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Second Circuit Vacates Conviction Based on Off-Label Promotion, Deals Blow to Government Theory in Drug Marketing Cases

In a much-anticipated opinion, the U.S. Court of Appeals for the Second Circuit vacated and remanded the conviction of Alfred Caronia, a former pharmaceutical sales representative convicted of conspiring to introduce a misbranded drug into interstate commerce (click [here](#) to view the opinion). In an era in which most investigations of industry off-label promotional activities result in settlements rather than litigation, the *Caronia* case was widely seen as an important but rare test of the government's criminal liability theories in off-label promotion cases. In an opinion that will certainly be welcomed by many in the industry, the court rejected the government's interpretation of the Food, Drug and Cosmetic Act's (FDCA) misbranding provisions, holding, "We conclude simply that the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful off-label use of an FDA-approved drug." Op. at 51. The court found that "such a construction — and a conviction obtained under the government's application of the FDCA — would run afoul of the First Amendment." Op. at 33.

Top-Line Summary

- The court vacated Caronia's misdemeanor conviction for conspiracy to introduce a misbranded drug into interstate commerce in a 2-1 decision;
- The court held that the government prosecuted Caronia for his speech — rather than simply relying on Caronia's speech as evidence of his intent — and that such a prosecution was not permissible;
- The court relied heavily on the Supreme Court's decision in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2659 (2011), which held that "[s]peech in aid of pharmaceutical marketing ... is a form of expression protected by the Free Speech Clause of the First Amendment";
- The court rejected the government's proposed interpretation of the FDCA that purported to criminalize a pharmaceutical manufacturer's truthful, non-misleading promotion of a drug's off-label use, reasoning that a conviction obtained under that theory would violate the First Amendment; and
- The court avoided the constitutional question regarding the FDCA promotions limitations by presuming that use of speech as evidence of intended use is permissible; it went on to note, however, that it is "unclear how the government would identify criminal misbranding from communications between drug manufacturers and physicians authorized to prescribe drugs for off-label use." Op. at 32 n.10.

Background of the Case

Orphan Medical — now Jazz Pharmaceuticals — hired Alfred Caronia in March 2005 as a pharmaceutical sales representative to sell its prescription drug Xyrem. Xyrem's only FDA-approved use at the time was for the treatment of cataplexy — a condition

associated with weak or paralyzed muscles — in narcolepsy. Caronia was contacted in late 2005 by a physician working as government cooperating witness. Caronia met with the government’s cooperating physician witness twice and on one such occasion in the presence of a company-affiliated physician, Dr. Peter Gleason. Government officials secretly recorded discussions of off-label uses for Xyrem at each meeting.

In July 2007, the grand jury returned a four-count superseding felony indictment against Caronia and Dr. Gleason based largely on the covert recordings. The indictment alleged that Caronia and Dr. Gleason conspired to misbrand Xyrem. Dr. Gleason and Caronia moved to dismiss the indictment, arguing that FDA’s misbranding regulations unconstitutionally restricted their First Amendment right to free speech. While the motions were pending, Dr. Gleason pleaded guilty to a misdemeanor. Caronia’s case remained active, and he reasserted his constitutional defenses. The district court ultimately denied Caronia’s motion, and the case went to trial. A jury found Caronia guilty of a misdemeanor for conspiring to misbrand Xyrem. He received a \$25 fine, one year of probation and 100 hours of community service. That judgment was reversed by the Second Circuit’s *Caronia* opinion.

The Second Circuit’s Opinion

In vacating Caronia’s conviction, the Second Circuit focused on the government’s theory of liability, as demonstrated by the evidence and arguments at trial. While recognizing that off-label promotion “plainly” had occurred, the court rejected “as simply not true” the government’s argument that it had not prosecuted Caronia for his speech, but rather that it had used the speech as evidence that the off-label uses were intended uses for which the drug’s labeling provided no directions. In rejecting the government’s post-hoc theory of prosecution, the court stated, “[e]ven assuming the government can offer evidence of a defendant’s off-label promotion to prove a drug’s intended use and, thus, mislabeling for that intended use, that is not what happened in this case.” Op. at 27-28. The court concluded that the government’s contention “was belied by its conduct and arguments at trial,” noting that the government highlighted Caronia’s “off-label promotion of Xyrem ... over forty times” in its closing argument and rebuttal at trial. *Id.* at 28. The court found that “the government clearly prosecuted Caronia for his words — for his speech. A pharmaceutical representative’s promotion of an FDA-approved drug’s off-label use is speech.” *Id.* at 31.

After recognizing that “Caronia plainly promoted the use of Xyrem in unapproved indications” and concluding that the government had premised its prosecution solely on Caronia’s speech relating to these unapproved uses, the court went on to evaluate whether the government’s construction of FDCA’s misbranding provisions as criminalizing a pharmaceutical manufacturer’s truthful, non-misleading speech about a drug’s off-label use violated the First Amendment. The court relied on the First Amendment analysis articulated in *Sorrell*, which was decided after Caronia’s trial, while observing that “[c]riminal regulatory schemes, moreover, warrant even more careful scrutiny.” Op. at 34. The court held that the government’s interpretation of the misbranding provisions are content-based and speaker-based and are therefore subject to heightened scrutiny. Like the Supreme Court in *Sorrell*, the Second Circuit declined to identify the level of heightened scrutiny it employed. Next the court turned to the *Central Hudson* four-part test to determine whether commercial speech is protected by the First Amendment. The court found that the government’s speech restrictions were not supportable under the third and fourth parts of the *Central Hudson* — namely, that the restriction “must advance the governmental interest asserted ... to a material degree” and that the restriction must be “narrowly drawn.” The court further noted that the “government’s construction of the FDCA essentially legalizes the outcome — off-label use — but prohibits the free flow of information that would inform that outcome.” Op. at 47. The court declined to address the broader question of

whether off-label promotion is tantamount to illegal misbranding, noting that it was construing “the FDCA narrowly to avoid a serious constitutional question.” Op.at 32-33.

The Dissent

Judge Livingston offered a spirited dissent, seemingly concerned that the majority’s holding would eviscerate the “very foundations of our century-old system of drug regulation.” Dis. Op at 1. Judge Livingston argued that the majority opinion misinterpreted several statements made by the prosecution at trial and several isolated phrases from the jury instructions as evidence that the government sought to prosecute Caronia for his speech alone. *Id.* at 8-10. Instead, the dissent argued that the government used promotional speech merely as evidence of Caronia’s objective intent to place Xyrem into interstate commerce for an off-label indication without providing “adequate directions for use” for that indication — which Judge Livingston viewed as a primary and long-accepted example of mislabeling. *Id.* at 2-3, 12. The dissent found no precedent prohibiting this use of speech as evidence of wrongful intent. *Id.* at 12. In addition, even assuming the FDCA’s misbranding provisions directly regulate speech, Judge Livingston made clear that such regulation should survive heightened scrutiny under *Central Hudson* and *Sorrell* because it directly advances, in a narrowly tailored way, the FDA’s objectives to ensure the safety and effectiveness of products and manufacturers’ requisite participation in the FDA’s approval process. *Id.* at 27.

The Future of Enforcement

The long-term impact of the *Caronia* decision will depend in large measure on the government’s response to an appellate court’s rejection of its prosecutorial theory. As an initial matter, the Department of Justice (DOJ) must determine whether to seek *en banc* review or file a cert petition with the Supreme Court. The *Caronia* decision calls into question the legal theories that DOJ has relied upon for years to extract huge monetary penalties and impose a “compliance regime” focused on these theories. Will DOJ appeal to the First Amendment-friendly Supreme Court? Or does DOJ let the decision stand, creating unfavorable law in the Second Circuit and follow a policy of non-acquiescence in other Circuits?

Beyond DOJ’s procedural response to the *Caronia* decision, the immediate question is how this opinion will impact the government’s investigations of FDA-regulated industry. The opinion may curtail certain off-label prosecutions, but it may also have the less dramatic result of simply reshaping the way the DOJ develops such cases. Going forward, DOJ is likely to look for and focus on the dissemination of false or misleading information or the withholding or concealment of information relevant to the off-label use that is being promoted (*e.g.*, adverse safety information), which would not enjoy First Amendment protection. For instance, even in the prosecution of Caronia, Judge Livingston’s dissenting opinion suggests that DOJ could have focused on Caronia’s false statements concerning the safety of Xyrem. Dis. Op. at 7 n.3. Focusing on these aggravating facts also could have the effect of producing more cases that include felony charges, since evidence of false or misleading information also can be used to satisfy the statute’s felony requirement that misbranding occur with the intent to defraud or mislead. In addition, as fewer companies plead guilty to misdemeanor FDCA violations for “simple” off-label promotion, the exclusion risks for corporate executives under the Office of Inspector General’s so-called (b)(15) authority should be reduced. Finally, the Second Circuit’s decision should appreciably reduce the risk of potential fines and penalties in a wide range of off-label promotion cases as the type of promotional activity that can be prosecuted consistent with the First Amendment is greatly reduced.