Cassels

Pandemic Promotional Pitfalls & Marketing Claims

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Not surprisingly, many health and wellness companies are making claims that their products can mitigate or even cure COVID-19. In addition, many companies are advising the public about the measures they are taking to protect employees and customers from possible infection.

Both of these types of claims can create potential compliance risks for companies.

When making any COVID-19-related performance claims, companies must ensure that all of their marketing complies with the misleading advertising provisions of the *Competition Act* and any other relevant laws, in particular, the *Food and Drugs Act* and its regulations, notably, the *Food and Drug Regulations* and the *Medical Devices Regulations*.

Under the *Competition Act*, misleading advertising can be subject to either criminal or non-criminal enforcement action. Sanctions under the criminal provisions can include jail terms of up to 14 years and discretionary fines, while contraventions of the civil misleading advertising provisions can include monetary penalties of up to $10 million, as well as restitutionary orders.

In addition to the general prohibition on misleading advertising, the *Competition Act* specifies that performance claims be based on adequate and proper testing. This means that appropriate empirical tests must be conducted before performance claims are made to ensure that they are supported.

Under the *Food and Drugs Act* and related regulations, making misleading claims or any claim that advertises a food or drug as a treatment, preventative measure or cure of a disease set out in Schedule A.1 of the Act, which includes acute infectious respiratory syndromes like COVID-19, can result in significant financial penalties and/or imprisonment. If such acts knowingly or recklessly cause a serious risk of injury to human health, sanctions can include fines of up to $500,000, and/or 18 months imprisonment for summary offences, or fines in an amount set at the discretion of the court (which can be more than $5 million), and/or 5 years imprisonment for indictable offences. The severity of the penalty varies with the seriousness of the offence.

These statutory consequences are in addition to the potential for civil damages actions – which are typically advanced by way of class actions.

In light of several instances of misleading (and in some cases allegedly fraudulent) claims regarding the ability of products to prevent or cure COVID-19, enforcement authorities around the world are actively monitoring these types of claims and have taken rapid enforcement action. Just last week, the US Federal

Trade Commission and Food and Drug Administration issued warning letters to seven companies for selling fraudulent COVID-19 products (the products included teas, essential oils, tinctures and colloidal silver). Similarly, the UK Advertising Standards Authority published two rulings against companies who ran ads for face masks which were claimed to protect wearers against COVID-19.

While there has not been any Canadian enforcement action to date, it is clear that Canadian authorities are closely monitoring the situation. The Canadian Anti-Fraud Centre has created a page warning consumers about COVID-19 fraud and indicated that any suspect activity should be reported.

While the focus of the enforcement activities to date has been on improper claims relating to the ability of a product to protect against or cure COVID-19, companies should also be careful in their statements regarding the steps they are taking to reduce the risk to employees and consumers. Consumers want to know what the businesses they frequent are doing to reduce risks of transmission of this illness, and it is appropriate for businesses to provide this information. However, it is essential that any claims made by businesses regarding preventative measures being taken be accurate, otherwise they may attract liability under the misleading advertising provisions of the *Competition Act*. In this regard, companies should avoid giving the impression that the steps they are taking will eliminate the risk of transmission to their customers. Finally, companies should be aware that even cautious, responsible descriptions of steps they are taking to mitigate risks may give rise to a duty of care under tort law that could result in liability.

The key takeaways for companies making claims about the ability of their products to prevent or cure COVID-19 are to ensure that:

- The claims are not misleading in a material respect
- The claims are based on an adequate and proper test
- The claims comply with the *Food and Drugs Act* and its regulations where applicable

When informing customers about steps they are taking to reduce risks to customers and employees, businesses must ensure that the information they provide is accurate, and that they are in fact taking the steps they say they are taking. As well, companies should avoid giving the impression that the steps they are taking will eliminate the risks of infection.
