

## False Advertising Dangers Lurk in the Age of COVID-19 – Redux

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As we previewed in our earlier [post](#), the COVID-19 pandemic raises new and heightened false advertising concerns for companies seeking to capitalize through mentions of the virus in marketing or consumer outreach efforts. During this harried time, both the unwary – and the well-informed – advertiser should navigate carefully to avoid the trap of consumer and competitor lawsuits, government enforcement actions, and even prosecution.

Section 5(a) of the FTC Act declares unlawful “unfair or deceptive acts or practices in or affecting commerce.” And when the FTC has “reason to believe” that a violation may have occurred, it may launch a civil investigation or sue the alleged transgressor. Fraudulently misleading the public can also subject a company to prosecution or [enforcement action by the SEC](#) depending on the types of representations. Class-action lawsuits are tools available to private citizens under numerous state laws that can target misleading advertising. Similarly, Section 43(a)(1)(B) of the Lanham Act authorizes false advertising claims by competitors that are injured by a defendant’s false or misleading claims.

Our earlier article noted that the FTC and FDA were already focused on COVID-19 related advertising. That trend continues and shows no sign of abating.

For example, on March 31, 2020, the FDA sent a warning letter to CBD manufacturer NeuroXPF regarding its website. According to the FDA, the website offers CBD products for sale in the United States “intended to mitigate, prevent, treat, diagnose, or cure COVID-19 in people.” The FDA warned that these products are unapproved new drugs sold in violation of section 505(a) of the Federal Food, Drug, and Cosmetic Act (“FDCA”), and thus “misbranded drugs” under section 502 of the FDCA (21 U.S.C. § 352). The FDA expressed specific concerns about the following claims on NeuroXPF’s website and various social media sites for which the company provides content:

- Crush Corona . . . While scientists around the world are working 24/7 to develop a COVID-19 vaccine, it will take many more months of testing before it’s approved and available.

However, there's something you can do right now to strengthen your immune system. Take CBD . . . CBD can help keep your immune system at the stop of its game. . . . We want everyone to take CBD and take advantage of its potential to help prepare your body to fight a coronavirus infection. So, we're making all of our products more affordable. – *Previously posted at neuroxpf.com.*

- Crush Corona! Your best defense against the COVID-19 blitz starts with a strong immune system. It's what protects your body from the everyday attacks of bacteria, viruses, parasites and a host of other nasties. Learn more here: <https://neuroxpf.com/crush-corona/> – *Previously posted at [www.facebook.com/NeuroXPF/](https://www.facebook.com/NeuroXPF/) and [twitter.com/NeuroXPF%5d%20](https://twitter.com/NeuroXPF%5d%20).*

The FDA directed NeuroXPF to review its online presence to ensure that it stopped making any claims about COVID-19-related use for which the products had not been FDA approved. The FDA pointed out that “no competent and reliable scientific evidence, including, when appropriate, well-controlled human clinical studies,” substantiates claims that CBD can be used as a defense against COVID-19. The FDA also directed NeuroXPF to respond within 48 hours with the steps it had taken to remove and mitigate statements related to treatment of coronavirus disseminated by the company. The order departs from the FDA's usual allotment of fifteen working days to address similar concerns. See [here](#).

The FDA has since sent numerous warning letters to companies marketing COVID-19 tests, or products claiming to treat or prevent COVID-19. See [here](#) and [here](#).

With the public at risk, activity by [states' attorneys general and law enforcement](#) to carefully monitor representations concerning products being sold comes as no surprise. For example, American actor Keith Middlebrook recently claimed to have developed a cure for COVID-19, offering a 100X return to investors in his supposed cure. See [here](#). Following an undercover meeting with Middlebrook, he was arrested and charged with wire fraud.

Finally, as we expected, the plaintiffs' bar is monitoring these actions and following suit. Target is now facing a lawsuit alleging that its store-brand hand sanitizer is misleading to consumers because it represents it can “eliminate 99.99% of germs.” *Taslakian v. Target Corporation, et al.*, Case No. 2:20-cv-02667, Central District of California. Taslakian bases her claim, in part, on Target's comparison of its product to Purell, which makes a similar representation, and notes that Purell recently received a [warning letter](#) from the FDA in early 2020 regarding its 99.99% claim. See [here](#).

A wary eye could have avoided many of these issues for companies and individuals, underscoring the importance of continuing to exercise caution before making product representations to the public.

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National Law Review, Volume X, Number 106

Source URL: <https://natlawreview.com/article/false-advertising-dangers-lurk-age-covid-19-redux>