

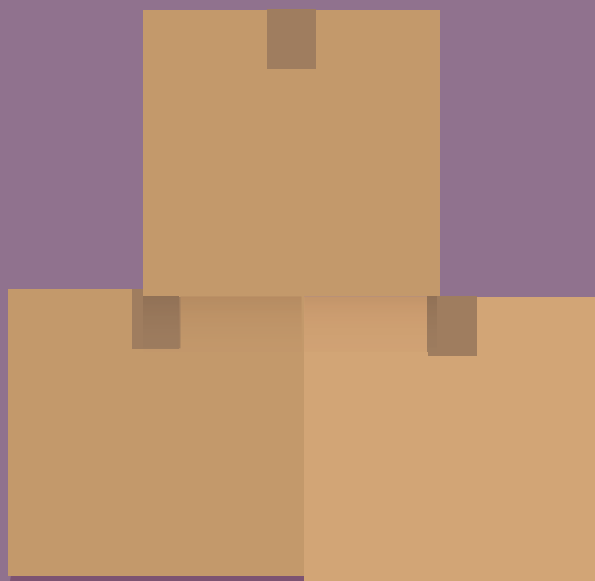
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False Advertising: The Application and Influence of the Federal Trade Commission Act



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False Advertising and the FTC

By Steve Armato

As methods of commerce continue to evolve, so too will the FTC's and states' responses.

False Advertising: The Application and Influence of the Federal Trade Commission Act

At the federal level, the Federal Trade Commission ("FTC") enforces consumer protection regulations. The FTC is empowered by the FTC Act, which evolved over the years to eventually provide the FTC with rule making and enforcement authority to protect consumers from false advertising. The FTC's lawsuits against Volkswagen in 2016 and various medical manufacturers over COVID-19 related issues illustrate the breadth and power of the FTC's authority over false advertising claims through the FTC Act. Additionally, by modeling their consumer protection standards after the FTC Act and other various model legislation, individual states also have the power and authority to protect their citizens from unfair and deceptive trade practices, including false advertising. Finally, as devices and software powered by artificial intelligence ("AI") continue to develop, so too will the FTC's enforcement mechanisms to ensure those companies are working within the bounds of federal consumer protection regulations. This article outlines the federal government's power and authority to enforce consumer protection standards in the realm of false advertising, how states share in that role, and how the FTC has evolved to ensure modern AI technologies are kept within the bounds of consumer protection regulations.

Federal Regulation of False Advertising

The Development of the FTC's Regulatory Power

The FTC was created in 1914 when President Woodrow Wilson signed the FTC Act

into law. Our History, [ftc.gov, https://www.ftc.gov/about-ftc/history](https://www.ftc.gov/about-ftc/history) (last visited Jan. 12, 2025). Initially, the FTC was created to monitor competition amongst businesses to prevent monopolies. *Thomas B. Merritt, § 4:2 Federal Trade Commission Act, in 35 Mass. Prac. Series, Consumer Law, chp. 4, Unfair or Deceptive Acts of Practices (4th ed., June 2024); Dee Pridgen & Jolina C. Cuaresma, Statutory Underpinnings and History of the FTC, in, Consumer Protection and Law § 8:2 (Nov. 2024)*. A debate materialized early in the FTC's existence whether unfair business competition included consumer deception, and whether the FTC had the power to make that determination. Pridgen & Cuaresma, *supra*. For example, in 1920, the United States Supreme Court concluded that the power to determine whether a business practice was unfair or deceptive lay with the courts, not the FTC. See generally *FTC v. Gratz*, 253 U.S. 421 (1920) *overruled by FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966). However, by 1922, the Supreme Court had shifted its position, concluding that the FTC had the power to determine that misbranded products divert consumers from truthfully marked goods, and therefore, deceptive trade practices constituted unfair competition. *Pridgen & Cuaresma, supra; FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922). By 1975, Congress granted the FTC explicit power to regulate and define unfair competition in commerce by passing the *Magnuson-Moss Warranty-FTC Improvement Act*. *Merritt, supra*, at § 4:2.



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The FTC Act

The FTC Act and its amendments are codified at 15 U.S.C. §§ 41 – 58. The FTC Act grants the FTC authority to enforce consumer protection and antitrust laws, and to create rules governing consumer protection and antitrust matters. A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, FTC.gov (May 2021), <https://www.ftc.gov/about-ftc/mission/enforcement-authority>. Moreover, the FTC Act allows the FTC to enforce their consumer protection and antitrust duties with a broad spectrum of investigative powers. A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, *supra*.

Specifically, § 45 of the FTC Act states that, “unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce, are . . . unlawful.” 15 U.S.C. § 45(a)(1). The FTC defines “deceptive acts” as a material representation, omission, or practice that is likely to mislead a consumer acting reasonably under the circumstances. A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, *supra*; *Letter from James C. Miller, III, Chair, FTC, to John D. Dingell, Chair, Comm. on Energy and Com.* (Oct. 14, 1983) <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

ity. The FTC Act defines an unfair act or practice as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition.” 15 U.S.C. § 45(n); A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority, *supra*. Section 52 of the Act explicitly links false advertisements to unfair and deceptive trade practices: “The dissemination or the causing of to be disseminated of any false advertisements . . . will be an unfair or deceptive act of practice . . . within the meaning of section 45 of this title.” 15 U.S.C. § 52(b). Moreover, § 53 of the FTC Act authorizes the FTC to enforce § 45 violations with injunctions and restraining orders. 15 U.S.C. § 53. The connection between false advertising and unfair or deceptive trade practices, and how § 45 of the FTC Act is used by the FTC to protect consumers from false advertising, is illustrated in the cases below.

The Volkswagen Case

In 2016, the FTC sued Volkswagen for installing “defeat devices” in several models of diesel vehicles. Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles, [ftc.gov](https://www.justice.gov/ftc/press-release/2016/jun/ftc-sues-volkswagen-for-cheating-emissions-tests) (June 28, 2016) (<https://www.justice.gov/ftc/press-release/2016/jun/ftc-sues-volkswagen-for-cheating-emissions-tests>).

opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving#:~:text=The%20FTC%20sued%20Volkswagen%20in%20March%2C%20charging%22that,standards%20and%20would%20maintain%20a%20high%20resale%20value)(hereinafter Volkswagen Settlement). A defeat device is a software installed in a vehicle to detect when the vehicle is being tested for emissions output. Volkswagen Settlement, *supra*. When the testing is in progress, the defeat device becomes operative, and activates the vehicle's full emissions controls to improve the results of the testing. Volkswagen Settlement, *supra*. When no testing occurs, the defeat device is inoperative, allowing the vehicle in which it is installed to release into the air increased emissions that exceed state and federal standards. Volkswagen Settlement, *supra*.

The FTC found that Volkswagen's decision to market vehicles with defeat devices installed as environmentally friendly, "clean diesel" vehicles that followed state and federal emissions standards, was false advertising and in violation of § 45 of the FTC Act. Volkswagen Settlement, *supra*. This false advertising resulted in the effected vehicles' devaluation, which led to financial losses for consumers who owned the vehicles with defeat devices. Volkswagen Settlement, *supra*. Consum-



ers additionally lost trust in the integrity of Volkswagen as a brand. Volkswagen Settlement, *supra*.

After litigation, and pursuant to its authority under § 53 of the FTC Act, the FTC issued a permanent injunction and monetary judgment against Volkswagen. See *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Am. Second Partial Stipulated Order for Permanent Inj. and Monetary J., Mar. 28, 2017 (hereinafter Permanent Inj.). The judgment required Volkswagen to pay over \$4 billion in restitution to effected consumers in the form of vehicle buybacks, lease terminations, and cash payments for emissions modifications to the vehicles with defeat devices installed. Permanent Inj., *supra*, at 15-17. To ensure effected consumers are protected from further negative consequences of Volkswagen's false advertising, the judgment includes strict consumer protection measures. These include the requirement that Volkswagen provide clear notices to effected consumers of their rights and remedies and the creation of a claims website where effected consumers can learn how to exercise their rights and remedies under the court order. Permanent Inj., *supra*, at 18-20.

False Advertising and COVID-19

The COVID-19 pandemic resulted in thousands of complaints related to consumer protection fraud, including false advertising. See generally Coronavirus Response: Enforcement Actions, *ftc.gov*, <https://www.ftc.gov/news-events/features/coronavirus/enforcement> (last visited January 19, 2025). Most recently, the FTC announced the enforcement of a settlement agreement reached in a lawsuit filed against Golden Sunrise, the manufacturer of Golden Sunrise Nutraceutical Products. FTC Announces Refund Claims Process for Consumers Who Bought Deceptively Marketed Golden Sunrise Nutraceutical Products, *ftc.gov* (Jan. 6, 2025) <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-announces-refund-claims-process-consumers-who-bought-deceptively-marketed-golden-sunrise> (hereinafter Golden Sunrise Refund). In 2020, the FTC filed a complaint against Golden Sunrise pursuant to §§ 45 and 52 of the FTC Act, which

prohibits false advertising. See generally *F.T.C. v. Golden Sunrise Nutraceutical, Inc., Compl. for Permanent Inj. and Other Equitable Relief*, July 30, 2020. The complaint alleges that Golden Sunrise falsely advertised that several of their supplements could be used to treat people suffering from COVID-19. FTC Sues California Marketer of \$23,000 COVID-19 "Treatment" Plan, *ftc.gov* (July 31, 2020) <https://www.ftc.gov/news-events/news/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan> (hereinafter FTC Sues California Marketer). The FTC additionally alleged Golden Sunrise falsely advertised that they sold other supplements that effectively treated Parkinson's Disease and cancer. FTC Sues California Marketer, *supra*. Although the costs of some of the supplements range from \$170,000 to \$200,000, they are made only with herbs and spices that are inexpensive and not proven to cure any of the diseases as advertised by Golden Sunrise. FTC Sues California Marketer, *supra*.

In 2021, the FTC initially settled the claim with Golden Sunrise pursuant to their authority under § 53 of the FTC Act. See generally *F.T.C. v. Golden Sunrise Nutraceutical, Inc., Stipulated Order for Permanent Inj. and Monetary J.* as to Defendant Stephen Meis, June 6, 2021. As part of the settlement, Dr. Stephen Meis, the medical director of Golden Sunrise, paid over \$100,000 in consumer refunds for propagating false advertisements for the supplements. Golden Sunrise Refund, *supra*. It is expected that all complaints against Golden Sunrise will be finalized this year as 581 additional consumers who purchased the supplements are refunded under the terms of the settlement agreement. Golden Sunrise Refund, *supra*.

State Regulation of False Advertising Model Legislation

As discussed above, the FTC developed much of its power to regulate consumer protection practices, including false advertising, in the 1970s. Around the same time, consumer activists across the country began work to uniformly regulate consumer protection practices amongst the states. *Thomas B. Merritt, § 4:1 Generally*, in 35 *Mass. Prac. Series, Consumer Law*, chp. 4, *Unfair or Deceptive Acts of*



The COVID-19 pandemic resulted in thousands of complaints related to consumer protection fraud, including false advertising.

Practices (4th ed., June 2024). Because interstate trade practices in the twentieth and twenty-first centuries connect buyers and sellers from across the United States, activists thought it would be helpful to have predictable state laws governing that commerce. Merritt, *supra*, at § 4:1.

In the 1960s and 1970s, several pieces of model legislation regulating consumer protection practices were drafted. *Thomas B. Merritt, § 4:3 Model Legislation*, in 35 *Mass. Prac. Series, Consumer Law*, chp. 4, *Unfair or Deceptive Acts of Practices* (4th ed., June 2024). Some pieces of model legislation enumerate practices that are deemed unfair and deceptive, along with a "catch-all" category to ensure the list is not restricted to the enumerated items. Merritt, *supra*, at § 4:3. Other pieces of model legislation take a more generalized view of unlawful acts considered unfair and deceptive trade practices. For example, the FTC drafted model legislation based on the FTC Act titled, "Unfair Trade Practices and Consumer Protection Law." Merritt, *supra*, at § 4:3. That model legislation gave states three options on how to classify unlawful acts in the realm of consumer protection: (1) "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce;" (2) "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce;" and (3) "twelve specified acts or practices relating primarily to false advertising and false representations, and then to prohibit generally 'any act or practice which is unfair or deceptive to the consumer.'" Merritt, *supra*, at § 4:3



Today, all 50 states have some variation of an unfair and deceptive trade practices statutory compilation. Carolyn Carter, *Consumer Protection in the United States 1* (National Consumer Law Center, 2018). The FTC Act itself is modeled after the first and second alternatives listed in the paragraph above. Merritt, *supra*, at § 4:3. As previously discussed, the FTC Act explicitly interprets false advertising to align with the interpretation of false and deceptive trade practices. 15 U.S.C. § 52(b). States such as Massachusetts do the same. The Massachusetts consumer protection statute explicitly states that the interpretation of its statute must align with the interpretation of the FTC Act. Mass. Gen. Laws Ch. 93A § 2. Thus, in Massachusetts, false advertising is an unfair and deceptive trade practice. The Massachusetts Consumer Protection Law, [mass.gov](https://www.mass.gov/info-details/the-massachusetts-consumer-protection-law), <https://www.mass.gov/info-details/the-massachusetts-consumer-protection-law> (last updated Jan. 7, 2025)..

Other states, such as California, have two distinct sections of code delineating between unfair and deceptive trade practices and false advertising. *Cal. Bus. & Prof. Code* §§ 17000-17101; *Cal. Bus. & Prof. Code* §§ 17500-17606. Nonetheless, because California's false advertising statute is broad, the application of that statute overlaps with the application of California's unfair and deceptive trade practices statute, resulting in similar legal outcomes when the statutes are applied concurrently. See Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, 26 *Unfair*

Competition Litig. 227, 276 (1996). For example, California separately sued Volkswagen in state court for installing defeat devices in certain vehicle models under the state's false advertising and unfair and deceptive trade practices laws. See *California v. Volkswagen, AG*, Second Partial Consent Decree, Dec. 20, 2016. Nonetheless, the outcome of the state's settlement with Volkswagen was similar to the outcome Volkswagen reached with the FTC; Volkswagen agreed to pay California residents restitution for false advertisements that deceived them into purchasing the vehicles with the defeat devices. *Attorney General Becerra Announces Approval of \$66M for California in Settlement with Volkswagen*, [oag.ca.gov](https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-approval-66m-california-settlement-volkswagen) (May 11, 2017) <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-approval-66m-california-settlement-volkswagen>; *California v. Volkswagen, AG*, *supra*.

The Next Generation of False Advertising: Artificial Intelligence

AI is daily becoming more prevalent. The FTC responded to claims of false advertising and unfair and deceptive trade practices pertaining to AI by developing a task force called Operation AI Comply. FTC Announces Crackdown on Deceptive AI Claims and Schemes, [ftc.gov](https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes) (Sept. 25, 2024) <https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-announces-crackdown-deceptive-ai-claims-schemes> (hereinafter FTC Announces Crackdown). This task force ensures businesses who are misleading consumers by exaggerat-

ing the capabilities of AI powered products are made to comply with FTC regulations. FTC Announces Crackdown, *supra*. Thus far, the task force has focused on enforcing consumer protection policies across multiple AI platforms. For example, the FTC charged Ecommerce Empire Builders with advertising training programs that falsely promised to help consumers grow their ecommerce portfolio by \$10,000 each month. FTC Announces Crackdown, *supra*. However, consumers invested thousands of dollars into these programs but did not see any of the promised ecommerce returns. FTC Announces Crackdown, *supra*.

In another example, the FTC filed a complaint against the company DoNotPay that advertised the creation of "the world's first robot lawyer." FTC Announces Crackdown, *supra*. The company promised to create "perfect" legal documents without the need for attorney supervision. FTC Announces Crackdown, *supra*. However, the quality of work produced by the software fell far below the promised results FTC Announces Crackdown, *supra*. The company was fined \$193,000 and is required to give effected consumers notice regarding the product's limitations. FTC Announces Crackdown, *supra*. As more AI technology is integrated into people's daily lives, the FTC will continue to crack-down on consumer protection violations, including false advertisements propagating the products' abilities.

Conclusion

This article outlined the federal government's power and authority to enforce consumer protection standards in the realm of false advertising, how states share in that role, and how the FTC has evolved to ensure modern AI technologies are kept within the bounds of consumer protection regulations. Both the FTC's powers and the states' powers to protect consumers from fraud such as false advertising grew as commerce changed. As methods of commerce continue to evolve, so too will the FTC's and states' responses to new ways consumers are exposed to fraud through false and deceptive trade practices, including false advertising.

