

A frustrated contract is deemed to have terminated at the point of frustration.

Unless the Law Reform (Frustrated Contracts) Act 1943, which provides a statutory framework for the effects of frustration upon a contract (this previously having been governed entirely by common law), is excluded, all money paid under the contract can be recovered, and money payable ceases to be payable, less the value of any ‘valuable benefit’ or consideration which has already been provided.

Where this act is excluded, common law rules apply, and no money paid before the frustrating event can be recovered unless a “total failure of consideration” has taken place – for example, where a business hires a premises for a series of events, and every single event is cancelled due to the frustrating event.

### **Commercial considerations**

The exercise of any rights invoking the doctrine of frustration should be considered in the wider commercial context. For example, even where businesses need not reimburse, there may be advantage in doing so, or, for example, offsetting the pro rata value of cancelled games against the cost of any future multi-events contract, in order to avoid reputational damage and maintain goodwill.

Businesses should also bear in mind any codes of practice (binding or non-binding) of any bodies they are part of, as well as any wider obligations under other legislation, as these may determine or influence the options available.

### **German View**

For agreements where German law applies, COVID-19 may be a force majeure event entitling brands to stop performing agreements and/or terminate the agreement, but only in certain situations and on a case-by-case basis. Organizations may be released from their duty to perform under an agreement and/or terminate the agreement on the grounds of “impossibility of performance” (section 275 German Civil Code) or under contractual force majeure clauses. The other party may also have the right to terminate the agreement. In case of “impossibility of performance” or force majeure, the other party is relieved of its payment obligations.

Whether or not performance is impossible should be decided on a case-by-case basis and will also depend on the contractually agreed provisions. Generally, “impossibility of performance” or force majeure requires objective circumstances that prevent the affected party from carrying out its duty to perform. A mere increase in costs or “precautionary measures” would not suffice; however, where orders from authorities (e.g., the export restriction order imposed by the Ministry of Economy and Energy or orders to limit contact with other people and stay home) or sanctions are the direct reason for the non-performance, performance will likely be considered as impossible.

Brands should check if and to what extent they have obligations under applicable law or a specific agreement, whether or not the agreement can or must be terminated, or whether or not the other party to the agreement must be informed of the force majeure event or otherwise.

## Chapter 2 Sponsorships and Events

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Across the globe, music festivals, comedy tours, technology and gaming conferences, political gatherings, sporting tournaments, cultural events and other sponsored events have been cancelled either pursuant to governmental mandate or by the event producer's own volition. A BBC report estimates suggesting the live music industry alone will lose as much as \$5 billion during the outbreak, a vast majority of which will likely come from touring.

Upon cancellation, and subject to any force majeure provisions appearing in applicable sponsorship agreements, brands who sponsor events are left with several contractual remedies, including (i) termination of the agreement; (ii) rescission of consideration; (iii) makegood for benefits not received; and (iv) postponement.

- *First*, brands who sponsor events should review their sponsorship agreements to determine their rights upon (i) event cancellation and/or (ii) the event producer's failure to deliver sponsorship deliverables contemplated in the agreement.
- *Second*, brands who sponsor events should conduct an audit of the applicable sponsorship to determine (i) which deliverables were rendered, (ii) which deliverables are still pending, (iii) fees paid to the event producer, (iv) fees to be paid to the event producer; and (v) which party is liable for producing and publishing sponsorship collateral.
- *Third*, brands who sponsor events should obtain a firm understanding from event producers as to proposed go-forward plan for the event and if there are any makegood or postponement opportunities that are satisfactory to the advertiser. For example, event producers may choose to host the event virtually and promote brands using channel bugs, interstitials, background signage, by voice over, or otherwise.

If the event is canceled and the event producer fails to deliver sponsorship deliverables or a makegood as contemplated in the sponsorship agreement, brands may be able to rely on contractual breach remedies to terminate the agreement for subsequent years and/or to recoup paid sponsorship fees. To avoid dilution of sponsorship benefits in the event of cancellation, brands who sponsor events should ensure that each deliverable is described in sufficient detail in the sponsorship agreement to determine whether the applicable benefit has been rendered as initially contemplated by the parties (i.e. avoid vague or amorphous descriptions of sponsorship benefits such as, "on-site presence at event").

Brands should anticipate that event organizers might attempt to release themselves of liability relating to the sponsorship agreement, including by putting forth the impossibility of performance, force majeure, impracticability, and other arguments. Though brands who sponsor events may seek rescission of consideration paid, event producers may be insolvent upon cancellation with an increasing line of potential creditors, including vendors, venues, and ticketholders. Brands who sponsor events should determine whether event producers maintain event cancellation insurance policies, which policies may contemplate sponsorship fees.



# Chapter 3 Endorsements

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The world is a captive audience in a way like never before. However, with shifting budgets, travel restrictions, and social distancing, it may be impossible or impractical to move forward with planned service days under talent contracts or media buys. Below are some considerations for brands when thinking about postponing or cancelling an endorsement deal or campaign.

## Confirmed production/service day bookings

Which party is canceling, and for what reason? Prior to the widespread lockdowns and calls for social distancing, talent may have been too concerned to show up for service days that were previously confirmed. Alternatively, brands may not be able to travel their team to shoot locations. From a practical perspective, brands will not likely look to talent to recoup out-of-pocket costs expended for confirmed production days that the talent ultimately canceled, but consider negotiating makegoods such as longer usage rights, additional service days, or extra social media posts.

## Termination rights

Does the agreement afford a brand the right to cancel without cause? What is the notice period, and what must happen during that notice period?

## Force majeure language

In addition to the considerations set forth in Chapter 1 above, many talent agreements give brands the option to push back the service days and usage period for a certain period of time as a result of a force majeure event.

## Media buys and makegoods

For longer campaigns spanning multiple years, campaigns promoting products that may be in limited supply, or campaigns that are not appropriate to launch in this climate, there may be a business case to push back the campaign launch. Where media was already purchased for the commercial, look to the terms of media buy/insertion order to determine what rights the brand may have in the event that the brand pulls its media buy, including whether make goods are available. See Chapter 7 below for more considerations related to media buys.

## PR and crisis communications

Is now *really* the right time to be releasing a new campaign? In the coming weeks, brands will need to balance the push to distract consumers from the negativity around the news and carry on business as usual while remaining sensitive to current events. There are bound to be missteps, and Twitter will certainly be active. Consider a brand's campaign and timing, and whether it makes sense to amend a talent agreement to push back the usage period, imagery, content, and the like. See below for more considerations related to PR and Crisis Management.

As is common in the world of celebrity endorsements, brands may find themselves in the middle of a contract negotiation but need to postpone it or pull the campaign completely. First, determine which option applies – is the brand in a position to commit to a new date for service days, or must the campaign budget be reallocated elsewhere? Next, identify whether either side has rendered any services. *Has the talent taken photos or videos that are with the business for review? Were service days already performed? Has the brand teased or announced the partnership?* If yes, consider whether modifying the agreement to push back the remaining service days and usage period is possible. If not, look at termination rights (including the required notice period) along with the brand's payment obligations in the event of termination. This often includes making pro-rated payments to talent. If neither side has announced the partnership nor rendered services, a brand might consider ceasing negotiations and “walking away” from the deal, at least for now. In that case, be sure to notify talent's team in writing.

## Influencers will be king

Although influencer campaigns are already popular, during this time of global quarantine and shelter-in-place, those who can continue to self-produce from home will be highly valuable to brands. The key will be to strike the appropriate balance and sensitivity between capitalizing on a global pandemic and delivering authentic and appropriate commercial messaging. Of course, a global pandemic is no excuse for ignoring the FTC's Guides on Endorsements and Testimonials.



# Chapter 4 Commercial Production

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The inability to gather in larger groups, travel, or – more fundamentally – leave home will certainly put a “pause” on upcoming productions. Given the uncertainty of when such restrictions will be lifted in light of the COVID-19 pandemic, many questions will arise when postponing or cancelling productions.

## Talent Union issues

Stacy Marcus, a partner in Reed Smith’s New York office, also serves as the Chief Negotiator for The Joint Policy Committee (“JPC”) – the multi-employer collective bargaining unit that represents the advertising industry in negotiations for both the SAG-AFTRA Commercials Contracts and the American Federation of Musicians Commercial Announcements Agreement. As a result, we are uniquely suited to advise and resolve issues under the collective bargaining agreements that arise because of the pandemic. Please be advised that the American Federation of Musicians Commercial Announcements Agreement that was set to expire on March 31, 2020, will be extended by the bargaining parties until negotiations can take place.

We are aware of several different issues that have arisen as a result of the pandemic, including (i) productions are being halted midstream (under either the traditional contract or the Alternate Compensation Structure (“ACS”) of the SAG-AFTRA Commercials Contract) leaving the brand with incomplete assets; and (ii) completed productions that were produced under the ACS may no longer air because the content is either not appropriate given the current pandemic OR the media buy no longer exists (e.g., the spot was meant to air during March Madness). The primary issues that we are seeing relate to late payment penalties, cancellation fees, the maximum period of use, and timing for payment of the upfront use fee under the ACS where the spot can no longer air. We are working with SAG-AFTRA to address these issues, and have been able to obtain relief for several signatories. If a brand has a SAG-AFTRA issue, please contact Stacy Marcus ([smarcus@reedsmith.com](mailto:smarcus@reedsmith.com)) and/or Michael Isselin ([misselin@reedsmith.com](mailto:misselin@reedsmith.com)) so that they may work with the union to obtain the appropriate relief. In addition, keep up to date on these and other issues that brands may face with union commercial productions by visiting [www.jointpolicycommittee.org](http://www.jointpolicycommittee.org). Such consultation is without cost to ANA members.

## Rescheduling or cancelling a production

Brands should carefully review their agreements with advertising agencies and related production agreements. In many instances, there will be production guidelines that govern postponing or cancelling a production as well as what constitutes a force majeure event.

The Association of Independent Commercial Producers (“AICP”) recently issued guidance on production cancellations and whether cancellations due to COVID-19 are considered a force majeure event, which might be relied on to cancel a production and related obligations. According to the AICP, when navigating the terms of the AICP production agreement or agreements with similar terms and conditions, whether the cancellation constitutes a force majeure event depends upon the reason for the cancellation:

- **Government-issued travel restrictions:** According to the AICP, this would be considered a force majeure event. However, if restrictions are not in place but rather the crew is not comfortable with the travel, the production company should secure other crew locally or who will travel for the shoot.
- **Government restrictions on large gatherings:** Where there is a government mandate prohibiting gatherings of fifty people or more, the AICP states that this would constitute a force majeure event.
- **Government revocation of permit to shoot:** Typically, when a government authority revokes a production permit or restricts travel to the shoot location, the production company suggests alternative locations for the shoot. It is up to the agency or advertiser whether to accept the alternative location or to cancel or postpone the production. Under the AICP’s perspective, the costs of such relocation or postponement will likely constitute a force majeure event in this instance, similar to a weather day.

## Recovering out-of-pocket costs

In some instances, production insurance might provide a means to recoup funds expended prior to the cancellation of a production. For the most part, it will be a case-specific inquiry with the insurance provider whether out-of-pocket costs lost due to cancellations for COVID-19 reasons are recoverable under production interruption or cancellation coverage. With the influx of claims arising from cancellations, it is likely that insurance providers will be reluctant to pay out for such claims. There are, of course, a number of factors that will determine whether – and how much – production insurance can be relied upon to recover such costs:

- **Understand the terms of production insurance coverage:**
  - As mentioned, insurance providers will likely narrowly construe all terms of their coverage to avoid the need to pay out enormous amounts for production cancellations due to COVID-19. The AICP also warned that extra expense coverage within the larger production insurance policy will unlikely provide a means for recovery, since this coverage is usually limited to direct physical loss to property. COVID-19 will not result in such physical losses, so this coverage will not likely help.
  - Production companies may also carry a “commercial producers indemnity endorsement,” while brands may also have wrap-up policies of their own. These typically cover losses beyond direct physical damage to property, but other terms and limits might still render these additional coverages unhelpful to recover lost costs.
- **Understand the force majeure provisions:** Does COVID-19 constitute a force majeure event under the insurance policy? Did the circumstances make it impossible or illegal to carry on with the production? Some insurance policies specifically exclude coverage due to viruses, others may exclude coverage only for listed viruses (e.g., flu virus, H1N1, SARS), while others consider communicable diseases within the concept of a force majeure event.
- **Has talent provided a doctor’s note if talent is too sick or cancels the production:** Some policies may afford coverage where the talent has a pre-existing condition accompanied by a doctor’s note indicating that talent would be at too great of a health risk to attend the production. Of course, whether this situation will result in recouped costs will depend upon the terms of coverage and whether the insurance provider finds the talent is reasoning sufficient for a cancellation.

## Scheduling new productions

The AICP recently released an [amendment](#) to include with standard production bids and production contracts to address concerns related to COVID-19. The purpose of the amendment is to clarify that if a production is cancelled or postponed due to issues related to the COVID-19 pandemic, such circumstances will be considered a force majeure event.



# Chapter 5 Promotions

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Sweepstakes and contest promotions can serve as powerful tools for building brand awareness and gaining customers. By providing customers with a chance to win, brands incentivize consumers to interact, and build a positive association with the brand.

The COVID-19 pandemic is having a substantial effect on promotions. Brands are canceling or postponing scheduled promotions, and finding challenges to provide winners with the advertised prize. For example, brands are unable to award travel prizes in the wake of restrictions. Similarly, prizes to attend sporting events, concerts, and to participate in or attend other unique live events are similarly unable to be fulfilled. Brands will need to turn to their official rules to determine the appropriate remedy.

In most cases, promotion rules contain the following language:

*“In the event of unavailability of any prize (or portion thereof) the Sponsor reserves the right to substitute the prize with another prize of equal or greater value.”*

This language will provide brands the ability to award another prize (cash, gift cards, etc.).

Additionally, regulators are taking a unique approach to registration and bonding. In New York and Florida, consumer games of chance are required to be registered and bonded if the total prize value in the promotion exceeds \$5,000. Currently, for example, Florida has agreed to waive late penalties for revisions to promotions’ official rules due to COVID-19. Further, it is now acceptable for sponsors to substitute a trip or sports related prize for another due to COVID-19.



# Chapter 6 Agency Contracts

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Due to COVID-19 and the rapid economic decline, some brands may look to reduce advertising and media budgets and cut costs where possible. These cost saving measures could come in the form of terminating, in whole or in part, certain agency services or asking for credits if the agency is unable to provide services for a period of time. Brands should promptly analyze their termination rights and obligations under agency agreements. For example, many contracts require brands to provide notice to the agency as a condition to termination. The notice period can vary drastically by agency agreement, but is often between thirty to ninety days. In addition, an advertiser's termination rights may differ depending on whether the advertiser is terminating a master agreement or a statement of work.

Many agency agreements will also include a force majeure clause. Brands should carefully review such clauses. Whether a force majeure clause applies will depend on a number of factors and will likely be very fact specific, as outlined in Chapter 1 above. For brands in particular, a defense of force majeure under an agency contract must be carefully assessed. An advertiser's primary obligation under most agency agreements is to pay the agency for services provided. Even though the outbreak of COVID-19 is testing brands and businesses in new and unforeseeable ways, banks remain open and online transfers of money are still a viable option in paying vendors. On the other hand, it might actually be the agency that is prevented from performing services it is required to perform under the applicable agreement, such as commercial productions, in such instances, depending on the language, a force majeure provision may give the brand a right to terminate the agency or otherwise delay payment.

Brands should also consider that they might receive claims of force majeure from their agencies, particularly event and production agencies. Brands should be prepared and know their rights under the applicable force majeure clause. For example, how is force majeure defined in the agreement; does it expressly include pandemics, epidemics or government action (e.g., a government shutdown, a government-imposed travel ban); what are the advertiser's termination rights in the event of a force majeure event; is there a suspension period that applies before the advertiser may terminate; and is the advertiser eligible to receive a refund of fees paid to the agency for such services?

Termination may not be the only option available to brands. Brands may also have the right to modify or reduce scopes of work through a "change request" or "charge order." Similar to termination, material changes often require the advertiser to provide notice to the agency. The length of the notice period may vary depending on the extent of the reduction. For example, a reduction in fees in excess of twenty percent (20%) may require a longer notice period, because the agency may need to lay off staff. A reduction in services may be a more desirable approach to termination, if the advertiser wishes to maintain its relationship with the agency and/or if the reduction in services or fees is expected to be short-term.

Once business returns to normal, brands should consider whether to pursue a credit towards agency fees if the agency was unable to provide services for a period of time. The force majeure clause may address the inability to provide services, but if the agency does not claim force majeure, then such inability to provide services may not be excusable.

Finally, when entering into new contracts, there is a renewed focus on termination and force majeure clauses. Brands should update form agreements in light of COVID-19. For example, brands should consider requiring a termination right for convenience with a reasonable notice period, reviewing the definition of force majeure to include events such as pandemics, epidemics and government actions, and requiring a refund of fees paid in the event of termination whether due to force majeure or not.

# Chapter 7 Media Buys

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With the current climate of budget cuts, limited supply of products, social distancing, travel restrictions and the new norm of working from home for non-essential employees, brands may wish to review their current media plans and campaigns. For example, certain brands may wish to make real-time adjustments to media plans, e.g., decreasing out-of-home spend and increasing digital and mobile spend given that people are spending an unprecedented amount of time at home, or pull campaigns for products in limited supply or campaigns that no longer seem appropriate during these uncertain times. Below are some considerations for brands when modifying or cancelling current media purchases.

## **Brands should collaborate with media agencies**

For media purchased through a media agency, brands should collaborate with their media agencies in understanding and enforcing their right to modify or cancel media. Such rights will depend on the agreement with the relevant third party. Brands should also look to their agency master services agreement to see if the agency has an obligation to ensure that the advertiser always has a right to terminate its media.

## **Review agreements with media publishers**

Brands (and their media agencies) should carefully review the terms of any agreements with media publishers. For example, under Version 3.0 of the IAB's Standard Terms and Conditions for Internet Advertising for Media Buys One Year or Less (the "IAB Terms"), unless the insertion order (IO) designates a media purchase as non-refundable, brands may cancel, without cause, an IO (in whole or in part):

- with 14 days prior written notice to the media publisher, without penalty, for any guaranteed deliverable (e.g., CPM deliverables or deliverables sold on a cost-per-thousand basis).
- with 7 days prior written notice to the media publisher, without penalty, for any non-guaranteed deliverable (e.g., CPC deliverables or deliverables sold on a cost-per-click basis; CPL deliverables or deliverables sold on a cost-per-lead basis; CPA deliverables or deliverables sold on a cost-per-acquisition basis, as well as certain non-guaranteed CPM deliverables).
- with 30 days prior written notice to the media publisher, without penalty, for any flat-fee based or fixed-placement deliverable (e.g., roadblocks, time-based or share of voice buys or some types of cancelable sponsorships).

Pursuant to the IAB terms, brands remain liable for amounts due for custom content or development. However, many custom content arrangements are subject to a separate agreement or addendum between the advertiser (or agency on behalf of the advertiser) and the media publisher. Brands should carefully review all relevant documents in evaluating their rights and obligations.

Importantly, some publishers will not agree to the IAB Terms and, even if a publisher will agree, some media agencies have their own addendums to the IAB Terms. Therefore, the issue of whether brands can modify or cancel media is fact-specific and will depend on the specific terms with the relevant media publisher. Brands should request copies of the terms with the relevant media publisher from their agency.

## **Closely monitor media performance and actively seek makegoods where possible**

Where brands purchased media based on "guaranteed deliverables" (e.g., a guaranteed number of impressions), brands should closely monitor performance and actively seek makegoods for underperforming media.

## **Consider other options if media cannot be canceled**

Some brands have decided to "go dark" during the COVID-19 pandemic. If media cannot be cancelled and a brand does not want to run advertising, ask the publisher if they can try to resell the media and provide a credit or makegood as a compromise. Alternatively, consider asking the publisher whether the media can be donated to a charity and then talk to tax counsel to see if there are tax benefits to making such donation. Additionally, brands should look to their insurance (see Chapter 14 below) to see if they might be covered for any losses.

# Chapter 8 Digital

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Digital advertising placements are an opportunity for brands to quickly make an impression on their audiences. Below are topics for brands to take into account as they consider the effectiveness of their digital advertising strategies during the pandemic.

## Responding to crisis via digital advertising

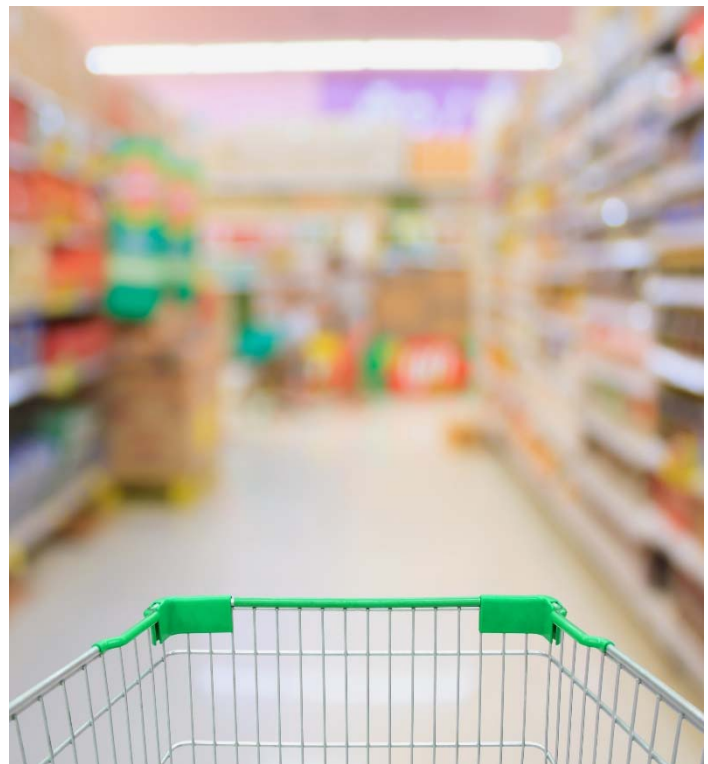
As consumers practice social distancing, there is a brighter spotlight on brands' responses to COVID-19, including the content that they disseminate. Of course, brands ought to highlight how their products can serve consumers – whether for their utility, safety or entertainment value. Consider whether a brand can capitalize on this increase in attention by reflecting the changes that consumers are making to their own lives. Such advertisements may include an unannounced, but apparent, “spreading out” of actors to indicate the new necessity of distancing ourselves from one another. Other advertisements might portray a main actor's night in as opposed to a night on the town.

Consumers also look to brands' corporate social responsibility efforts. Social media platforms are using their broad reach to share accurate, critical information. For example, Facebook allocated free advertising space to the World Health Organization and Google launched a highly anticipated resource webpage. Faced with the pervasive spread of misinformation amidst the panic, Facebook is monitoring the veracity of information shared on the platform. These practices support the global health community's efforts to keep the public informed and healthy. Though seemingly small steps in the fight against the growing pandemic, consumers will likely remember how digital platforms responded to COVID-19 when normalcy returns.

## COVID-19's impact on essential products & services

Take a trip to your local supermarket or drugstore and you may find that many household cleaning products, beauty products, paper products -and non-perishable goods are out of stock. Attempts to avoid bare aisles by visiting stores in “off-hours” and ordering these products online are often met with considerable wait times, including long lines in stores and week-long lead times for deliveries.

The scarcity of products might create panic in consumers, who are concerned that they cannot re-up their supply. Also, consider the impact that the scarcity of essential products and services may have on the quality of products offered. Many brands, particularly in the beauty industry, are keenly aware of the risk that counterfeit products will be sold. Brands in other industries should also be on alert during this pandemic. The advertisement and sale of counterfeit products may increase as the demand for essential products remains high and supply stays low. Brands are responding to these risks through their digital advertising strategies. Consider, for example Clorox, which is experiencing product shortages on Amazon. As a result of these shortages, Clorox stopped display advertising of its disinfecting products on Amazon. Brands may monitor the sale and availability of their products to determine whether a strategy like that adopted by Clorox is advisable.



## Use of web analytics

Quarantined, consumers can only engage with brands online; therefore, web analytics tools are arguably important for brands now more than ever. The collection and use of such data is integral to the development of effective advertising campaigns. However brands must ensure that their practices comply with the patchwork of data privacy laws. In particular when using web analytics with EU users, organizations must comply with the strict EU cookie obligations that require obtaining opt-in consent for most web analytics tools. For more information, please reference Chapter 15, Data Privacy and Security.

# Chapter 9 Anti-Gouging Laws

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Matt Colvin never intended to take advantage of a national state of emergency when he stockpiled 17,000 units of hand sanitizer and antibacterial wipes and set up shop on Amazon and eBay. However, the online marketplace platforms saw this situation differently, shutting down his account and leaving him with a huge inventory and a public relations nightmare on his hands. Colvin appears to have cleansed himself of the ignominy of potentially reaping a profit from the fears and desperation caused by COVID-19. Colvin is donating the stockpile to the people of Tennessee.

Not only did Amazon and eBay have concerns about whether he was engaged in gouging, the Tennessee attorney general's office is also apparently conducting an investigation into Colvin's commercial activities. Tennessee's focus on anti-gouging as well as Amazon and eBay's actions are good reminders that there are limits on the ability of a seller to set prices in accordance with supply-and-demand principles when a disaster strikes. Those restrictions are based on both federal and state law.

On Wednesday, March 25, 2020, thirty-three (33) state attorneys general issued a joint letter to Amazon, Facebook, eBay, Walmart, and Craigslist to "more rigorously monitor price gouging practices by online sellers who are using their services." The letter recommends the online retailers take several steps to help curb the deceptive act, including:

- Set policies and enforce restrictions on unconscionable price gouging during emergencies: Online retail platforms should prevent unconscionable price increases from occurring by creating and enforcing strong policies that prevent sellers from deviating in any significant way from the product's price before an emergency. Such policies should examine historical seller prices, and the price offered by other sellers of the same or similar products, to identify and eliminate price gouging.
- Trigger price gouging protections prior to an emergency declaration, such as when systems detect conditions like pending weather events or future possible health risks.
- Implement a complaint portal for consumers to report potential price gouging.

In response to current price gouging activities on their respective platforms, and even prior to the letter by state attorneys general, eBay and Amazon have both warned sellers and removed listings that were not in compliance with the retailers' pricing policies.

"We will not let those hoarding vital supplies & price gougers to harm the health of America in this hour of need," White House Press Secretary Stephanie Grisham tweeted on Monday, March 23, 2020, announcing that President Donald Trump has signed an executive order to prevent price gouging amid the COVID-19 pandemic. In relevant part, the executive order delegates to the Secretary of Health and Human Services, "(i) the authority of the President conferred by section 102 of the Act to prevent hoarding of health and medical resources necessary to respond to the spread of COVID-19 within the United States, including the authority to prescribe conditions with respect to the accumulation of such resources, and to designate any material as a scarce material, or as a material the supply of which would be threatened by persons accumulating the material either in excess of reasonable demands of business, personal, or home consumption, or for the purpose of resale at prices in excess of prevailing market prices." It remains to be seen which materials will be designated as "scarce." However, the Executive Order, drafted broadly, deems any price "in excess of prevailing market prices," price gouging.

## Federal law

"Unfairness" is defined under FTC jurisprudence pursuant to the Federal Trade Commission Act. An act is "unfair" when it causes substantial consumer injury, which is not outweighed by countervailing benefits to competition and which the consumer could not reasonably avoid. One could reasonably make an argument that charging a premium price on certain necessary items during an emergency meets that definition.

Even if the FTC did not choose to expend its resources looking into whether a seller might be engaged in unfair acts or practices, Congress can create laws that protect consumers against such practices. In the wake of Hurricane Katrina, the FTC conducted a Congressionally-mandated investigation and issued a report pursuant to Section 1809 of the Energy Policy Act of 2005, requiring the FTC to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices." In its

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investigation, the FTC found no instances of illegal market manipulation that led to higher prices during the relevant time periods but found fifteen (15) examples of pricing at the refining, wholesale, or retail level that fit the relevant Energy Policy Act's definition of evidence of "price gouging." Nevertheless, in a 2006 report, the Commission found that there were mitigating factors that explained why there were higher prices in certain regional or local areas. In fact, the Commission indicated that the reactive legislation was difficult to enforce and "could cause more problems for consumers than it solves." Preferring its flexible "unfairness" standard under Section 5 of the FTC to the draconian definition imposed by Congress during a regional state of emergency, the Commission argued that "competitive market forces should be allowed to determine the price of gasoline drivers pay at the pump."

As recently as March 17, 2020, four Democratic members of Congress wrote to the Chairman of the FTC demanding that the FTC look into reports of price gouging in the wake of the COVID-19 public health emergency. As described in the letter by the lawmakers, "profiteers who have cleaned the shelves of hundreds of stores are hoarding these [essential] supplies or charging unconscionable prices." The lawmakers further cautioned the FTC that if it does not act within its existing authority, they would "pursue other means, including legislation, to assist your efforts and help consumers."

As was demonstrated in the aftermath of Katrina, one can expect that the FTC will take a very careful competition-based approach to gouging enforcement under § 5 of the FTC Act. As Chairman Leibowitz said at the time the FTC released its 2006 report regarding gas prices, "price gouging is a phenomenon that is hard to nail down. Indeed, price gouging is the obscenity of antitrust law: difficult to define in theory but easily recognized at the pump." The Chairman seems to suggest that people might feel there is gouging going on, but from a § 5 perspective – which incorporates a balance with benefits for competition and consumers – increased prices may be justified and not unlawful.

### **State law**

While the FTC takes a balancing approach to "unfairness" and thereby can theoretically bring price gouging under its enforcement scrutiny, states can take a more pointed view and most states have statutes or regulations prohibiting price gouging.

State price gouging laws typically involve three elements: (i) an event (typically an event of emergency) that (ii) significantly increases demand for certain goods and/or services; and (iii) a retailer that increases the price of such goods and/or services above a certain threshold relative to the previous market price in the trade area. Price gouging laws will often define the particular category of goods and/or services (e.g. food items, gasoline, pharmaceuticals, and emergency supplies). These categories are typically goods and/or services that regulators deem "essential." Such laws may also require that the triggering event be classified by executive order or a declared state of emergency. While some statutes place a particular threshold on the price increase (e.g. a price increase of over 15% constitutes "gouging"), others more generally refer to "unconscionable," "excessive," "exorbitant," price increases.

States (like the FTC) can use their Unfair and Deceptive Acts and Practices (UDAP) statute to investigate and take action against violators.

What if the seller's costs have increased? Generally, there are express exceptions in the case where a merchant's costs have increased, which have occasioned the increase in his offering prices. A merchant should be prepared to show that his costs actually have increased and that only that incremental amount is being passed on to the consumer.

Because these state laws generally flow into the state UDAP statutes, recovery is usually available by both state regulators as well as consumers. Accordingly, class actions are a possibility. Some anti-gouging provisions, however, limit the remedial actions to state regulators.

It should also be noted that some municipal jurisdictions, like New York City, enforce their own "unfair trade practices" regulations or ordinances, which prohibit unconscionable practices in the sale or lease of consumer goods and services.



# Chapter 10 Advertising Content

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Now that consumers are at a physical stand-still, the collective focus has shifted to consuming more content. The COVID-19 epidemic brings with it a unique advertising landscape that brands must carefully navigate. Below we highlight issues that brands ought to consider as they develop new advertising content.

## **Steer clear of misleading or inaccurate claims**

It is imperative that claims in advertising are truthful and supported by sufficient substantiation. The Federal Trade Commission (“FTC”) and U.S. Food and Drug Administration (“FDA”) have begun to issue warning letters to companies that make misleading or inaccurate claims about the efficacy of their products. On March 9, 2020, the FTC and FDA sent letters to seven (7) companies in response to claims that their products – including teas and essential oils – can treat or prevent COVID-19. The letters advise these companies to immediately stop making claims that their products can treat or cure COVID-19. The companies were further advised that if they do not cease making such claims, the FTC might seek an injunction and order from a federal court that would require the company to refund customers. Notably, the FDA has stated that there are no approved products available to treat or prevent COVID-19.

State attorneys general are also monitoring advertising claims related to COVID-19. On March 10, 2020, Missouri Attorney General Eric Schmitt filed suit against television preacher Jim Bakker for misrepresenting the effectiveness of a product called “Silver Solution” to treat COVID-19. The claims were broadcast nationwide, and resulted in action from the FDA, FTC and New York Attorney General Letitia James. On March 11, 2020, Attorney General James also ordered “The Silver Edge” company to cease and desist selling and marketing its “Micro-Particle Colloidal Silver Generator” as a treatment or cure for COVID-19.

It is reasonable to expect that more orders and warning letters are coming down the pipeline from state attorneys general, the FTC and FDA. It is advisable that brands take every precaution to ensure that their advertising claims do not run afoul of consumer protection laws.

## **Support the global health community**

Brands may benefit from incorporating their efforts to support the global health community into their advertising. For example, if a company enacts policies that alleviate hardships caused by COVID-19 it may publicize those policies through advertising. Consider a supermarket that opens its doors for senior citizens only during the first three hours of operation and communicates that policy through an ad campaign. A campaign that highlights that practice may be memorable to consumers and generate positive press.

As COVID-19 spread throughout the United States, consumers began to stockpile protective gear. Though many health professionals advise that the average consumer need not wear protective gear, many continue to purchase these items in an abundance of caution. This practice led to rapid depletion of the supply of face masks and other gear that medical professionals require to administer care. In an effort to slow this trend and simultaneously preempt exploiting the pandemic, tech companies are updating their advertising policies and monitoring the content of advertisements on their social media platforms. For example, Facebook temporarily banned advertisements for medical face masks and commercial listings selling the product. Brands ought to keep abreast of health organizations’ practices, policies and advice as they develop new advertising during the pandemic.

# Chapter 11 Public Relations and Crisis Management

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In times of crisis, public relations becomes a vital communications tool for brands. The COVID-19 pandemic's impact on the world's economy will have both short- and long-term consequences that will foster great debate. Brands will want to participate in those conversations.

Generally, there are few legal issues that arise from PR campaigns. However, when they do, they can be disastrous. We have seen such disasters in poorly drafted releases following data breaches or in response to videos posted by disgruntled consumers. With the COVID-19 panic, the sensitivities of consumers could not be higher, and brands need to be very careful in their communications.

Brands are already telling consumers how they are reacting and what they are doing to help. This may be through the provision of goods through home delivery, liberalization of return policies, discounts, or simply the exchange of ideas. A good example are the airlines who are making it easier for customers to change or cancel flights. Other industries, however, are not so liberal. Some online providers of vacation rentals have refused refunds when consumers cancelled because of COVID-19. Some have reportedly told consumers that they should have secured trip insurance (or in other cases, the insurance coverage would not apply for cancellations due to COVID-19). In some instances, the terms and conditions of a booking do not allow cancellations at all – in other words, the customer is left without any recourse OR refund. They may well be legally entitled to hold the line but the PR fallout may not be worth it in such an unprecedented crisis. Consumers are not going to want to hear legal excuses when they are ill or out of a job or do not receive the product or service they paid for.

For the foreseeable future, brands will need to walk a fine line between responding to the current health crisis and carrying on with their business. Consumers expect brands to step up in times like this, whether through donations or similar activism. However, for every communications relating to a brand's response to the crisis, there is a need for distraction. Customers are sitting at home scrolling websites and social media, seeing ads on TV or news sites. There is no one-size-fits-all approach to walking the line between being sensitive in communications and keeping business as usual – one day a brand might post about its donation efforts, the next day it might post about a new product. There will always be upset consumers and negative comments, particularly when consumer emotions are already at their peak. Remember to remain sensitive but responsive – customers need to hear from brands, and sometimes that might just mean through emails or posts about products or service as a distraction to the current crisis.

Brands also need to be careful about regulatory compliance issues and getting their messages right. No brand wants to be accused of increasing panic or taking advantage of the crisis for its own gain.

Consumers will be looking very closely to see whether PR messages from brands are consistent with their actions (e.g., brands sending an email to consumers that they are taking extra precautionary measures to sanitize store spaces, making hand sanitizers readily available throughout the store, taking care of their employees – but then not following through). Failure to follow through or to “practice what they preach” will create strong negative fallout with consumers.

Other brands may be asked to contribute in various ways. For example, hotels may be asked to host COVID-19 patients, or parking lots for big box stores may be slated for drive-up testing. Some manufacturers may even be asked to stop producing their usual products and instead make products essential to fighting COVID-19 (e.g., masks, ventilators, cleaning fluids). There is both positive and negative PR that can obviously come from this, and brands should make sure they are in front of this possible trend with appropriate strategies.

PR communications also need to be vetted to avoid inadvertent violations of laws and regulations. For example, not all goods can be delivered to a home (e.g., alcohol and drugs in some states). Government-mandated restrictions are changing daily, so messaging should be up to date with respect to store openings and delivery services.

Brands should also consider the PR impact of how employees are treated during this time. If a brand announces how it is helping consumers in the crisis but fails to address the needs of their employees, all the goodwill associated with the announcement will be lost. While working remotely is an option for many businesses, it is not universal. Layoffs are inevitable. Some may have read about Delta's CEO receiving praise for foregoing his salary for six months in an effort to avoid layoffs, but compare that to the negative press SXSW leadership received for laying off one-third of its employees.

Brands should also carefully review any employee announcements that try to alleviate concerns. They may be well-intentioned, but may also create unforeseen contractual obligations if they imply any job security or the continuation, or extension, of benefits. Changes in the economy are happening at an unprecedented speed and circumstances change hourly. Brands need to be careful in their communications to avoid unwittingly backing themselves into obligations or promises they cannot keep.

# Chapter 12 **Regulatory Enforcement and Litigation Based on Product Advertising**

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Frightened by the increasing number of cases of COVID-19 in the U.S., the expansion of the number of states in which cases are being reported, and the rising death toll, consumers are looking for ways to mitigate the serious health risks. Uncertain of the continued availability of staple foods, beverages, and household products, they are stockpiling everything from tea bags to toilet paper. As the brands which make these consumer products and the supermarkets, specialty stores, drugstores, warehouse stores, and online retailers which sell them are struggling to keep up with demand, brands may wish to consider the following issues in deciding how best to truthfully and accurately advertise and promote the products brands sell.

## **Do not advertise or sell products that claim to treat or prevent COVID-19**

As detailed in Chapter 10 on advertising content above, on March 9, 2020, the FTC and the FDA jointly sent warning letters to seven (7) companies demanding that they immediately cease making all claims that their products (which included teas, lozenges, dietary supplements, and essential oils), can treat or cure COVID-19. The FTC warned it would file lawsuits against them seeking injunctions and consumer refunds if they failed to comply. As noted by the FTC in those letters, “there are currently no vaccines, pills, potions, lotions, lozenges or other prescription or over-the-counter products available to treat or cure Coronavirus”.

The FTC then posted on its website the following warnings to other companies which are considering making similar claims:

- The FTC has “a magnifying glass on the marketplace to monitor Coronavirus claims” and is strictly scrutinizing product names, URLs, metatags, and other ways companies can suggest or imply claims to consumers.
- Don’t even think about marketing a product unless brands can support your claims with “sound science,” *i.e.*, claims that a product can prevent or treat a serious disease “must be supported by well-controlled human clinical studies.”
- Promotional claims in social media also must also be supported by “solid scientific support,” *i.e.*, clinical studies.

Attorneys general in key states, including New York, are also closely monitoring claims related to COVID-19 and plaintiffs’ class action attorneys in states, including Ohio and California, have already begun to file lawsuits for allegedly false and misleading product claims.

## **Carefully vet other product claims directly or indirectly related to COVID-19**

Be particularly cautious about making claims about any products including soaps, laundry detergent, bleach, antibacterial wipes, hand sanitizers, household cleaning products, ingestibles ranging from herbal tea to dietary supplements, topical lotions, creams and ointments, wearing apparel, or any other products which state or imply that they offer protection against COVID-19 or any other illness. Following on the heels of warning letters by regulators that plainly state that there is no scientific evidence to support such claims, class action attorneys already have begun filing lawsuits against manufacturers of such products which accuse them of false and misleading advertising.

For example, in January, the FDA sent a letter to the maker of Purell hand sanitizer warning it against making unsubstantiated claims about the effectiveness of its product. The FDA contended that the company made a litany of unverified claims on its website and in social media that suggested that using Purell could prevent the flu, norovirus, Ebola, MRSA, and VRE, among other illnesses. The FDA stated it is “currently not aware of any adequate and well-controlled studies demonstrating that killing or decreasing the number of bacteria or viruses on the skin by a certain magnitude produces a corresponding clinical reduction in infection or disease caused by such bacteria or virus”.

Although Purell responded to the FDA warning letter by immediately changing its websites and other digital promotional material, nonetheless, immediately following the FDA’s pronouncements, plaintiffs’ attorneys have filed three separate class action lawsuits against the company, the first in U.S. District Court for the Southern District of New York and the others in U.S. District Court in Ohio. Relying in substantial part on the statements made by the FDA in its warning letter, the lawsuits accuse the company of making “misleading claims” that its product can eliminate “99.9 percent of illness-causing germs.”

In a new twist, on March 20, 2020, a class action lawsuit was filed in U.S. District Court for the Central District of California against a major national retailer, based on its marketing of its private label hand sanitizer as comparable to Purell. Although the retailer makes no claims that its product combats COVID-19 or any other illness, the lawsuit alleges that “by comparing its less expensive in-house private label product” to Purell, the retailer misleads customers into thinking its hand sanitizer is “as effective as Purell” and “can therefore prevent disease or infection from, for example, COVID-19 and flu, along with other claims that go beyond the general intended use of a topical alcohol-based hand sanitizer.” The lawsuit also alleges that, like Purell, the retailer deceptively claims that use of its hand sanitizer will “eliminate 99.99% of germs” when the FDA’s warning letter to Purell demonstrates that there is no proof to support those claims.

### **Carefully vet product endorsements by influencers**

Remember that product claims being made by influencers who have a relationship with a brand are subject to the same substantiation requirements as any claims made by the brand itself. Influencers should be cautioned not to post comments about any consumer products which state or imply that they offer protection against COVID-19 or any other illnesses and posts should be monitored to ensure that influencers are complying with this prohibition.

### **Exercise care when advertising and selling essential products in high demand**

In deciding when and how to advertise popular brands of essential consumer products that are in high demand, keep in mind that the periodic unavailability of these products online and on store shelves is the “new normal.”

- Print advertising supplements and mailers and online offers of weekly deals, digital coupons, or other time-limited offers should only include such products if brands expect those products to be reasonably available in quantities that a brand’s historical sales data shows have been sufficient to meet reasonably anticipated consumer demand online or in the geographic locations in which those products are being advertised and sold. In light of the substantial increase in consumer demand, consider including prominent disclosures with respect to anticipated product availability that go above and beyond the usual “Quantities limited; no rain checks”.
- Online sellers of name brand essential products should not display online ads to consumers which offer favorable pricing and/or mega packages or otherwise promote those branded product when the products they are advertising are out of stock on their website.
- Brick-and-mortar outlets, like grocery stores and drug stores, that are still permitted to operate, should consider posting prominent signs outside their stores or assigning store personnel to advise customers, before they enter the store, that key categories of products are unavailable, particularly if customers are required to wait in line before entering.
- Do not inadvertently engage in practices that could be interpreted as a “bait and switch.” Retailers should exercise care not to advertise popular brands of high demand products like bottled water, paper towels, and toilet paper at favorable prices if:
  - The advertised products are not available and stores and/or website offers only higher priced products such as a “designer brand” of water that is sold only in single-bottle units as opposed to the advertised brand of water that is sold in 24-bottle units but is not available.
  - The advertised products are not available and stores and/or website offer only products that consumers may not view as comparable such as private label product, lesser known brands, and/or inferior quality brands that are now being sold at prices that are higher than the prices at which they were historically sold.

### **Be wary of price gouging**

Do not inadvertently engage in practices that could be considered price gouging, which is discussed in detail in Chapter 9 on anti-gouging laws above, at the manufacturing, wholesale, or retail level. Carefully document increases in costs of making and supplying products and the wholesale prices charged. Retailers should avoid the temptation to charge premium prices for necessary consumer products by doing the following in any instance in which the higher price does not bear a reasonable relationship to the retailer’s increased costs:

- Substantially increasing the prices of “essential” name brand products.
- In instances in which name brand products are unavailable, selling house brand products, lesser known brands of products, and/or lower quality products which consumers may not view as comparable at “premium” prices.

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- Breaking down products previously sold in multi-unit quantities, like bottled water and facial tissue, into smaller units in order to sell them at substantially higher prices.

### **Be clear, truthful, and up front with consumers**

Recognize that consumers are confused and easily frustrated in these uncertain times. Be clear, truthful and up front with them. Whether brands are selling in a physical store or online, be sure to clearly and conspicuously inform customers prior to the time they begin to shop about out-of-stock product, any limitations on purchase quantities, the terms and conditions of special offers, return policies, any anticipated delays in delivery, and any other issues that are likely to be material to their decision to purchase specific products from brands.

Finally, be sure that customer service representatives in store, online, and at call centers are familiar with a brand's products, pricing, promotions, and selling practices and are able to answer consumer questions and to promptly resolve complaints before they escalate.

# Chapter 13 Intellectual Property: Addressing Counterfeit Goods

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With storefronts closing and retail shops taking a pause, consumers are turning to online sellers to complete subscriptions or to fulfill their needs for purchases of cosmetics, electronics, auto parts or household goods. While this will help brands ensure sales in an economic downturn, it also gives rise to an increase in sellers that have less legitimate online footprints: counterfeiters. Sales of counterfeit products can be rampant on the Internet during normal business; but as stores close due to COVID-19, consumers will be limited to online purchases. This could give rise to an increase in opportunities for counterfeiters looking to expand their networks.

Brand owners should be prepared to address this risk, and develop strategies to mitigate vulnerability to counterfeiters. Below are some anti-counterfeiting measures and strategies that brand holders can implement to protect their brand:

## **Educate consumers about ways to identify legitimate products**

Given that brand owners will likely see an upswing of counterfeiting in the coming months, it is important for them to develop educational materials now to help consumers recognize “legitimate” vs. “fake” product. Any information that a brand owner currently knows about “fakes” in the marketplace could be included in the materials, such as tips about misspelled words or trademarks, or inaccurate details about a product that may be included on the counterfeit seller’s product page. Brand owners should also provide consumers with a method of reporting suspected counterfeit goods to the brand. Finally, and most importantly, the brand owner should heavily tout the places where legitimate products are sold.

## **Practice proper trademark monitoring and enforcement efforts**

Brand owners must actively monitor the online marketplace to identify sellers, web sites, platforms and retailers that are selling or distributing counterfeit products. Establishing a systematic approach to brand protection will help narrow and target sources for counterfeit products. There are several online brand protection services that focus on anti-counterfeiting and will assist with monitoring the marketplace, and will even automatically/proactively work on the brand owner’s behalf to take down counterfeits. (Ex: Yellow Brand Protection).

## **Purchase products that are suspected to be counterfeit**

Once a brand owner has identified a potential counterfeit product, it should make a purchase and have the product delivered to a source that is not going to trigger awareness on the part of the seller. Brand owners should avoid having products shipped directly to the company address, for example. Other considerations include the appropriate jurisdiction to challenge the sale of the product, so consider a state or jurisdiction where the enforcement will be more effective for a brand owner. Work with legal counsel to identify that jurisdiction before making a purchase.

## **Work with third-party intermediaries/platforms to identify and remove counterfeit products**

Many online third-party platforms have procedures in place to report and initiate takedowns of goods suspected to be counterfeit. In addition, several large online marketplaces provide additional tools and resources that will proactively assist brand owners in preventing the sale of counterfeit goods. For example, Amazon’s Brand Registry provides brand owners with tools to assist with locating, notifying, and removing counterfeits as they appear. Consider utilizing these resources to supplement anti-counterfeiting efforts.

## **Identify target jurisdictions and register trademarks in those jurisdictions**

Many jurisdictions recognize trademark rights only if a trademark is officially registered. This means that a brand owner may only enforce their rights in that region if their mark is registered. Brand owners should identify where counterfeit products are routinely sold and register their marks in those regions. While it may be difficult to register all marks in one region, brand owners should work with counsel to ensure their core and primary marks are protected in regions where the manufacturing and sale of counterfeiting products occurs. Brand owners; however, should keep in mind that in light of the COVID-19 pandemic, several Intellectual Property Offices are experiencing delays at this time, while others have temporarily suspended operations.

## **Record trademarks with Customs, and educate Customs officials**

In the United States, the U.S. Department of Customs and Border Protection (CBD) has a recordation system for brands so that they can help identify or spot counterfeit products. Other jurisdictions have similar recordation processes, and brand owners should identify those regions where counterfeit goods are sold and work with customs officers in those regions. These agencies have enforcement programs in place to monitor and prevent importing and exporting of counterfeit goods.

Brand owners should also educate customs officials about their brands, and help them spot authorized manufacturers and sellers. This education should include details about where legitimate product is made, and key elements to packaging or brand elements. Also, any information about known counterfeiters should also be shared.

## **Consider using technology to distinguish legitimate product from counterfeit**

It is becoming increasingly popular for brand owners to implement and use technology as a means of distinguishing authentic goods from counterfeits. For example, as a way to combat counterfeiting, some businesses are beginning to use Radio-Frequency Identification (RFID) Tags (which gives each individual product a unique serial number) to distinguish their products.

## **Publicize efforts to counteract counterfeiting**

Finally, brands should market their success with counterfeiting – whether it be successful court ruling or a “win” in the marketplace via the shutdown of a virtual storefront. Counterfeiters certainly pick on popular brands, but they also know when to avoid brands that are routinely and aggressively enforcing their rights. When a brand has a success, publicize it. It will help deter some counterfeiters from taking part in activity associated with a brand.

## **Intellectual Property: trademark portfolio management during a recession - audits**

As the COVID-19 pandemic expands, both in the U.S. and abroad, businesses in nearly all industries and sectors will be severely affected, and most economic forecasters are predicting that a global recession, or worse, is imminent. Economic downturns present an opportunity for brand-driven brands to re-examine their trademark portfolios, determine where coverage is no longer necessary, where it should be added, and how resources can be better allocated. A “trademark audit” can identify brands that need to be enhanced and those that should be dropped (“deadwood”), which will allow a brand to determine what reparative steps need to be taken with respect to the documented portfolio. Think of it as a strategic tool for managing and maximizing return on its intellectual property investment.

An audit can help a company prioritize its trademark holdings, identify its core brands, secondary brands and less important properties, and assess where coverage of goods and services is adequate, overly broad or lacking. If successful, the audit will:

- Save the company money while increasing its trademark portfolio's equity
- Present this data in a clear manner to enhance the company's position with its shareholders and institutional investors
- Reduce costs of unused trademark assets
- Reduce new brand development and clearance costs
- Allow for more nimble evaluation of intellectual property assets and risks should a company engage in acquisition, merger, licensing and other transactions in response to a recession
- Enhance business direction and strength, and discovery of unclaimed business and expansion of opportunities

*“Now, before a downturn takes hold, is an opportune time for brand holders to assess their trademark portfolios. Indeed, audits “are not just for mergers and acquisitions anymore...”*



# Chapter 14 Insurance

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Due to notice requirements in all policies, brands should analyze *now* whether to submit notices of claims or potential claims. The decisions made today, especially if there is an insurance renewal on the horizon, may affect the availability of coverage and whether brands will be subject to criticism later for failing to make a claim.

The legal landscape around this type of coverage is relatively undeveloped, but will evolve as claims are submitted. Reed Smith's Insurance Recovery Group is monitoring proposed legislative developments in multiple states that may change the current application of certain policy exclusions, namely exclusions relating to viruses and communicable disease. We know that brands are already experiencing difficult renewals and often double digit premium increases combined with additional restrictions on coverage. The uncertainties surrounding liability for COVID-19 will make these renewals even more challenging – and the proliferation of “shelter in place” orders may even interfere with renewal negotiations, as well as a brand's ongoing operations.

Below is a brief look at some of the coverages potentially available to the advertising and marketing industries and the relevant questions related thereto:

## **Event cancellation insurance**

- Has a brand had to cancel events due to COVID-19? Event cancellation insurance (or “special event coverage”) may help offset the costs.
- Most special event insurance policies will cover cancellation due to circumstances beyond one's control.
- Each policy is different with respect to communicable diseases – some exclude it, some specifically include it by endorsement, or rider.

## **Loss or damage to property**

- For claims involving first-party loss of or damage to property, will the presence of COVID-19 on the property constitute the requisite physical loss or damage for coverage?

## **Business interruption insurance & contingent business interruption insurance**

- Has a brand experienced a loss of Business Income, or Extra Expenses, due to business interruption?
- Has a suspension of operations due to COVID-19 resulted in a loss of Business Income or lost profits?
- Can lost profits resulting from facility or building closures be recovered under business interruption insurance?
- Can lost profits caused by the closure of a vendor, supplier, or customer's property be recovered under contingent business interruption insurance?

## **Commercial general liability insurance**

- Is insurance available to cover third-party claims for property damage and bodily injury? What about the timing of notice or a potential occurrence?

## **City authority and ingress/egress insurance**

- Is insurance available to cover costs associated with government-imposed travel restrictions or quarantines?

## **Directors' & Officers liability insurance**

- We expect shareholder derivative suits to mount in the wake of stock drops; will insurance be available to respond?
- Is insurance available for claims made against the C-Suite concerning business contingency plans and the company's overall response to COVID-19?
- When should a notice of claim, notice of circumstance, or notice of potential claim be submitted to the carrier?

**Employment practices liability insurance**

- If a brand needs to readjust workforce needs, will discrimination claims follow – and will the brand be covered?

**Political risk insurance/trade disruption insurance**

- Is insurance available to cover costs associated with government-imposed quarantines, or travel restrictions, or border closures that impair an insured's ability to honor contracts?

**Data privacy & security/cyber liabilities insurance**

- Hackers are likely to take advantage of the chaos caused by COVID-19; are your brands covered for a cyber-event?

These are just a few of the insurance-related issues arising out of this crisis.

# Chapter 15 Data Privacy and Security

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In response to the global disruption and uncertainty created by COVID-19, it is paramount that brands ensure that appropriate cybersecurity and data privacy practices are in place and are followed. With more and more brands moving to remote working environments across the globe, businesses are susceptible to an increase in cyberattacks and inadvertent or unauthorized disclosures of personal information. At the same time, the COVID-19 pandemic presents employee and consumer data privacy concerns as businesses are processing more health-related information relating to virus screening and diagnosis.

In this pandemic, brands struggle to remain compliant with domestic and international data privacy and security requirements, while also attempting to adhere to government guidelines for consumer and employee safety. While the United States does not have a comprehensive federal data privacy framework, it does regulate certain individually identifiable health information through Health Insurance Portability and Accountability Act (HIPAA), though HIPAA generally does not apply to brands outside the health care sector except with respect to employer-sponsored group health plans. Similar to the European Union General Data Protection Regulation (GDPR), several states have enacted or proposed broad data privacy laws, while others continue to emerge. The California Consumer Privacy Act (CCPA), which went into effect on January 1, 2020, is the most notable state data privacy framework to date in the U.S. Other emerging state laws, like the Illinois Biometric Information Protection Act (BIPA) and state breach notification laws, create significant obligations around personal information. These legal frameworks must not be ignored, even in the wake of a global pandemic.

While HIPAA explicitly allows for public health disclosures under certain circumstances, it is important to note that most other data protection laws do not explicitly cover the collection, storage, and disclosure of data in response to public health emergencies like COVID-19. However, in this changing climate, brands should implement (if needed), and act in accordance to their data collection protocols. Brands should generally collect no more than what is necessary and proportionate to the company's business purpose. While it is likely that brands might acquire sensitive personal health information from their employees to promote and maintain a safe work environment, brands should nonetheless place reasonable limits around how much personally identifiable information is stored in this pandemic. Brands should also strongly consider storing COVID-19-related employee data on a separate and secure server so that such information can be easily extracted in cooperation with government agencies upon valid governmental request.

Given the potential increase in cybersecurity breaches, it is integral to every company's success that they maintain required protocols to secure their networks. As we navigate these uncharted territories, the maintenance of data privacy and cybersecurity protocols will have a critical impact on every brand's success.

For organizations for which GDPR applies, the collection and processing of personal information to contain the COVID-19 pandemic may be justified in certain scenarios:

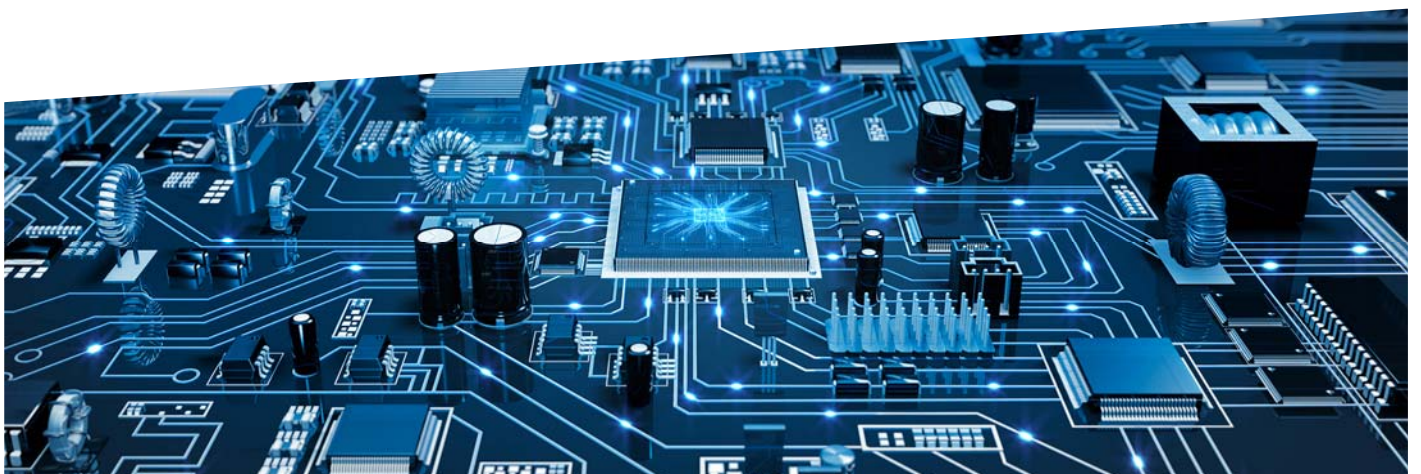
- Organizations may process personal information of their employees (including health data) to prevent the spread of COVID-19 among employees. Such information includes if the employee is infected by COVID-19, had contact with someone who has tested positive for COVID-19 or has any symptoms (such as cough or fever).
- Organizations may also process personal information of visitors (including health data) to determine if they are infected or had contact with someone who is infected in order to protect the organizations employees. However, organizations may not screen visitors for COVID-19 or symptoms, unless the visitor agrees to the screening. The organization may however refuse access to its premises if the visitor refuses the screening.

In any case, organizations must comply with the core GDPR principles relating to the processing of personal information. Only personal information that is necessary for the above purposes may be processed and only for the explicit purposes. Data subjects must receive transparent information about the processing activities, including purposes of processing and the retention periods. The information must be provided in an easily accessible manner and in clear and plain language. All measures addressing the COVID-19 emergency and the decision-making process for these measures must be sufficiently documented.

Given the potential increase in cybersecurity breaches, it is integral to every company's success that they maintain required protocols to secure their networks.

Many employees work from home at the moment. While these are challenging times for employees, employers should implement at least the following IT security measures: (i) Provide clear guidelines for the handling of personal information that the employee has on actual paper; (ii) Ensure access security regarding the virtual office, (iii) Implement clear authorization of employees when accessing personal information; (iv) Raise awareness of the increased use of phishing emails; (v) Use secure VPN communication channels.

As we navigate these uncharted territories, the maintenance of data privacy and cybersecurity protocols will have a critical impact on every brand's success.



# Our team

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## ANA Leadership



**Douglas J. Wood**  
Partner  
New York  
+1 212 549 0377  
dwood@reedsmith.com



**Keri S. Bruce**  
Partner  
New York  
+1 212 549 0220  
kbruce@reedsmith.com

## Entertainment and Media Industry Group



**Darren B. Cohen**  
Partner  
New York  
+1 212 549 0346  
dcohen@reedsmith.com



**John P. Feldman**  
Partner  
Washington, D.C.  
+1 202 414 9230  
jfeldman@reedsmith.com



**Jason W. Gordon**  
Partner  
Chicago  
+1 312 207 2456  
jgordon@reedsmith.com



**Stacy K. Marcus**  
Partner  
New York  
+1 212 549 0446  
smarcus@reedsmith.com



**Kathylen A. O'Brien**  
Partner  
Century City  
+1 310 734 5268  
kobrien@reedsmith.com



**Ingrid Silver**  
Partner  
London  
+44 (0)20 3116 3738  
isilver@reedsmith.com



**Meredith D. Pikser**  
Counsel  
New York  
+1 212 521 5432  
mpikser@reedsmith.com



**Jonathan J. Andrews**  
Associate  
London  
+44 (0)20 3116 2918  
jandrews@reedsmith.com



**Erika N. Auger**  
Associate  
Chicago  
+1 312 207 2883  
eauger@reedsmith.com



**Michael S. Isselin**  
Associate  
New York  
+1 212 549 0359  
misselin@reedsmith.com



**Bretta T. Oluyede**  
 Associate  
 New York  
 +1 212 549 4197  
 boluyede@reedsmith.com



**Jillian Petrera**  
 Associate  
 New York  
 +1 212 549 0253  
 jpetrera@reedsmith.com



**Toam Rubinstein**  
 Associate  
 Washington, D.C.  
 +1 202 414 9211  
 trubinstein@reedsmith.com



**Terrance Vales**  
 New Associate  
 New York  
 +1 212 549 4276  
 tvales@reedsmith.com

**IP, Tech & Data**



**Sarah L. Bruno**  
 Partner  
 San Francisco  
 +1 415 659 4842  
 sbruno@reedsmith.com



**Kimberly J. Gold**  
 Partner  
 New York  
 +1 212 549 4650  
 kim.gold@reedsmith.com



**Dr. Andreas Splittgerber**  
 Partner  
 Munich  
 +49 (0)89 20304 152  
 asplittgerber@reedsmith.com



**Aurélie T. Chorly**  
 Associate  
 New York  
 +1 212 549 4676  
 achorly@reedsmith.com



**Donald A. Cespedes**  
 Associate  
 Silicon Valley  
 +1 650 352 0506  
 dcespedes@reedsmith.com



**Sven Schonhofen**  
 Associate  
 Munich  
 +49 (0)89 20304 158  
 sschonhofen@reedsmith.com

**Insurance Recovery Group**



**Cristina M. Shea**  
 Partner  
 San Francisco  
 +1 415 659 4736  
 cshea@reedsmith.com

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