How Caronia Could Reshape Government Investigations

Law360, New York (January 02, 2013, 12:32 PM ET) -- Truthful, nonmisleading speech promoting the lawful off-label use of an approved drug or device is constitutionally protected.

This belief, long articulated by free speech advocates, many within U.S. Food and Drug Administration-regulated industries, and by physicians, is now the law in the U.S. Court of Appeals for the Second Circuit, which vacated Alfred Caronia's conviction after concluding that it had been based on speech protected by the First Amendment. The court's decision in United States v. Caronia is likely to have myriad consequences, and could reshape the federal government's enforcement efforts, the manner in which physicians and consumers receive information, and the business practices of FDA-regulated industry.

While the full effect of the Caronia decision will play out over time, the central holding in Caronia, that the First Amendment protects truthful, off-label information, may remain contentious as federal prosecutors try to preserve what has been a powerful and profitable enforcement theory facing additional legal challenges.[1]

The basic facts giving rise to the Caronia decision are relatively well known. Alfred Caronia was a sales representative for Orphan Medical (later acquired by Jazz Pharmaceuticals), which manufactured and promoted Xyrem. Xyrem was a schedule II controlled substance, and, during the time period in question, was approved only for cataplexy associated with narcolepsy. The U.S. Department of Justice prosecuted Caronia for promoting Xyrem for nonapproved uses.[2] Caronia was eventually charged with two misdemeanor counts: conspiring to misbrand Xyrem, and misbranding Xyrem. A jury found Caronia guilty of conspiring to misbrand Xyrem, and acquitted him of the underlying misbranding charge. He received a $25 fine, one year of probation and 100 hours of community service.

In vacating Caronia’s conviction, the Second Circuit focused on the government’s theory of liability, as demonstrated by its 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 merely 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.”

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. 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."

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 the Food, Drug and Cosmetic Act's misbranding provisions as criminalizing a pharmaceutical manufacturer's truthful, nonmisleading speech about a drug's off-label use violated the First Amendment.

The court relied on the First Amendment analysis articulated by the U.S. Supreme Court in Sorrell, which was decided after Caronia's trial, in observing that "[c]riminal regulatory schemes, moreover, warrant even more careful scrutiny." 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." "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."

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." 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."

The language of the Second Circuit decision is important to understanding the scope of the opinion. While the appeal involved an individual who had been prosecuted for criminal violations of the FDCA, the decision spoke to both individuals and manufacturers: "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." This broad language, applicable to companies and their employees, should apply equally to truthful speech about the off-label uses of medical devices.

The most immediate impact will likely be in ongoing government investigations. In matters where there has been little or no evidence that the manufacturer or its representatives made false or misleading statements, the government will likely redouble its efforts to locate admissible evidence of false or misleading speech. Without this type of evidence to support a misbranding charge, the government's primary theory of criminal liability, has been removed, and the cases should be closed.

The court's holding that only false or misleading promotion is violative should have the effect of mitigating settlement amounts, since damages would be limited to the subset of off-label sales that are based on alleged false or misleading speech. Finally, the decision should also have a limiting effect on False Claims Act investigations premised on off-label promotional activities. If the purported off-label promotion is not false or misleading, it is difficult to see how a claim resulting from such speech could be "false" under the FCA.

The Caronia decision is a watershed event in many ways. The government's theory of off-label liability deployed for so long and so prominently as part of settlements rather

than in litigation, now has been rejected by an appellate court. Going forward, investigations likely will focus on the distinction between truthful, nonmisleading information and that which is false or misleading. This will form the new battleground between prosecutors and those under investigation. An important component to the government's evaluation will be ensuring that personnel from FDA are involved in evaluating the facts at the preliminary stages so that the associated medical and scientific questions can be examined.

Questions will arise such as: How much disclosure is needed for a truthful statement not to be misleading? Will a truthful statement about a clinical trial, in the course of a brief hallway conversation, be misleading if the conversation does not include a contrary study? At a minimum, the decision should cause federal prosecutors and regulators to pause and consider the public health interest that is served by ensuring the flow of accurate information between manufacturers and the physicians who prescribe drugs and devices for their patients.

In the final analysis, the goal of the Food Drug and Cosmetic Act is designed to protect the public health by ensuring that Americans have access to drugs and medical devices that are safe and effective. Almost all drugs and devices have off-label uses and it is a cornerstone of our health care delivery system that physicians may choose to use products for off-label uses when treating their patients. The Second Circuit's message is that, if the information is truthful and not misleading, the Constitution guarantees the right of anyone, including a sales representative, to deliver that message.

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[1] The government has not sought rehearing en banc by the Second Circuit.

[2] The government also investigated the company and a company-affiliated physician, both of whom eventually entered into settlements.