

# UPDATE

Food and Drug Law, Regulation and Education



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## Keynote Address:

# FDA and the First Amendment, a Dialogue at Last?

By Douglas Hallward-Driemeier

Many of us have been following the recent *Amarin* litigation, which held that the FDA could not, consistent with the First Amendment, preclude Amarin from making truthful and non-misleading statements about the effectiveness of its drug, Vascepa, for off-label use. I wanted today to take a step back and look more generally at the relationship between the FDA and the First Amendment, how the present situation developed, and where we are at present, and then to offer a few comments about where this relationship might go as we move forward.

### Past

As Judge Engelmayer observed in his recent decision in *Amarin*, First Amendment doctrine, and its relationship to the FDCA, has changed dramatically since the FDCA and many of its implementing regulations were adopted. They were adopted in an era when commercial activity was widely regarded to be outside the scope of the First Amendment. Even when it became clear some First Amendment protection did apply, FDA took the position that there was very little scrutiny because the pharmaceutical industry was heavily regulated.

Since that time, the Supreme Court has clarified that almost all content-based speech restrictions must survive “strict scrutiny,” a standard that requires the government to establish that it has a compelling government interest and that the restriction is narrowly tailored to achieve that interest. Commercial speech has, under the *Central Hudson* doctrine, been subject to a slightly lower standard

referred to as “intermediate scrutiny.” If it is truthful speech about a lawful activity, the government’s interest in restricting the speech must be “substantial,” the restriction must directly advance that interest, and the law must not restrict significantly more speech than necessary to serve that interest. More recent decisions, including *Sorrell*, have cast doubt on the commercial speech exception, or at least whether it applies beyond speech proposing a commercial transaction.

Throughout this development of modern commercial speech doctrine, there was little consideration, at least in the form of judicial review, of how this evolving First Amendment jurisprudence applied to the FDCA and FDA’s regulations of pharmaceutical companies’ advertising and labeling. Industry participants, Congress, and the FDA were all aware of the First Amendment issues lurking behind FDA’s regulations, but there was little consideration in the courts.

Why was that so? In large part, it was because of how the government proceeds in enforcing the FDCA—through Warning Letters, the initiation of civil or criminal DOJ investigations, and non-binding and often draft “guidance” documents from FDA. The FDA guidance documents generally lay out the agency’s views on enforcement discretion in order to create safe harbors for otherwise prohibited speech, but do not create binding, judicially enforceable standards.

None of these mechanisms—Warning Letters, the opening of investigations, or non-binding guidance documents—are viewed as “final agency action” subject to challenge under the Administrative Procedure Act. That makes it difficult, if not impossible, for companies to take preemptive action in court challenging the threat of enforcement action.

Companies also could not risk waiting for “final action” in the form of prosecution and adjudication to raise First Amendment arguments, because the risks are intolerable. The FDCA makes misbranding a crime. Through a



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complicated set of regulations, FDA has turned many types of manufacturer speech about pharmaceutical products into misbranding violations and therefore criminal acts. And the threat of exclusion from Medicare and Medicaid that accompanies any criminal violations was seen as a virtual “corporate death penalty” that companies couldn’t risk. So cases involving pharmaceutical manufacturer speech rarely go to trial, further preventing courts from addressing these issues.

The lack of judicial oversight had a very unfortunate consequence. Without an ongoing dialogue between courts and the agency, the regulators went in one direction as the law went in the other.

Regulators adopted an increasingly complex web of regulations governing manufacturer speech. Sometimes, these regulations were designed to allow manufacturers some limited avenues for sharing concededly important information, such as certain information about off-label uses that were not only legal, but often represented the standard of care—care for which the government itself was willing to make reimbursement payments. But these ever-more complex regulations and guidance documents enmeshed the agency in increasingly minute control over what manufacturers could say about their products and how they could say it. And this tightening of control on pharmaceutical manufacturer speech was happening just as the law on commercial speech was moving in the other direction, becoming increasingly less tolerant of government restrictions on speech.

## Present

This situation began to change with the Supreme Court’s 2011 decision in *Sorrell*. *Sorrell* involved Vermont’s attempt to limit the sale of prescriber identifiable information to manufacturers, even though the state and others could obtain the same information. In striking down the law, the Supreme Court made clear that pharmaceutical manufacturers’ speech about their products was protected by the First Amendment and that laws restricting such speech were subject to “heightened scrutiny,” without specifying whether that was strict or intermediate scrutiny. In his dissenting opinion, Justice Breyer specifically called out the likely application of the decision to the FDCA as one reason he disagreed with the majority.

Shortly thereafter, in *Caronia*, a criminal prosecution, the Second Circuit in New York held that truthful and non-misleading speech about a lawful, though unapproved, use of an approved drug was protected by the First Amendment and could not by itself be the basis of a conviction under the FDCA.

Notably, these significant developments in the application of the First Amendment to pharmaceutical manufacturer speech and the FDCA occurred in cases that did not involve large pharmaceutical companies and had very different dynamics from the traditional agency issuance of a warning letter or opening of a DOJ investigation. In the case of *Caronia*, the government had prosecuted an individual, who had nothing to lose from fighting his conviction.

Even before *Caronia*, industry groups, like Pharmaceutical Researchers and Manufacturers of

America (PhRMA) and the Medical Information Working Group (MIWG), which my firm Ropes & Gray represents, were attempting to engage FDA on the need to revise its regulations to take account of First Amendment concerns. Although FDA has recently indicated that it is undertaking such a review, we have not yet seen any significant proposals from the agency, and instead have seen only very targeted revisions to specific speech restrictions. Even these have come so far in the form of non-binding draft guidance or proposals, not final agency action.

The agency had, at least until very recently, adopted the view that *Caronia* did not signal a major shift in the First Amendment environment for the FDCA, but was instead a fact-bound case about poor jury instructions, so that off-label promotion could still be the focus of a criminal misbranding charge as long as the jury was told the speech was “evidence that demonstrated a new intended use for which the drug lacked approved instructions.”

Judge Engelmayer’s recent opinion in *Amarin* marks another highly significant development in this unfolding story. (I should acknowledge that MIWG, which my firm represented, submitted an amicus brief in this case.) Note, first, that the procedural context of *Amarin* is quite different from the dynamic of a company that is being charged with criminal conduct trying to bring a First Amendment suit as a defensive matter, as had occurred a few times before *Amarin*, and where the government had argued to dismiss the suits as improper and/or premature. *Amarin* brought suit as an affirmative

matter, and it could do so in part because the Second Circuit, which had issued *Caronia*, has favorable law governing when a party can bring suit to challenge government action or regulations that are chilling First Amendment protected speech.

Judge Engelmayer's decision in *Amarin* is also significant in that it rejects any attempt to cabin *Caronia* in the way the government had. Judge Engelmayer focused on the Latin phrase "actus reus," which basically means the criminal *act* that is the basis of the prosecution. He read *Caronia*, as many of us had, to hold that the government cannot undertake a prosecution in which truthful, non-misleading speech about a lawful off-label use of a drug is the core bad act that forms the basis of alleged criminal misbranding. Speech could be used as evidence of a crime, he indicated, but only where there was separate, underlying non-speech conduct (such as kickbacks).

Of course, the threshold requirement for First Amendment protection is that the speech be truthful and non-misleading, and Judge Engelmayer gave great attention to that concern. *Amarin* had proposed specific promotional material that it wanted to use, FDA had responded with proposed alterations to *Amarin*'s scripted material, and Judge Engelmayer's order specified precisely which additional disclosures and disclaimers he believed were necessary to make it truthful and non-misleading. Of course, this approach provides helpful guidance, but it also raises an important question—does an *Amarin*-type lawsuit set up a regime under which, instead of going to FDA to seek pre-approval (in the form of enforcement discretion) for a

company's speech, the company must seek pre-approval from a court of exactly what it proposes to say?

I would suggest that neither is appropriate under the First Amendment. The First Amendment does not tolerate prior restraint regimes under which government permission must first be obtained before a person can speak.

And, of course, these new FDCA-specific cases do not occur in a vacuum. At the same time, First Amendment law is developing more generally, in ways that will further impact the FDA regulatory regime. For example, in a major case last term, *Reed v. Town of Gilbert*, the Supreme Court held that *any* content-based restrictions on speech are subject to strict scrutiny, and that the government's justifications for regulating the speech are relevant—not to the level of scrutiny applied, but only to whether the restrictions survive application of the strict scrutiny test. Notably, as in *Sorrell*, Justice Breyer's separate opinion again highlights pharmaceutical marketing as one of the areas of law that will be affected by the Court's more robust insistence on applying strict scrutiny.

## Future

So, where does this all end? Of course, that is the 64 billion dollar question.

One thing that is clear is that the litigation is not tracking FDA's traditional framework for regulating speech, which focuses on who is doing the speaking (the sales rep or a medical specialist), and the content of the speech (whether the speech is promotion or so-called "scientific exchange").

Rather, as the *Amarin* lawsuit makes clear, going forward the focus is and will be on the key threshold questions of what standard applies to determine if a manufacturer's speech is truthful and non-misleading, and also as I described above, of who gets to make the initial determination of whether the speech conforms with the standard—the agency, the courts, or the company.

These issues matter not just for off-label claims, but also on-label claims. It is true that most of the cases to date have focused on off-label promotion, and the government has attempted to argue that the speech is not directly at issue, but only being used as evidence of selling a misbranded drug. The opinion in *Amarin* rejects that distinction. But even apart from *Amarin*, FDA's speech restrictions are not limited to off-label promotion. FDA has regulations that deem any promotional claim for a prescription drug to be false or misleading if it lacks substantial evidence, which FDA generally construes to require two randomized clinical trials. While FDA, as an exercise of its enforcement discretion, often allows claims without two trials, a regulation that establishes a two-trial standard unless and until the government, in its discretion, allows lesser evidence, operates precisely like the prior restraint system that the First Amendment forbids. So, for both on-label claims, such as product comparisons, and for off-label claims under *Amarin*, the standard that will apply to determine whether speech is truthful and non-misleading is critical.

The FDCA itself, as well as FDA regulations, utilize many different formulations for what level of evidence

is necessary in order to make a claim truthful and non-misleading, depending on what kind of product and what kind of claim is being made. These include substantial evidence, substantial clinical experience, valid scientific evidence, competent and reliable scientific evidence, significant scientific agreement, adequate evidence, and evidence sufficient to satisfy the relevant scientific community of the claim's truth.

"Substantial clinical experience" may be a standard that is worth developing further. This standard could be expanded to take into account the significant evidence that companies gather about how their products fare when used in the real world. But so far FDA has not construed the standard in that fashion.

The "competent and reliable scientific evidence" (CARSE) standard is perhaps the most interesting and plausible as a standard going forward. This is a standard that is used by the

Federal Trade Commission, and so has the benefit of already having been applied consistently across classes of speakers. It thus provides a more uniform standard for establishing the truthfulness of scientifically-based claims. And, because it is applied more generally, there would be a greater opportunity for development and refinement of the standard, thus avoiding the problems (such as the corporate death penalty) that have plagued judicial development of standards under the FDCA.

CARSE allows for some flexibility in its application, and has even been construed to require substantial evidence criteria in some circumstances. But it gets away from categorical rules, instead looking to the expertise of professionals in the relevant area, evaluated in an objective manner, using generally accepted procedures in the field. I would maintain that such flexibility

is ultimately required by the First Amendment.

There is no doubt that these recent First Amendment developments raise difficult, challenging, and critically important questions. The stakes are quite high, both on the side of avoiding claims based on unreliable studies that could have serious adverse health consequences, and on the side of ensuring the free sharing of information that pharmaceutical companies possess about their products—information that is often of better quality than that from any other source. As the Supreme Court reminded us in *Sorrell*, information can literally save lives. It is in no one's interest for the regulatory system to fall apart. One would hope that, guided by the courts, the agency and industry can now work together to help align the regulatory framework with First Amendment values. ▲

## New to Food and Drug Law Group

This popular informal group brings together lawyers, regulatory affairs professionals, and policy specialists who consider themselves new to the practice. Members range from first-year associates to seasoned professionals learning a new area of law. Networking with peers, lunch speaker series, and social events are held throughout the year. If you would like to receive emails about NFDL activities, or get involved with planning, contact [Elizabeth.Stevelak@fdli.org](mailto:Elizabeth.Stevelak@fdli.org).

### Lunch Discussion: FDA Law and Marijuana

Join us on February 25 from 12:00-1:00pm to hear William Garvin discuss FDA law and marijuana. A light lunch will be provided. RSVP required to Laura Brown at [lab@fdli.org](mailto:lab@fdli.org).