

FTC Engages in First Enforcement Action under COVID-19 Consumer Protection Act

April 27, 2021 | Blog | By [Joanne S. Hawana](#), [Samantha P. Kingsbury](#)

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In its first exercise of a newly granted authority, the Federal Trade Commission (FTC or the Commission) on April 15, 2021 **charged** a St. Louis-based chiropractor and his company (the Defendants) with violating the COVID-19 Consumer Protection Act (the COVID-19 Act) and the Federal Trade Commission Act (FTC Act). The Commission's allegations focus on the deceptive marketing of products containing Vitamin D and Zinc as being scientifically proven to treat or prevent COVID-19 and as being equally as effective as or more effective than currently available COVID-19 vaccines.

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The **COVID-19 Act** makes it illegal under the **FTC Act** to engage in deceptive marketing related to the treatment, cure, prevention, mitigation or diagnosis of COVID-19, among other things. This recently enacted law also authorizes the Commission to seek civil monetary penalties for first-time violations, which is not typically an available remedy under the FTC Act.

The **complaint**, which the Department of Justice (DOJ) filed on behalf of the FTC, alleges that the Defendants lacked "valid factual or scientific bases" for their claims and were "selling their products by disseminating misinformation, exploiting fears in the midst of a pandemic, and posing a significant risk to public health and safety." We have blogged previously about DOJ enforcement involving all manner of COVID-19 fraud (see [here](#)) as well as about FTC's heightened scrutiny of consumer marketplaces and its issuance of a huge number of warning letters since the pandemic began (see [here](#)).

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The complaint was not the Defendants' first notice that the FTC was examining their conduct. In fact, the Commission sent a **warning letter** to the Defendants in May 2020, indicating that the agency had "determined that [the Defendants were] unlawfully advertising that certain products or services treat or prevent" COVID-19. The letter also warned that the FTC Act prohibits advertising "that a product or service can prevent, treat, or cure human disease unless you possess competent and reliable scientific evidence, including, when appropriate, well-controlled human clinical studies, substantiating that the claims are true at the time they are made." Despite this warning, and that the COVID-19 Act was signed into law in December 2020, the FTC alleges that the Defendants refused to stop their unlawful marketing conduct. In addition to seeking monetary penalties from the Defendants, the Commission is seeking a permanent injunction to prevent similar conduct going forward, as well as any remedies the court deemed necessary to redress the harms resulting to consumers from the Defendants' conduct, as also provided for in the COVID-19 Act and the FTC Act.

The availability of civil monetary penalties in the COVID-19 Act has taken on increased significance following the Supreme Court's **April 22, 2021 decision** in *AMG Capital Management et al. v. Federal Trade Commission*. (Read an analysis of this critical ruling by our Antitrust colleagues [here](#).) In this case, the Court invalidated the Commission's decades-long use of Section 13(b) of the FTC Act to obtain financial judgments against defendants, finding that the language of this section speaks solely to the FTC's right to enjoin fraudulent or deceptive commercial activity without first going through certain administrative proceedings. Because the Commission's authority to seek civil monetary penalties is an important deterrent to other potential COVID-19 fraudsters, Congress's decision to provide for such penalties in the COVID-19 Act was seemingly prescient.

The FTC has highlighted that this action against the Defendants is its first enforcement action under the COVID-19 Act. Although true, some observers are pointing out that this case involves conduct that is by no means new (false claims regarding the effectiveness of dietary supplements) and that the COVID-19 Act does not necessarily broaden the types of conduct historically subject to enforcement under the FTC Act. Nevertheless, in light of the significant blow struck by the Supreme Court to FTC's consumer protection activities under its older FTC Act authorities, the availability of civil monetary penalties under the COVID-19 Act will permit the Commission to take the steps it deems necessary to protect consumers from COVID-19-related fraud even as it re-assesses its strategy in other areas of its mission. We therefore expect that this is not the last enforcement action we will see under the COVID-19 Act and will continue to report on notable cases.

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