Politics, Policy & Law

Free speech, in theory

By Steve Usdin
Washington Editor

A federal appeals court’s decision to overturn the criminal conviction of a pharmaceutical salesman for promoting off-label uses of an FDA-approved drug is, at least in the short term, far less consequential than media coverage suggests. But it may signal the agency and Congress will have to accept less FDA regulation of speech.

The U.S. Court of Appeals for the Second Circuit last week ruled in U.S. v. Caronia that the government’s prosecution of Alfred Caronia for statements he made while selling Xyrem sodium oxybate to a physician violated his free speech rights under the First Amendment to the U.S. Constitution.

But companies and individuals who take the decision as a signal that the rules of the road have changed and they are now free to promote off-label indications put themselves in great legal and economic peril, attorneys who helped persuade the court to overturn Caronia’s conviction told BioCentury.

At the same time, the decision by one of the country’s most influential and respected courts to overturn a criminal conviction on First Amendment grounds is persuasive evidence that, in the long term, FDA will have to change some of the assumptions underpinning its regulation of medical products.

FDA, which now has lost a string of First Amendment cases, cannot forever hold on to the notion that it is empowered to prohibit drug companies and their employees from saying things that anyone else is free to say. Sooner or later, according to legal experts, the agency will have to reconcile itself with the idea that industry has the right to truthful, non-misleading speech.

While change is inevitable, the pace of change is uncertain. It is also not clear who will shape that change — FDA employees, judges, or members of Congress.

The case

The Caronia story started in 2005 when Stephen Charno, a physician seeking to lighten his sentence for healthcare fraud, agreed to cooperate with the Department of Justice by soliciting information about off-label uses of pharmaceuticals and helping the government prosecute the resulting cases.

Among other companies, Charno contacted Orphan Medical Inc. about its narcolepsy product, Xyrem. Orphan was acquired by Jazz Pharmaceuticals plc in April 2005.

Charno surreptitiously recorded conversations with Caronia and Peter Gleason, a psychiatrist Orphan had hired to promote Xyrem. Both Caronia and Gleason made statements about uses of Xyrem that had been studied in clinical trials but were not approved.

DoJ separately prosecuted Caronia, Gleason and Jazz for conspiring to introduce a misbranded drug into interstate commerce.

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Jazz settled, pleading guilty in 2007 to one count of felony misbranding and agreeing to pay $20 million over five years. Drug companies virtually always settle misbranding cases because a conviction could lead to the company being excluded from participation in federal healthcare programs such as Medicare.

Gleason pled guilty and was sentenced to one year of probation and a $25 fine.

Caronia contested the case. Federal prosecutors told a jury in the U.S. District Court for the Eastern District of New York that Caronia’s statements to Charno were in themselves evidence of his guilt. The judge supported this interpretation of the law in instructions to the jury.

Caronia was convicted in November 2009 of conspiring to introduce a misbranded drug into interstate commerce and sentenced to one year of probation, 100 hours of community service and a $25 fine.

When Caronia appealed, the Washington Legal Foundation (WLF), a non-profit free market-oriented advocacy and litigation organization, agreed to defend him based on the theory that the government’s case constituted a violation of First Amendment rights to free speech.

The Medical Information Working Group, an informal group of major manufacturers of prescription drugs and medical devices, also submitted a brief supporting Caronia. Working group members who signed on to the case included Allergan Inc., Amgen Inc., Boehringer Ingelheim GmbH, Eli Lilly and Co., GlaxoSmithKline plc, Johnson & Johnson, Novartis AG, Novo Nordisk A/S, Pfizer Inc. and Sanofi.

First Amendment

Last week’s majority decision by the Second Circuit panel slammed down FDA’s and DoJ’s long-standing contention that the Food, Drug & Cosmetic Act (FDCA) makes it illegal for drug companies and their employees to communicate about an off-label use.

Judges Denny Chin and Reena Raggi wrote: “We construe the misbranding provisions of the FDCA as not prohibiting and criminalizing the truthful off-label promotion of FDA-approved prescription drugs.”

The decision added: “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.”

Judges Chin and Raggi stressed the inconsistency between allowing physicians to prescribe drugs off-label and barring companies from discussing such uses.

“As off-label drug use itself is not prohibited, it does not follow that prohibiting the truthful promotion of off-label drug usage by a particular class of speakers would directly further the...
government’s goals of preserving the efficacy and integrity of the FDA’s drug approval process and reducing patient exposure to unsafe and ineffective drugs,” they wrote.

The ruling goes further, asserting it is in the public interest for drug companies to discuss off-label uses with physicians. It states, “prohibiting off-label promotion by a pharmaceutical manufacturer while simultaneously allowing off-label use ‘paternalistically’ interferes with the ability of physicians and patients to receive potentially relevant treatment information; such barriers to information about off-label use could inhibit, to the public’s detriment, informed and intelligent treatment decisions.”

While DoJ argued that it had cited Caronia’s speech as evidence of his intent to violate the law by misbranding a drug, according to Chin and Raggi, the transcript of the trial contradicts this assertion.

They wrote that the “government’s assertion now that it used Caronia’s efforts to promote Xyrem for off-label use only as evidence of intent is simply not true. Even if the government could have used Caronia’s speech as evidence of intent, the district court record clearly shows that the government did not so limit its use of that evidence.”

Chin and Raggi concluded that the “government clearly prosecuted Caronia for his words — for his speech.” They noted the Supreme Court ruled in June 2011 in Sorrell v. IMS Health Inc. that “speech in aid of pharmaceutical marketing” is “protected by the Free Speech Clause of the First Amendment.”

That case involved the use of prescriber databases for marketing.

In a strongly worded dissent, a third Second Circuit judge, Debra Ann Livingston, argued that Chin and Raggi wrongly determined that the government’s prosecution was entirely about speech. Siding with the government, she concluded speech had been cited as evidence of intent.

The FDCA, Livingston wrote, defines drugs based on their intended uses. In vacating Caronia’s conviction, the majority decision “calls into question the very foundations of our century-old system of drug regulation.”

According to Livingston, “Xyrem was ‘misbranded’ — and Caronia could be guilty of conspiring with others to introduce it into interstate commerce in such a state — if the conduct and statements of the persons legally responsible for labeling the drug (or the conduct and statements of their representatives) demonstrated an objective intent that Xyrem be used for off-label purposes.”

Illustrating her disagreement with Chin and Raggi’s contention that Caronia had a First Amendment right to discuss off-label uses for Xyrem, Livingston cited the movie Arsenic and Old Lace. “There might be no law forbidding the consumption of arsenic. But this would not endow Abby and Martha with a First Amendment right to offer arsenic-laced wine to lonely old bachelors with the intent that they drink it,” she wrote.

**Subdued response**

Livingston, along with reports in The New York Times and other newspapers, dramatically exaggerated the impact of the Caronia decision, attorneys who specialize in FDA law told BioCentury.

“The underlying principles [articulated in the Second Circuit decision] are very, very important, and they have been enshrined in a Court of Appeals decision for the first time. But this case won’t bring down the entire FDA regulatory scheme.”
said Coleen Klasmeier, a former attorney at FDA. She heads the food, drug and medical device regulatory practice at Sidley Austin LLP, and represented the Medical Information Working Group in its brief supporting Caronia.

Although the Second Circuit decision was a clear victory for drug companies that are chafing at restrictions on communications about off-label uses — and that have been stung by large settlements negotiated in criminal cases alleging off-label promotion — the issues raised in the case are far from resolved.

“I think it will be a long time before we figure out the true meaning of the case,” said Mary Pendergast, a former FDA deputy commissioner who now is president of Pendergast Consulting.

“On the one hand, it could mean the drug approval system we have isn’t going to be as robust as it has been in the past because it will be easier to sidestep FDA approval for secondary uses,” she told BioCentury. “That puts a burden on the court system to police what companies are saying because it won’t be up FDA to police them.”

“On the other hand,” she added, “you have a well-reasoned dissent.” If the Second Circuit considers the case en banc, “it may take a step back and say that although it isn’t symmetrical that doctors can use a drug off-label but companies can’t promote it, it makes sense for overall drug regulation.”

John Fleder of Hyman, Phelps & McNamara told BioCentury he also advised a circumspect response.

If a biopharma company asked him how to respond to the Caronia decision, the advice he would give is “take a deep breath, this case is not over.” Fleder was responsible for FDA enforcement litigation while a director of DoJ’s Office of Consumer Litigation.

He noted FDA and DoJ have procedural options, including seeking an en banc hearing by the Second Circuit or appealing the case to the Supreme Court.

No celebrations

Richard Samp, chief counsel of WLF, thinks companies will not — and should not — change their marketing practices based on the Caronia decision.

“This has never been about what the law says; it is about what FDA says,” Samp told BioCentury. Regardless of the law, pragmatic biopharma executives will not be eager to test their First Amendment rights in court, he said.

“If FDA sends you a warning letter, the next day your stock is going to go down. What are you going to do if you get that letter, hire [the constitutional lawyer] Floyd Abrams and sue FDA?” Samp said. “No, this is just a letter, you can’t sue.”

Samp led litigation WLF filed in the 1990s that resulted in a sweeping 1999 ruling by the U.S. District Court for the District of Columbia that FDA’s restrictions on dissemination of information about off-label uses violated the First Amendment (see BioCentury, Aug. 2, 1999).

Caronia “doesn’t change anything from the victory we won 12 years ago, except it is the Second Circuit and that’s a very prestigious court,” Samp said. “Companies thought in the past they had First Amendment rights and the result has been they paid very large fines” as a result of settlement agreements.

Klasmeier voiced a similar message. She said her advice to biopharma clients is “you need to ratchet up your level of compliance and scrutiny of compliance because it is after something like this that people get complacent.”

After the WLF decision in 1999, she noted, “everyone started celebrating, and just after that we had massive off-label settlements.”

Even if Caronia withstands legal challenges, Klasmeier predicted DoJ will continue to extract large settlements from biopharma companies.

She noted such cases frequently involve admissions of kickbacks, antitrust violations or fraud.

“The government has good arguments on its side,” Samp said. “These settlements are invariably ‘off-label plus,’ e.g., the fees you paid to docs were really kickbacks, the statements you made talked about off-label use and failed to include appropriate disclaimers.”

From FDA’s perspective, “there are a hundred ways you could take the Second Circuit decision and explain it away and continue to do things the way you have been doing them,” he said.

Not a tsunami

For starters, FDA and DoJ may simply conclude they lost the Caronia case because it was poorly argued, and the agency may respond not by changing its policies but rather by adopting smarter legal tactics, according to Klasmeier, Samp and Peter Barton Hutt, who is senior counsel at Covington & Burling LLP and a former FDA chief counsel.

“This is not some tsunami that is going to sweep away all of FDA regulation of off-label use,” Hutt said. “Both the majority and dissent indicated that if FDA had litigated the case right, they might have won.”

FDA and DoJ “made a terrible mistake in continually saying any off-label speech is per se illegal; that leads right into the First Amendment,” he said.

Hutt predicted FDA and DoJ will find a way to live with the Second Circuit’s ruling and are unlikely to take Caronia to the Supreme Court. “If I were chief counsel, I would not go anywhere near the Supreme Court” with this case, he said.

Instead, Hutt said, he would read it in a “very narrow way” and revise how he enforced the law.

The Supreme Court is extraordinarily hospitable to the First Amendment and inhospitable to restrictions on the First Amendment,” he noted.

All three Second Circuit judges also left open the possibility that systematic “off-label promotion — not a single discussion by a single employee — would signal a new intended use for the drug, which in turn requires adequate directions for use, and the failure to have those adequate directions for use is misbranding,” Hutt added.

Whether that interpretation would survive a First Amendment challenge “is the billion dollar question,” and the Caronia case doesn’t answer it, he said.

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Losing streak

While Caronia isn’t a green light to promote off-label uses, it is nonetheless an important milestone, Hutt and other FDA attorneys told BioCentury.

“This is the ninth straight case FDA has lost involving the First Amendment,” Hutt said. “The agency should worry about its credibility in the courts. You don’t want to get yourself in a position where you lose, lose, lose.”

FDA could shrug off its latest loss, but it shouldn’t, Klasmeier said.

“When is FDA going to wake up and smell the coffee and wrestle with all the First Amendment problems it has across all its areas?” she said. “FDA has never won a First Amendment case; it has managed to extricate itself from some, but it has never won.”

Daniel Kracov, a partner and head of the FDA practice at Arnold & Porter LLP, agreed.

“There is a hundred ways you could take the Second Circuit decision and explain it away,”

Richard Samp,
Washington Legal Foundation

“FDA has tried to hold a line that is increasingly untenable for the last several years and it is now glaringly obvious,” he told BioCentury. “FDA will have to adapt to Sorrell and the Supreme Court’s interpretation of the First Amendment. They can’t say ‘you are a pharma company, and we are going to treat your speech entirely differently.’”

Kracov cited FDA’s December 2011 guidance on responding to unsolicited requests for off-label information as an example of a policy that should be re-worked.

The guidance, he said, requires a doctor who works for a pharma company to refrain from answering questions about off-label uses in front of an audience of other doctors. According to FDA, he said, the doctor must address those questions with individual doctors afterward.

In the long run, FDA will not be able “keep pharma companies from saying things that anyone else can say,” Kracov predicted.

Klasmeier also thinks FDA should undertake a thorough analysis of its legal obligations and of its role in regulating medical products.

“Now is a really good time for FDA to think deep thoughts about how to make the current regulatory scheme more contemporary,” Klasmeier told BioCentury. She suggested FDA should “stop thinking of itself as a censor and start thinking of itself more as a curator of information.”

COMPANIES AND INSTITUTIONS MENTIONED

Allergan Inc. (NYSE:AGN), Irvine, Calif.
Amgen Inc. (NASDAQ:AMGN), Thousand Oaks, Calif.
Boehringer Ingelheim GmbH, Ingelheim, Germany
Eli Lilly and Co. (NYSE:LLY), Indianapolis, Ind.
GlaxoSmithKline plc (LSE:GSK; NYSE:GSK), London, U.K.
Jazz Pharmaceuticals plc (NASDAQ:JAZZ), Dublin, Ireland
Johnson & Johnson (NYSE:JNJ), New Brunswick, N.J.
Novartis AG (NYSE:NVS; SIX:NOVN), Basel, Switzerland
Novo Nordisk A/S (CSE:NVO; NYSE:NVO), Bagsvaerd, Denmark
Pendergast Consulting, Washington, D.C.
Pfizer Inc. (NYSE:PFE), New York, N.Y.
Sanofi (Euronext:SAN; NYSE:SNY), Paris, France
U.S. Food and Drug Administration (FDA), Silver Spring, Md.
Washington Legal Foundation (WLF), Washington, D.C.

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