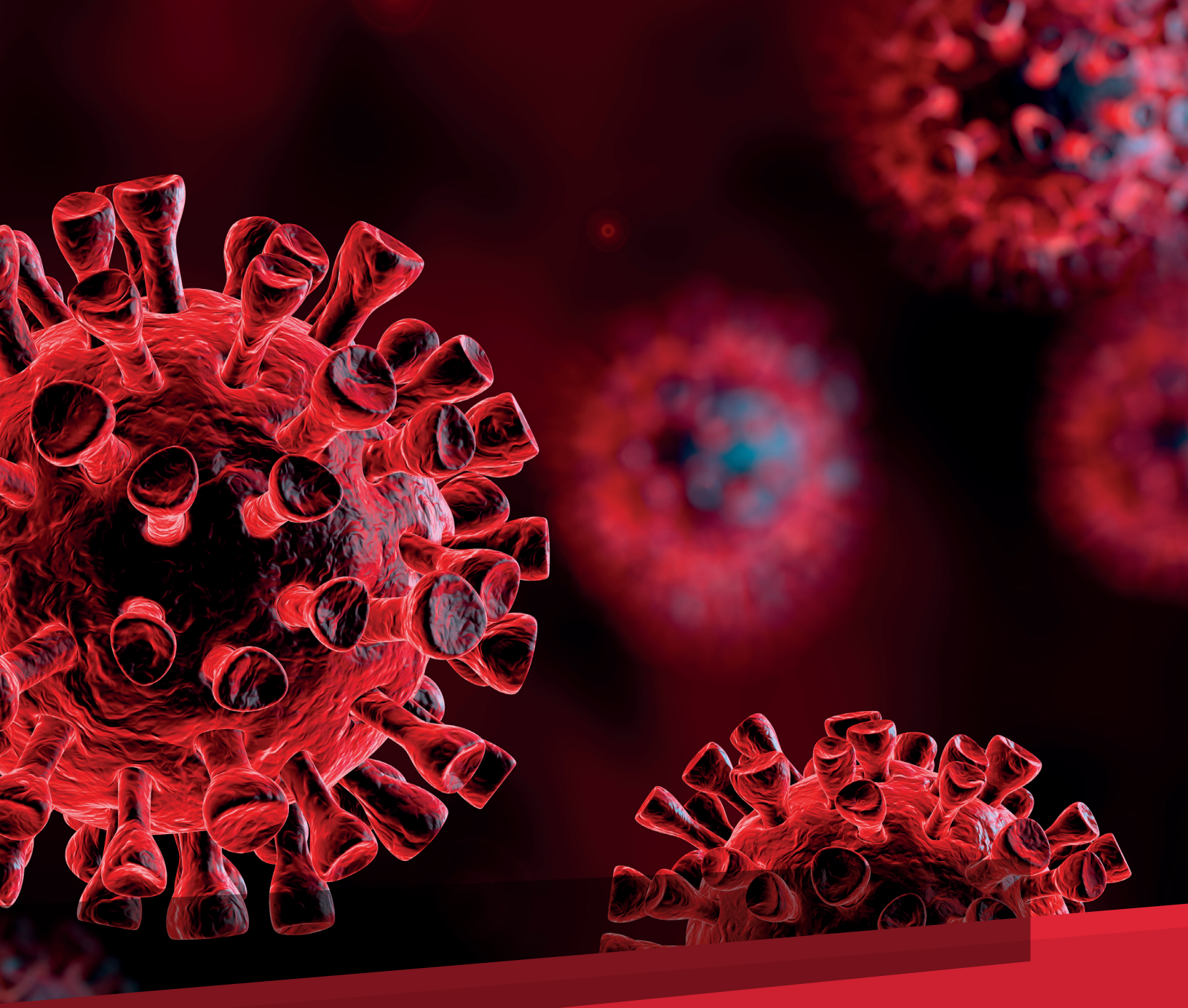


An ANA and Reed Smith Legal Guide

# The Impact of COVID-19 on Brand Advertising and Marketing

Second Edition

ReedSmith

Driving progress through partnership

ANA

# Table of Contents


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.

First published on March 31, 2020, the ANA and Reed Smith are pleased to release the 2nd edition of their legal guide. The fundamental content and intent of the first edition remains the same, but with the ever changing developments of COVID-19 we have asked our vast network of lawyers to incorporate a more global view of challenges and opportunities when dealing with this pandemic. The second edition includes three insightful, new chapters on antitrust compliance, the impact on manufacturing and supply chains, and force majeure under the UAE law. Our authors have also provided additional considerations on hot topic chapters such as Chapter 1, “Contractual Issues and Force Majeure;” Chapter 4, “Commercial Production;” Chapter 8, “Digital;” Chapter 9, “Anti-Gouging laws;” Chapter 10, “Advertising Content;” and Chapter 13, “Intellectual Property: Addressing Counterfeit Goods.” 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

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. In unprecedented times such as these, many brands are now looking to the force majeure clause in their contracts to see whether it refers to pandemics or other similar events. In the event the contract does not contain a force majeure clause, or the force majeure clause does not cover this pandemic, it may be possible for a party seeking to excuse performance to invoke the doctrines of commercial impracticability, impossibility or frustration of purpose, depending on the factual circumstances and the applicable law.

**Force majeure and COVID-19**

A force majeure clause may excuse a party's performance under a contract when an extraordinary event outside the party's control prevents the party from performing its contractual obligations. The applicability of a force majeure provision is contract-specific, and a party faces a heavy burden when it attempts to invoke a force majeure clause. Such clauses may not apply, for example, if performance is merely difficult, expensive, or more onerous than expected. Moreover, 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. Some force majeure provisions give the non-performing party a window of time to fulfill its obligations (*e.g.*, ten days), and, if the force majeure event continues past that period of time, then the other party can terminate the agreement. Other force majeure provisions excuse performance entirely upon occurrence of certain types of triggering events. Whatever the language used, a party invoking a force majeure clause must meet multiple legal requirements to excuse its performance.

- *First*, a court or arbitrator will typically only allow a force majeure clause to excuse performance if the triggering event is specifically listed in the contract's force majeure clause or otherwise captured by a "catch-all" clause, such as one addressing "any other unforeseen events." In other words, the party invoking force majeure must show that the triggering event 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, viral outbreaks, epidemics, pandemics, quarantines or other health crises as triggering events. If so, force majeure is more likely to be triggered. 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". It bears noting, however, that courts in many jurisdictions, including New York courts, interpret those "catch-all" provisions very narrowly.

- *Second*, the party invoking force majeure may have to show that the precise event preventing full performance under the agreement was unforeseeable and that the risk of the triggering event could not have been allocated in the contract. When parties specify a force majeure event in their contracts, such as a "pandemic," there is no need to show that the occurrence of a "pandemic" was unforeseeable in order for it to qualify as a force majeure event. Indeed, the fact that the parties included the event in their force majeure clause is a clear indicator that they foresaw the event as a risk and allocated the risk of non-performance in their contract. The issue of foreseeability comes into play when a party claims that, although an event, such as a "pandemic," was not specifically referenced in the force majeure provision, it was included in a "catch-all" provision like "act of God" or "act of government." To determine whether the parties intended to include "pandemic" in a catch-all provision, the court will look to whether a "pandemic" was a foreseeable event. If the event was foreseeable, then the court will almost certainly find that it is not included in the catch-all provision because, if the parties intended for a "pandemic" to be a force majeure event, they would have specifically listed it among the force majeure events in the contract.

- *Third*, the party may have to demonstrate that performance was made impossible by the force majeure event. Stated differently, a party is not excused from performance by a force majeure event (*e.g.,* pandemic) when the party was otherwise unable to perform for reasons other than force majeure event (*e.g.*, lacked the necessary software to design an online advertisement). Brands should ask themselves: Did the outbreak of COVID-19 and the resulting government closures cause the inability to perform? If the brand would not have been able to perform even in the absence of these events, it will be more difficult to invoke force majeure as an excuse for non-performance.

- *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 (*i.e.*, the party invoking force majeure took reasonable steps to mitigate the damage). 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. On this point, it bears noting that, even if a mitigation duty is not expressly provided for in the contract, it is likely to be implied by law in most (if not all) jurisdictions. Moreover, 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 give notice of the actual or anticipated non-performance in the manner specified in the 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 a party's failure to provide 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 14, "Insurance"). 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.

### Impossibility, Impracticability & Frustration of Purpose

If the contract at issue does not have a force majeure provision, or if the clause does not extend to encompass pandemics like COVID-19, there are three doctrines that parties may invoke to excuse performance based on unforeseen events: impossibility, impracticability and frustration of performance.

Impossibility, or, in some jurisdictions, impracticability is a common defense in situations where an intervening event makes it extremely difficult for it to perform its obligations under an agreement. Courts sometimes refer to impossibility as "impracticability," although the concept of "impracticability" almost always comes up in the context of contracts for the sale of goods governed by the Uniform Commercial Code, in particular Section 2-615 of the Code.

These two doctrines may excuse a party's performance if the party can establish at least the following elements:

- *First,* the triggering event must be unforeseeable, such that the non-occurrence of the event was a basic assumption of the contract. If the intervening event was foreseeable, a court or arbitrator will typically assume that the parties (especially when they are sophisticated entities) accounted for it in their agreement (for example, in the price of the goods or services) or will refuse to grant relief because the parties *could* have allocated for it.
- *Second*, the party seeking to excuse its performance cannot be at fault for the event causing the impossibility.
- *Third,* the party must not have assumed the risk of a triggering event, whether in the contract itself or through subsequent agreement.
- *Finally*, and perhaps most fundamentally, the party must establish that performance, by virtue of this unforeseen event, is truly *impossible.* Although most courts take a narrow view as to what constitutes "impossible" and place a significant burden on the party claiming impossibility, different jurisdictions require different levels of "impossibility." In some jurisdictions, courts take a very strict view of impossibility, performance must be, quite literally, impossible—either the subject matter or the means of performing the contract were destroyed, making performance "objectively impossible." In these jurisdictions, increased cost or undue burden to perform is typically not enough. In other jurisdictions, however, courts take the view that performance must be relative impossible or impracticable, which may result from a market collapse or from exponentially increased costs may be enough to invoke impossibility (in one case, for example, an unforeseeable 666% increase in the cost of performance year-over-year rendered performance "impracticable"). Accordingly, what is "impossible" or "impracticable" is a fact-specific and jurisdiction-specific inquiry.

Frustration of purpose, functions similarly to impracticability and impossibility, but focuses on whether the event at issue has obviated the purpose of the contract, rather than whether the event has made a party unable to fulfill its contractual obligations. When a change in circumstances makes one party's performance *worthless* to the other, the party's purpose in entering the contract is frustrated and performance may be excused. Frustration of purpose requires many of the same elements as the defenses of impossibility and impracticability–namely, that the change in circumstance, brought on by an intervening event, must be unforeseeable to the parties, and risk of the event must not have been allocated to the party seeking to excuse its performance—and courts and arbitrators likewise grant it sparingly and only in exceptional cases.

The overarching question with respect to frustration of purpose is whether the unforeseeable event has so significantly altered the circumstances of a contract such that performance would no longer fulfill any aspect of the contract's original purpose and one party's performance would essentially be worthless to the other party. In this regard, it is important to differentiate between frustration of *purpose* and frustration of *intent.* All parties enter contracts intending to make a profit or receive something of value. The fact that an intervening event renders a contract unprofitable (even, in some jurisdictions, to the point of insolvency) or forces the parties to use alternative means or method of performance will not make the purpose of the contract frustrated.

Because of the similarities between impossibility and impracticability, on the one hand, and frustration of purpose, on the other, parties sometimes have difficulty distinguishing between the two. While the elements are in some ways almost identical, the key difference lies in the result of the triggering event – here, COVID-19 and resulting government mandates. If a party remains able to perform, even at a substantial loss or through alternative means, it will be difficult to invoke an impossibility or impracticability defense. Inability to perform is not, however, an essential prerequisite for frustration of purpose – in contrast, it requires that performance be of no value to the other party.

A somewhat simplistic example to distinguish impossibility from frustration of purpose might be this: A government-mandated shutdown in which IT workers providing services to certain types of companies are deemed non-essential may make it impossible for an IT services provider to perform under a services agreement. The purpose of the agreement is not frustrated – performance is not worthless to either party, it is just not possible to perform the way the contract requires. In

contrast, the purpose of a contract for rental of hotel or conference facilities for a large convention might be frustrated by government restrictions on travel or meeting sizes – the contract could still be performed (*i.e.*, the hotel could still rent the space to the requesting party) but that performance would be pointless – no one would be able to attend the convention. The hotel or conference facility's performance would be meaningless to the renter.

### United Kingdom view

For brands facing force majeure issues in the United Kingdom, here are some additional considerations.

#### 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 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 that 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 advantages 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 to 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 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 or may 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 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 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.

### French view

For brands facing force majeure issues in France, there are also some legal elements to take into account.

#### Recognition of force majeure

In principle, COVID-19 should constitute a force majeure event for contracts subject to French law. On February 28, 2020, the Minister of the Economy indicated that the French government would retain the existence of a force majeure event in the context of the execution of public contracts.

In the context of private contracts, however, the World Health Organization (WHO) guidance of January 30, 2020, is likely to help French judges define the occurrence of COVID-19 as a Force Majeure. Indeed, the element of unpredictability of force majeure is assessed at the time of the conclusion of the agreement. Thus, (i) although the COVID-19 pandemic may be considered as a force majeure event for contracts predating the pandemic, (ii) it is unlikely to be regarded any longer as an exonerating event for contracts concluded after January 30, 2020, (that is, the date the WHO defined COVID-19 as an pandemic), including purchase orders.

A detailed analysis of the contractual relationship is necessary to assess the characterization of the event. However, there are exceptions: for example, payment obligations cannot be exempted by a force majeure event. Situations of partial non-performance must also be determined: only contractual obligations affected by force majeure will be exempted. The exempting effect of force majeure on contractual obligations shall also be assessed on the basis of the temporary or permanent nature of the impossibility. A case-by-case analysis is recommended.

#### Ordinance dated March 25, 2020, creates a mandatory suspension on the parties' capacity to sanction contractual breaches

An unprecedented and temporary restraint on the binding force of contracts has recently been enacted by the French government. The health emergency and the measures implemented to maintain activity are now directly impacting the French principle of contractual freedom ("liberté contractuelle"). Among an impressive emergency regulation package issued by the French government in the context of the public health emergency, Ordinance No. 2020-306 of March 25, 2020 (the Ordinance) relates to the extension of time limits during the public health emergency period not only extending procedural

timeframes, but also suspending clauses sanctioning breach of contract and extending the duration of contracts. A “Super Force Majeure” has been created.

Article 4 of the Ordinance provides a temporary suspension of clauses sanctioning breach of contract until July 24, 2020 (to date). All late payment penalties, penalty clauses, termination clauses, and clauses providing for forfeiture are covered by the Ordinance, provided that:

- The purpose of these clauses is to "sanction the breach of an obligation within a specified period of time." In practice, this refers to clauses sanctioning the obligor in the event of a breach of an obligation to deliver a good, provide a service or pay off a loan within a specified period.
- The period available to the obligor to perform its obligations should expire between March 12, 2020, and June 24, 2020, (to date).

The effects of these clauses are frozen (they are "deemed not to have come into force or effect") until July 24, 2020, "if the obligor has not fulfilled its obligation before this term". The obligee can no longer invoke these clauses during this period, and the obligor thus has a further two-month period after the termination date of the health emergency to fulfill its obligations (that is, to date - until July 24, 2020). This provision benefits any obligor who has breached one of its contractual obligations within a specified period, without distinction as to the cause of the breach. Thus, unlike in the case of a force majeure event, the failure to perform or the breach does not have to be necessarily directly attributable to the health crisis in order to paralyze these clauses. It is deemed to be. It should not even have explored alternative solutions.

Article 5 of the Ordinance provides an extension of the period for termination and the deadline for notifying the termination of a tacitly renewable contract until August 24, 2020 (to date). The Ordinance refers to the case where the parties are entitled to terminate the contract during a given period and to notify the termination of a tacitly renewable contract within a given period. As soon as this right to terminate or to notify expires between March 12, 2020, and June 24, 2020 (to date) it is extended until August 24, 2020 (to date).

# Chapter 2 **Sponsorships and Events**

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 that 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 that sponsor events should determine whether event producers maintain event cancellation insurance policies, which policies may contemplate sponsorship fees.

# Chapter 3 **Endorsements**

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, "Contractual Issues and Force Majeure" 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, "Media Buys," 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**

The inability to gather in larger groups, to travel, or – more fundamentally – to 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) and/or Michael Isselin (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. 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 (50) 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.

**Production-related antitrust risks and opportunities**

The COVID-19 outbreak has led to massive disruptions in supply chains and production. This is affecting how companies adjust their production, and it increases the need for cooperation between companies and competitors in particular.

Antitrust laws generally prohibit cooperation between competitors in relation to production where this involves price-fixing, limiting output, customer/market allocation, and the exchange of competitively sensitive information. Antitrust authorities around the world have emphasized that the COVID-19 crisis does not change or automatically suspend antitrust law rules.

Antitrust laws do, however, allow for cooperation between competitors in production that leads to efficiency gains, which outweigh potential restrictive effects on competition and do not go beyond what is necessary to achieve these gains. This can include a wide range of arrangements, ranging from joint production and specialization agreements to subcontracting or cross-supply arrangements. The current crisis may therefore result in more arrangements being allowed than would normally be the case, especially short- and medium-term arrangements, provided the necessary safeguards are in place. The European Commission and other antitrust authorities, for instance, recently reassured companies that they will not actively intervene against necessary and temporary production arrangements to avoid supply shortages of scarce products needed to tackle the COVID-19 crisis, such as medicines, medical equipment, or other health care products.

Even in times of crisis, businesses must continue to be careful when dealing with competitors to avoid illegal information exchanges and should include an antitrust review of all proposed cooperation with competitors. Where appropriate, informal or formal guidance can be requested from antitrust regulators. See Chapter 16, "Antitrust compliance in the COVID-19 crisis," for more detail.

# Chapter 5 **Promotions**

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**

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, "Contractual Issues and Force Majeure," 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 toward 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**

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, "Insurance," below) to see if they might be covered for any losses.

# Chapter 8 **Digital**

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.

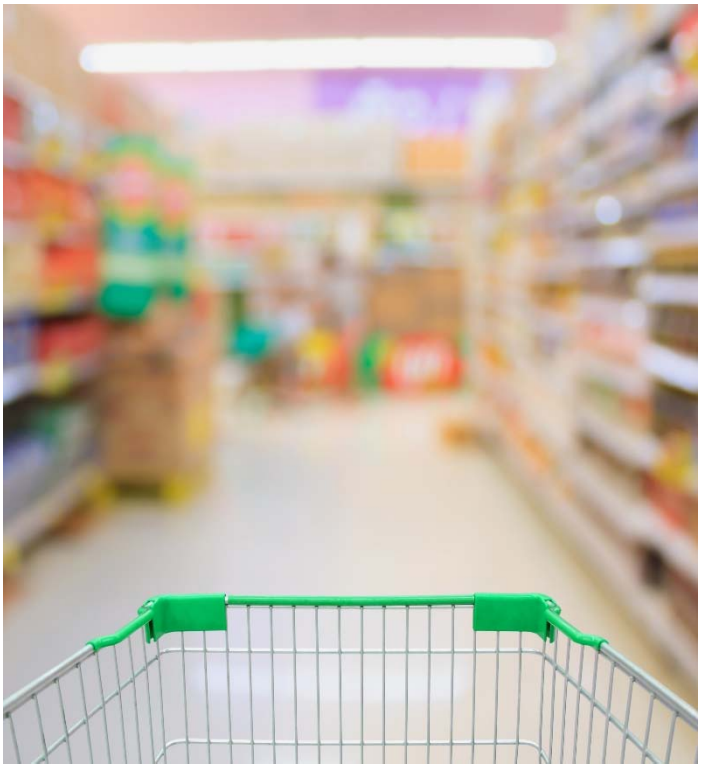
**Responding to crisis via digital advertising**

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 and services are of use to 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 amid 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.

At the European level, representatives of online platforms, social networks, advertisers, and the advertising industry are expected to "promote authoritative sources" of news, "remove forbidden or harmful content," and protect consumers from "misleading advertisements." This is in line with the self-regulatory EU Code of Practice they agreed to in 2018 to address the spread of online disinformation and fake news and other European rules such as the E-Commerce Directive. Their actions are under increased government scrutiny as the EU has now put to use its Rapid Alert System for flagging serious cases of disinformation following a series of fake online campaigns and hoaxes surrounding COVID-19.

**COVID-19's impact on the availability of essential products and 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 replenish 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 the alert during this pandemic. The advertisement and sale of counterfeit products may increase as the demand for essential products remains high and supplies stay 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**

Being quarantined, consumers can only engage with brands online; therefore, web analytics tools are important for brands arguably now more than ever. The collection and use of such data is integral to the development of effective digital 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 refer to Chapter 15, "Data Privacy and Security."

# Chapter 9 **Anti-Gouging Laws**

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, but the Tennessee attorney general's office also is 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 that 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 from the 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 had 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

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 Act 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 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," and "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, as a result, 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.

### Excessive pricing under antitrust laws

Excessive pricing can give rise to antitrust law violations when imposed by dominant companies. While it may be difficult for antitrust regulators to determine whether a price is excessive, taking into account the nature of the price increase and the market characteristics at stake, antitrust authorities around the globe have taken action against alleged excessive pricing in recent weeks. On April 9, 2020, the European Commission announced that it is closely and actively monitoring market developments and that it "will not tolerate conduct by undertakings that opportunistically seek to exploit the crisis as a cover for abuses of their dominant position (including dominant positions conferred by the particular circumstances of this crisis) by, for example, exploiting customers and consumers (e.g. by charging prices above normal competitive levels) or limiting

production to the ultimate prejudice of consumers (e.g. by obstructing attempts to scale up production to face shortages of supply)." At the same time, the EU encouraged businesses and consumers to actively report any antitrust violations.

Businesses that can be considered dominant (rule of thumb: market share of 40 percent or more) need to be vigilant when adopting or amending their pricing and business strategy in the context of COVID-19 (and its aftermath) to avoid the risk of potential excessive pricing and should abstain from using the COVID-19 crisis as a pretext to engage in practices that exploit consumers or exclude competitors from the market. Conversely, companies that have been victim of such actions have the opportunity to actively seek redress.

# Chapter 10 **Advertising Content**

Now that consumers are at a physical stand-still, the collective focus has shifted to consuming more content. The COVID-19 pandemic brings with it a unique advertising landscape that brands must navigate carefully. 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 their products' ability to treat, prevent, or cure COVID-19. 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 these efficacy claims. The companies were further advised that if they do not cease making such claims, the FTC may seek an injunction and order from a federal court that would require the company to refund customers.

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 the FDA. It is advisable that brands take every precaution to ensure that their advertising claims do not run afoul of consumer protection laws.

At the European level, different rules governing advertising claims will apply in function of the products concerned.

Claims to prevent, treat, or cure the COVID-19 infection are likely to be considered "medical or medicinal claims." Such claims can only be made for products when they are licensed medicines or appropriately marked medical devices (CE marking), and supported by robust clinical evidence. The European Medicines Agency and national health authorities have indicated that to date there are no such approved products.

Advertisers claiming that food or food supplements can help protect consumers from infection of COVID-19 by, for example, supporting their immune system are likely to be problematic too unless such claims are expressly listed as authorized in the EU Register of nutrition and health claims.

National advertising regulators are also carefully monitoring any reference made to "coronavirus" in marketing communications as potentially misleading, irresponsible, and likely to cause fear without justifiable reason. In doing so, regulators have indicated concern with alarmist language such as referring to the spread of the virus as being "barely controllable" and "this terrifying time."

Marketing communications will also need to comply with the European E-Commerce Directive and the Unfair Trading Directive. The European Commission and national consumer protection authorities have published guidance on the main consumer law breaches in relation to COVID-19. Aside from unsupported claims that products prevent or cure a COVID-19 infection, traders also unlawfully pressure consumers into buying products, for example, by claiming that products are "only available for a very limited time" or "sell out fast."

Certain competition authorities in Europe, for instance in the UK, Italy, and Poland, also have powers to investigate violations of consumer protection laws and have been using these in the COVID-19 crisis. The issues raised, for instance, relate to wholesalers' termination of contracts in order to raise prices (Poland) and the charging of excessive prices or giving misleading information about the efficacy of protective equipment and personal health products by retailers (UK) and online platforms (Italy).

### 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 (3) 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**

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**

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 that make these consumer products and the supermarkets, specialty stores, drugstores, warehouse stores, and online retailers that 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 that brands sell.

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

As detailed in Chapter 10 on advertising content, 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 that 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 that 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 such as 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 when making claims about any products such as 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 that 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 there is no scientific evidence to support such claims, class action attorneys already have begun filing lawsuits against manufacturers of such products accusing 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 had made a litany of unverified claims on its website and on social media that suggested 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 the U.S. District Court for the Southern District of New York and the others in the 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 being 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 that offer favorable pricing 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 or websites offer 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 or website offer only products that consumers may not view as comparable such as private label products, lesser known brands, 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, 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, or lower quality products which consumers may not view as comparable at "premium" prices.

- 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 products, 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 the 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

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 should develop strategies to mitigate vulnerability to counterfeiters.

Some companies have already been altering their brand strategies in light of COVID-19 (see articles at https://www.cnn.com/2020/03/26/business/social-distancing-brand-logos-coronavirus/index.html and; https://www.blackenterprise.com/major-brands-are-pushing-social-distancing-through-logos/). Other brands can learn from the efforts made by others.

It is also important for brands to take note of the impact of COVID-19 on trademark offices around the world (closures, changing deadlines, and long-term impact in maintaining portfolios, expanding them, and enforcing them). Some brands have increased vigilance and are using all the tools they usually use to assure that no one is trying to use their brands or products for price gouging.

Brands are also looking at their authorized retailer channels to be sure that they are functioning properly. Some brands are allowing supply chain participants to adjust (at least temporarily) as necessary to insure authentic products are in the right markets so there is less room for counterfeiters to improperly exploit demand. Brands are enforcing restraints on gray market goods that may come into the wrong country or region.

Brand owners also need to reassess how they work with customs and other enforcement agencies if they cannot go in person for training on counterfeit goods, e.g., Zoom meetings.

The damage from counterfeiting, and perhaps gray market goods, will occur when brands do not have enough authentic product to sell. That may already be the case in China, and will become potentially an increasing case in EMEA and the Americas. To respond, brand owners should consider implementing different data tools that they usually use. For example, brands might look not only for off-price points that are particularly low (often one metric used), but look for off-price points that are higher – realizing that price points may not be the right data if there is a lack of supply and counterfeiters are trying to mimic the authentic product more closely on price.

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” products. 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, websites, 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 and 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 the 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 should 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 that 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 (CBP) 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 the 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. In addition, any information about known counterfeiters should be shared as well.

The European Union has one unified set of customs rules, including for the seizure of IP infringing products while in transit in the EU, or when they enter its customs territory. Oftentimes, imported products that infringe trademarks and other forms of IP also breach the requirements that the EU applies to many regulated products, such as footwear, toys, cosmetics, etc. However, enforcement at the border has been largely ineffective, due to the fact that enforcement is in the hands of the Member States' customs and agencies, and that communication and exchange of data within and between Member States and the Commission is poor. The problem is made worse by the rapid growth of cross-border e-commerce (from China mainly). The EU has adopted tools recently to improve communication and the exchange of information, and better screen non-compliant products at the border. The EU is expected to strengthen those tools, as a consequence of the COVID crisis and ongoing consultations (see for instance the comment submitted on April 21, 2020, by the European Brands Association [AIM]), to protect domestic production and local distributors from unfair competition from outside of the EU. Until customs, authorities, and agencies communicate better and exchange information about infringing products, brand owners can significantly improve the quality of enforcement at the EU's border by identifying illegal trade flows, and educate, inform and train local customs and agencies.

### 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 a 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 and 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**

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, 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**

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 the 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 with 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 during 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 include the COVID-19 pandemic may be justified in certain scenarios:

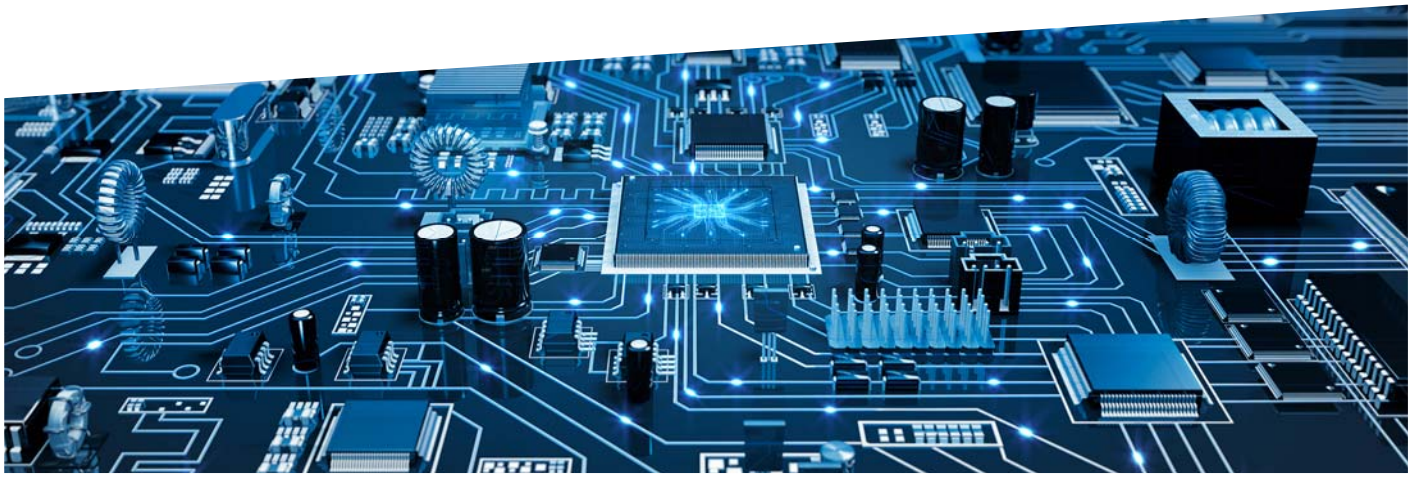
- Organizations may process personal information of their employees (including health data) to prevent the spread of COVID-19 among employees. Such information includes if the employee is infected by COVID-19, had contact with someone who has tested positive for COVID-19 or has any symptoms (such as 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 organization's 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; and (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.



# Chapter 16 **Antitrust compliance in the COVID-19 crisis**

The spread of COVID-19 is massively disrupting businesses and supply chains and creating volatility in the stock markets. However, even in times of crisis, brand owners and suppliers must respect antitrust and competition law rules to avoid high fines and damages.

Companies, therefore, should not assume that the COVID-19 crisis as such shields them from antitrust risks – in fact, it does not! Despite COVID-19, antitrust and competition law continues to apply fully and prohibits anticompetitive behavior, unless justified by sufficient efficiencies (which need to be applied narrowly). Talking to many of our clients, we see that the COVID-19 crisis may lead to situations where a closer cooperation with competitors is required and in fact might lead to efficiencies. Any such cooperation, however, requires businesses to put the necessary safeguards in place to ensure compliance with competition law.

**Practical implications for businesses**

- Despite COVID-19, competition law continues to apply fully.
- Competition law continues to prohibit anticompetitive behavior. This prohibition could apply to many situations, particularly where companies seek to jointly react to COVID-19-related disruptions aiming to compensate losses (e.g. by fixing prices, aligning production, jointly boycotting suppliers, etc.).
- Where companies seek to cooperate with competitors, they need to put the necessary safeguards in place to ensure compliance with competition laws. This might include, for example, joint activities to overcome disruptions in the supply chain and to ensure security of supply (e.g., medicine, medical equipment, health care products), joint purchasing, as well as research and development and joint production of emergency supplies, and lobbying activities through trade associations or sector bodies. The European Commission and other antitrust authorities have reassured companies that they will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply of essential and scarce products or services to tackle the COVID-19 crisis.
- Companies must not assume that the COVID-19 crisis as such shields them from the prohibition to engage in anticompetitive behavior – in fact, it does not!
- Some countries are willing to exempt certain industry sectors from the strict application of the competition rules that apply to cooperation between competitors to ensure access to necessary goods and services. For instance, Norway and the UK have introduced possibilities for exemptions in relation to the transport and food retail sectors, respectively. Other competition authorities, like the EU Commission, are more reluctant to give such blanket COVID-19 crisis exemptions from the competition rules, but are prepared to apply existing rules more flexibly to cooperation to address the shortages of essential products and services needed to tackle the COVID-19 products.
- Competition authorities will not tolerate actions by companies with market power – even where such market power is only temporary and is due to the emergency situation – that seek to exploit their position, for example, by significantly raising prices.

### Horizontal cooperation between competitors

The COVID-19 outbreak is likely to increase the need for cooperation between companies and competitors in particular, often with the objective to react to decreasing demand and to minimize losses or address shortages of essential products or services through concerted behavior.

Antitrust and competition laws generally prohibit competitors to align prices (including price components), limit output, share customers or markets, organize boycotts, or exchange competitively sensitive information. Violations can lead to high fines and damages. The COVID-19 outbreak does not change or automatically suspend these rules. Despite the COVID-19 outbreak, any cooperation between competitors, even if it occurs in the context of, or results from, the COVID-19 outbreak, requires careful analysis to avoid restrictive effects on competition. In recent weeks, competition authorities around the globe have increasingly become active and started to intervene in cases of alleged anticompetitive behavior caused by or related to the COVID-19 outbreak. Often, these interventions have been triggered by market complaints.

Importantly, the affected sectors do not include only the products and services most obviously related to COVID-19, such as medical equipment and personal health care products, but also all other products and services and industry sectors indirectly affected by the COVID-19. This can range from companies seeking to stop price collapse, manufacturers seeking to gain bargaining power and jointly oppose price increases imposed by suppliers of raw materials, or competing brand owners seeking to jointly reduce costs.

Horizontal cooperation can be justified when it is pro-competitive and leads to efficiency gains. There may be situations where, in the given circumstances, companies feel that they must cooperate with each other to uphold services in the currently disruptive business environment caused by COVID-19. Where such cooperation leads to efficiencies that are sufficient to outweigh the negative effects of the cooperation and do not go beyond what is necessary to achieve these benefits, there is scope for such cooperation to be exempted from the prohibition to engage in anticompetitive behavior. This could apply, for example, to businesses that need to cooperate to ensure the security of supply that otherwise would be endangered by disruptions in the international supply chain. The EU Commission and other antitrust authorities have, for instance, reassured companies that they will not actively intervene against necessary and temporary measures put in place in order to avoid supply shortages of scarce products to tackle the COVID-19 crisis, such as medicines, medical equipment, or other health care products. Any such exemption is, however, only available under the narrow criteria available under the relevant antitrust laws.

**Takeaways for COVID-19 crisis**

- The COVID-19 outbreak does not change or automatically suspend antitrust law rules.
- Do not engage in any activity that – absent the COVID-19 crisis – you would consider anticompetitive.
- Do not exchange any competitively sensitive information with competitors (neither directly nor indirectly through an association).
- In case you believe that the COVID-19 crisis leads to a necessity to cooperate (e.g. to uphold a business or to ensure security of scare products to tackle the COVID-19 crisis), seek legal advice on whether or how such cooperation could be structured.
- Your antitrust counsel will help to create practical and defensible solutions of cooperation. This might include the involvement of independent third party clearing stations to ensure the risk of undesired collusion is limited to a minimum.

A special area of concern is information exchange between competitors. The disruptive effects of the COVID-19 crisis on businesses are being discussed within many industry sectors and therefore increase both communications between competitors and, in parallel, the related antitrust risks. In particular, in critical business environments (with heavy disruptions in the demand and supply chain, shutdowns of manufacturing sites, difficulties in transport and deliveries), companies have an increased interest to better understand how competitors are doing (e.g. how production capacity has changed, or whether they still have stocks) and how they seek to (re)act (e.g. whether they will reduce production, dismiss employees, etc.) in order to respond to this rapidly changing market situation.

While joint lobbying activities vis-à-vis-governments or exchanges on technical safety standards or measures to prevent the COVID-19 spread in company premises are generally legitimate, company representatives must not share competitively sensitive information (including detailed information on prices, customers, production costs, and marketing/business strategy). This applies to direct information exchanges as well as to exchanges through industry associations. In some cases, for instance, information exchange might simply occur through competitors jointly complaining about the difficulties

they are currently facing in production. According to EU courts, even a situation where only one company discloses strategic information to its competitors – whether through contacts via mail, emails, phone calls, or meetings – could be sufficient to trigger a violation of competition laws. Information exchanges may be allowed, however, where they are strictly necessary for efficiency-enhancing and pro-competitive cooperation between competitors. The dividing line is and remains blurry, in particular in the current COVID-19 crisis, and businesses must continue to be careful when dealing with competitors to avoid illegal information exchanges and should include an antitrust review of all proposed cooperation with competitors. Antitrust counsel can advise on appropriate safeguards that will minimize antitrust risk. These may include, for example, using clean teams to analyze the gathered information and prepare aggregated data sets that may be shared with the businesses involved in the cooperation.

In turn, cooperation agreements, which are the result of a government order, may be exempt from the application of competition laws if certain strict requirements are met. Similarly, antitrust regulators may, either formally or informally, provide the green light for truly necessary cooperation (for instance, in the context of ensuring continued security of medical products to tackle the COVID-19 crisis or food supply in remote areas or other goods more generally). However, companies must make sure that any actions remain within the precise scope and duration of the exceptional measures adopted by the authorities in order to avoid regulators and courts taking a different view once the crisis is over.

Antitrust counsel can help to create practical and defensible solutions of cooperation. This might include the involvement of independent third party clearing stations to ensure that the risk of undesired collusion is limited to a minimum.

### Risk areas in supply–distribution relationships

In the ongoing crisis, certain suppliers and brand owners may seek to actively influence the final destination of their products and maximize profits across the supply chain. This may raise significant antitrust risks in the EU, which has stricter rules than other regimes (like the U.S.) on the degree of control a supplier can exert over its distribution network.

EU and national competition laws generally prohibit suppliers from fixing the resale price that its distributor must charge (so-called resale price maintenance) or restricting territories or customers to whom the reseller can resell the contract goods, and antitrust regulators in the EU regularly impose fines for this type of violation.

Exceptions are only available in limited, narrow circumstances, and are subject to prior legal review. In the context of resale pricing, for instance, recommended prices is generally low risk (unless the parties involved have market power). The same is true for maximum prices, provided they are set at a level that leaves sufficient room for each distributor to set prices individually.

### Excessive pricing and other potential abuses of market power

Another antitrust concern raised in the context of the COVID-19 crisis is that of dominant companies (whether producer or wholesaler) charging excessively high prices. EU and national competition laws generally prohibit dominant companies (rule of thumb: market share of 40 percent or more) from abusing their strong market position.

While it may be difficult for antitrust regulators to determine whether a price is excessive, taking into account the nature of the price increase and the market characteristics at stake, antitrust regulators in Europe have pursued several excessive pricing cases in recent years, in particular in the pharmaceutical and energy sectors. Given the significant impact the COVID-19 crisis has and will continue to have on consumers, dominant companies will need to be vigilant and careful when adopting or amending their pricing strategy in the context of COVID-19 (and its aftermath).

Other possible dominance abuses may include seeking to use the COVID-19 crisis, including supply shortages, as a pretext to exclude competing suppliers from, or to prevent their expansion in the market through product bundling, refusals to supply, discriminatory practices, or even below-cost pricing (predatory pricing) – particularly in end-consumer markets.

### Increasing antitrust enforcement against online platforms?

Before the COVID-19 outbreak, competition policy and draft amendments in Europe largely focused on the digital economy, notably online platforms with market power. The current crisis is likely to strengthen some of these platforms. The call for intervention by competition authorities might therefore become even louder in the near future.

# Chapter 17 Impact of the COVID-19 crisis on manufacturing and supply chains

The rapid spread of COVID-19 has led to the closure of borders and to the imposition of export restriction, disrupting manufacturing and supply chains. In the longer term, it is expected that a growing number of governments will become more protectionist and hostile to long supply chains. Brand owners and suppliers are advised to examine the short-term and long-term impacts of the COVID-19 crisis on manufacturing and supply chains, and to consider their exit strategy for the post-COVID-19 period.

### Short-term impacts: Coordination of exit strategies in lifting COVID-19 containment measures

Some countries are currently developing their strategy for lifting COVID-19 containment measures. Loosening of confinement measures is expected to be implemented in a gradual manner. General lockdowns affecting a majority of the population will be relaxed gradually, starting with strategic sectors, and then non-essential businesses will be allowed to head back to work.

Today, most supply chains straddle several countries, often several continents. Manufacturers often rely on suppliers and customers in other industries and countries. Therefore, when easing COVID-19 restrictive measures, coordination between various levels of national governments, multiple countries, and international institutions will be crucial. Without this type of coordination, an industry that is allowed to restart may quickly realize that it cannot operate due to the lack of supplies, or customers, in other countries or at home.

Accordingly, brand owners and suppliers are advised to closely monitor how regulators approach the lifting of their COVID-19 containment measures, and to try to influence those decisions and foster coordination to facilitate and accelerate the resumption of business operations.

### Long-term impact of the COVID crisis: Reshoring of manufacturing and diversification of supply

In the longer term, it is expected that many countries will incentivize the reshoring of certain industries.

In the immediate term, governments will intervene to boost production of products necessary to fight COVID-19, such as masks, ventilators, and other medical gear in their territories or neighboring countries.

In the medium term, governments are expected to identify critical or strategic industries, starting with the manufacturing of medical and health products, but also including innovative industries (e.g. A.I., electric cars, green/clean energy products, etc.) and industries that are well connected (e.g. steel). Those industries will receive more funding from their governments, and will see more restrictions placed on foreign acquisition or foreign direct investment.

Beyond, an overreliance on one source of supply (primarily China) has been seen increasingly as a vulnerability by the United States, and it is expected that the European Union and other countries could follow suit. The rapid imposition of duties (e.g. customs, trade remedies, carbon border adjustments, etc.) is to be expected in a growing number of sectors, affecting the manufacturing and distribution of an increasing number of branded products.

The discussions to define what these strategic or critical industries are, and the duties imposed to incentivize diversification of supply sources, will be complex ones, which brand owners should watch in order to anticipate their impact on manufacturing, supply chains, and distribution.

# Chapter 18 United Arab Emirates

A number of legal regulations in the United Arab Emirates influence the COVID-19 crisis and impact on brands.

### Force Majeure Under UAE Law

The UAE Civil Code (UAE Federal Law No. 5 of 1985) addresses the issues of force majeure, emergency conditions, suspension of performance, and termination of contracts based on the below factors.

If a party is unable to perform its obligations under a contract, a UAE judge, at their discretion, may extend the time for contractual performance, or may order the termination of the contract and the awarding of applicable damages (article 272 (2)). If a force majeure circumstance makes the performance of a contractual obligation impossible, then the corresponding performance of the other party shall also be suspended, and the contract shall terminate automatically (article 273(1)). The Civil Code also addresses the issue of partial or temporary impossibility. If such an impossibility exists in an executory contract, then it shall be removed from the contractual performance – but the obligee still retains the right to terminate the contract upon notice to the obligor (article 273(2)). The Civil Code also recognizes that a person shall not be liable for making good on harm if such harm was caused by an act of god, an unseen circumstance, force majeure, or the fault of the other party or third parties (article 287). Further, an obligor is not liable for damages if a delay or suspension on the contractual performance is due to an impossibility beyond its control (article 386).

While the Civil Code recognizes force majeure and impossibility as two distinct doctrines, the outcomes based on the law are not entirely clear. Application of these provisions in the current environment may produce mixed results depending on the scenario. For example, certain companies in the manufacturing, supply, and logistics sectors (which have been exempted by the government of Dubai from remote working requirements placed on other companies) may have a harder time asserting force majeure or impossibility than retail outlets. This assumes, of course, that the companies in the exempted sectors have felt minimal knock-on effects in their supply chain or vendor contracts.

Another interesting provision with wide-reaching implications is article 249, which states that in exceptional public circumstances, which could not have been reasonably expected and which make the performance of contractual obligations a hardship on the obligor such that it would be threatened with exorbitant losses, then a judge may, upon consideration of the circumstances, and weighing the interests of both parties, reduce the obligations upon the burdened party to a reasonable limit, should justice so require, and any agreement to the contrary shall be rendered void.

The “emergency conditions” provision could be considered a fall-back where a party cannot successfully demonstrate force majeure or impossibility. This provision also emphasizes the desire of the law and the courts to continue to enforce a contract even in extreme circumstances.

In the current environment, contractual parties are entering into negotiations in efforts to salvage their contractual relationship, by delaying performance or deferring payments for several months at a time. This should be revisited if the COVID-19 crisis continues through such extensions of time. Since most (if not all) businesses have been affected in one way or another, many parties do not want to risk relationships that may become workable in a few months – and others are even more reluctant to test force majeure or termination provisions before a court system that is currently on hiatus, and likely to be inundated with these claims in the future.

### Advertising and marketing of brands in the UAE retail context

Malls, shopping centers, and retail outlets have represented a large segment of the UAE economy for several decades. The UAE is home to some of the largest and most prestigious shopping malls in the world. Some of the largest UAE developers – including Emaar, Dubai Properties, and Nakheel – have forged solid and positive relationships with the brands in their retail spaces. Indeed, as a result of marketing fee provisions in most commercial leases, brands have received a substantial amount of marketing and advertising support from mall operators throughout the Emirates. For some brands, this type of advertising and marketing represents a substantial portion of their marketing budget.

Commercial tenants have been feeling the effects of an oversupply in retail real estate over the last several years – and the onset of COVID-19 has become a major concern for nearly all retail brands across the UAE. The UAE malls (except for grocery store and pharmacy outlets) have been closed for the past several weeks, since at least April 8 – and the consensus is that the period of closure will likely be extended for another several weeks.

### Current negotiations and interim solutions under COVID-19

Several of the large mall operators have already provided individual stimulus plans by offering their retail brands the next three months rent-free. They will revisit this issue at that time.

To the extent that they have not received such benefits, retail brands would be wise to approach their landlords to discuss a rent-free period, to be renegotiated as necessary. In the long-term, this will benefit the mall landlords as well. Since the malls are effectively inoperable for the time being, attempting to force rental payments from commercial tenants may force many of them to leave – and attempting to replace these tenants in the future will cost landlords several times the amount of keeping the current tenants.

Ultimately, most experienced mall owners know that a recovery of their malls will ultimately involve significant expenditures in marketing and advertising their top brands.

Mall operators should review copies of their insurance policies for potential business interruption clauses that may be of benefit to them during this time. While insurance companies are notoriously loathe to honor these provisions, having appropriate legal counsel to advocate for landlords with the insurance companies would certainly ensure a better insurance payout.

While business interruption insurance for a commercial tenant usually means that the insurer will cover rent for an alternative premises while the current premises are unusable, a commercial tenant would benefit from a review of these policies with legal counsel just in case.

### Online portals

In this time, retail brands should take full advantage of their online presence. In this market, they may consider discounts, sales (flash or otherwise), and coupons to maximize brand competitiveness and goodwill. Many brands have already reported positive feedback from undertaking these measures with their customers and clients. They have also captivated the attention of the public through the expansion of their platforms, including videos and greater interactive content.

To the extent that they have outsourced their social media marketing and management to third parties, brands should keep tabs on these sites, and agreements with marketing companies and brand managers should contain strict intellectual and data protection provisions to ensure no abuse or dilution of the brand.

# Our team

**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

**Kathyleen 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

**Katherine M. Basile**
Partner
Silicon Valley
+1 650 352 0507
kbasile@reedsmith.com

**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

## Financial Industry Group

**John C. Scalzo**
Partner
New York
+1 212 549 0219
jscalzo@reedsmith.com

## Global Commercial Disputes


**Daniel Kadar**
Partner
Paris
+33 (0)1 76 70 40 00
dkadar@reedsmith.com

**Stéphanie Abdesselam**
Associate
Paris
+33 (0)1 76 70 40 13
sabdesselam@reedsmith.com

**Laetitia Gaillard**
Associate
Paris
+33 (0)1 76 70 40 47
lgaillard@reedsmith.com

**Simon Le Reste**
Associate
Paris
+33 (0)1 76 70 40 34
SLeReste@reedsmith.com

**Karlin E. Sangdahl**
Associate
Chicago
+1 312 207 2808
ksangdahl@reedsmith.com

**Saladin Aljurf**
Legal Consultant
Abu Dhabi
+971 4 709 6317
saljurf@reedsmith.com


## Global Corporate Group


**Christian Filippitsch**
Partner
Brussels
+32 (0)2 320 3515
cfilippitsch@reedsmith.com

**Geert Goeteyn**
Partner
Brussels
+32 (0)2 320 3505
ggoeteyn@reedsmith.com

**Yves Melin**
Partner
Brussels
+32 (0)2 320 3525
ymelin@reedsmith.com

**Isabelle Rahman**
Partner
Brussels
+32 (0)2 320 3510
Irahman@reedsmith.com

**Wim Vandenberghe**
Partner
Brussels
+32 (0)2 320 3520
wvandenberghe@reedsmith.com

**Max Seuster**
Counsel
Brussels
+32 (0)2 320 3516
mseuster@reedsmith.com

**Jin Woo Kim**
Associate
Brussels
+32 (0)2 320 3521
jwkim@reedsmith.com

Reed Smith LLP is associated with Reed Smith LLP of Delaware, USA and the offices listed below are offices of either Reed Smith LLP or Reed Smith LLP of Delaware, USA, with exception of Hong Kong, which trades as Reed Smith Richards Butler.

All rights reserved.

ABU DHABI
ATHENS
AUSTIN
BEIJING
BRUSSELS
CENTURY CITY
CHICAGO
DALLAS
DUBAI
FRANKFURT
HONG KONG
HOUSTON
KAZAKHSTAN
LONDON
LOS ANGELES
MIAMI
MUNICH
NEW YORK
PARIS
PHILADELPHIA
PITTSBURGH
PRINCETON
RICHMOND
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TYSONS
WASHINGTON, D.C.
WILMINGTON

**reedsmith.com**