IADC COMMITTEE NEWSLETTER

DRUG, DEVICE AND BIOTECHNOLOGY

NOVEMBER 2014

IN THIS ISSUE

Sharon D. Stuart and Jonathan M. Hooks discuss the current landscape for defending off-label marketing claims in civil cases in the wake of U.S. v. Caronia and other recent decisions.

Defending against Off-Label Marketing Claims in Personal Injury Lawsuits

ABOUT THE AUTHORS

Sharon D. Stuart is a partner in the Litigation practice group of Christian & Small LLP in Birmingham, Alabama. Sharon handles product liability cases in the state and federal courts as well as complex business and insurance cases. Sharon is active in the IADC. She can be reached at sdstuart@csattorneys.com.

Jonathan M. Hooks is an associate in the Litigation practice group of Christian & Small LLP in Birmingham, Alabama. Jonathan's practice focuses on defending manufacturers of drugs and medical devices, machinery, appliances, and consumer electronics. He can be reached at jmhooks@csattorneys.com.

ABOUT THE COMMITTEE

The Drug, Device and Biotechnology Committee serves as an educational and networking resource for in-house counsel employed by pharmaceutical, medical device and biotech manufacturers and the outside counsel who serve those companies. The Committee is active in sponsoring major CLE programs at the Annual and Midyear Meetings as well as internal committee programs. The Committee also publishes a monthly newsletter that addresses recent developments and normally contributes two or more articles to the *Defense Counsel Journal* annually. In the future, the Drug, Device and Biotechnology Committee will be focusing on increasing its use of technology to make it an even more valuable resource for its members. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Kara T. Stubbs
Vice Chair of Newsletters
Baker Sterchi Cowden & Rice, L.L.C.
stubbs@bscr-law.com

A medical device manufacturer has just been sued in a personal injury case. Not only does the suit include the usual defect and failure-to-warn claims, it also contains a negligence claim founded on the idea that the manufacturer engaged in "off-label" marketing or promotion of the device, which allegedly led to the plaintiff's injury. The company has no proof to rebut this allegation, other than the word of its sales representatives and the fact it has provided certain brochures to the physician who used the device. While summary judgment is likely on the defect and warnings claims, the company is concerned that the off-label marketing claim may survive such a motion. Is there any way to secure a dispositive ruling on that claim, too?

For years, the law was simple: Off-label marketing is prohibited, and (besides the criminal penalties that can be imposed) proof of such tactics can form the basis of a civil claim for damages. In the 1990s, the law was in flux as a variety of statutes were enacted only to later sunset, and as the FDA issued guidance papers that were later superseded. Recently, however, the FDA has issued a new guidance paper that aids in understanding at least one aspect of off-label marketing. Moreover, recent decisions have suggested a number of defenses a civil defendant might be able to use to survive such a claim and possibly eliminate it in the dispositive-motions stage.

Legal Framework for Off-Label Marketing Allegations

Neither the Food, Drug and Cosmetic Act ("FDCA" or "the Act"), nor the Food and Drug Administration ("FDA") regulations implementing the Act, expressly prohibit or even define "off-label marketing" or "off-label promotion." Rather, those terms are shorthand descriptors for the following general legal context.

Upon submission of proper paperwork, the FDA approves or clears a device for one or more "intended uses." An intended use is the device's general purpose or function,[1] and is critically important to the FDA's determination of what sort of directions must be spelled out in the device's labeling.[2] Those directions for use are deemed "adequate" for a layman[3], and in the case of a prescription product, they are sufficient for a physician[4], so long as the appropriate person can use the device safely and for the intended use. Where

[1] The device's "intended use" includes its "indications for use," which is the specific application to which the manufacturer expects the device will be put. Food & Drug Administration, Guidance for Industry and Food and Drug Administration Staff, *The 510(k) Program: Evaluating Substantial Equivalence in Premarket Notifications* (July 28, 2014). *See also* 21 C.F.R. § 814.20(b)(3)(i) (defining "indications for use" in a new device premarket approval application as "[a] general description of the disease or condition the device will diagnose, treat, prevent, cure, or mitigate, including a description of the patient population for which the device is intended.") For example, a scalpel's intended use may be to cut body tissue, while its indication for use might be specifically for cutting cardiac tissue.

[2] *See* 21 U.S.C. § 352(f).

[3] 21 C.F.R. § 801.5.

[4] 21 C.F.R. § 801.109(c).

the label does not include proper directions for use, however, the device is "misbranded" and in violation of the FDCA.[5] When one markets a device for a use that is not "intended," then, the label lacks appropriate directions for use and is misbranded.

What Exactly Is Off-Label Marketing?

The problem comes in identifying exactly when a device has been marketed for a use that is not intended, and thus when the device has actually been marketed for an "off-label" use. FDA's regulation provides that it will look to the manufacturer's "objective" intended use of the device, which will be ascertained through evidence such as "advertising matter," "oral or written statements," and "circumstances" suggesting that the device is "offered and used for a purpose for which it is neither labeled nor advertised."[6]

Obviously a manufacturer's or representative's oral and written statements, if memorialized, can serve as evidence of an off-label intended use. The same goes for overt advertising material, such as, for instance, a brochure expressly pitching a device for a non-indicated use. Among many possible gray areas, the FDA has addressed two situations that are relatively common problem areas.

The FDA has essentially "carved out" objective medical and scientific evidence as information that will not be treated as evidence of off-label marketing.[7] That exception is fairly specific, however. Scientific or medical journal articles lauding off-label uses should be published by an organization having an editorial board that uses independent experts and a peer-review process to select articles, not edited or significantly influenced by a manufacturer.[8] Those articles should fully disclose any conflicts of interest or biases, and should not be written or published for or at the request of the manufacturer.[9] The publication should not be funded, partially or wholly, by the manufacturer.[10] The publication should be generally available as one would normally obtain objective medical literature, as opposed to being primarily available through the manufacturer.[11] FDA's guidance is intended to prevent a manufacturer from rigging the process by paying for favorable articles that appear in pseudo-official journals.

The FDA has also laid down certain ground rules for distribution of a favorable article. The article must be reprinted in its entirety, should not be marked or highlighted by the manufacturer, and should be presented outside the context of a "promotional"

[5] 21 U.S.C. §§ 331(a) & 352(f).
[6] 21 C.F.R. § 801.4.
[7] Food & Drug Administration, *Guidance for Industry, Good Reprint Practices for the Distribution of Medical Journal Articles and Medical or Scientific Reference Publications on Unapproved New Uses of Approved Drugs and Approved or Cleared Medical Devices* (January 2009). Note, however, that the FDA's guidance documents do not purport to establish "legally enforceable rights or responsibilities," but simply to offer "the Agency's ***current thinking*** on a topic." *Id.* (emphasis added.)
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

event.[12] In addition, the FDA requires the article to be accompanied by a panoply of other disclosures, including a comprehensive bibliography of other publications discussing "adequate and well-controlled" clinical studies about the device, and a representative publication, if one exists, that reaches contrary or different conclusions than that of the reprinted article.[13] Lastly, the reprint should be accompanied by a "prominently displayed and permanently affixed statement" disclosing (1) that the use described is not an approved/cleared use, (2) the manufacturer's interest in the device, (3) any author's financial interest in the product, (4) any known source that funded the study, and (5) any known significant risks or safety concerns associated with the use discussed in the article.[14]

Neither aspect of the FDA's "guidance document" constitutes a set of requirements that a manufacturer must follow to avoid prosecution. Rather, the FDA has repeatedly characterized its guidance documents as establishing a "safe harbor" that a manufacturer can follow to justify itself in the face of possible prosecution.[15] Thus, manufacturers should pay close attention to the guidance documents because they provide a roadmap for how to supply scientific documents to physicians without being successfully accused of off-label marketing or promotion.

How to Defend Against an Off-Label Claim?

The FDA's "safe harbor" argument is fascinating because it appears to have been a tactical maneuver to moot a controversy that would have otherwise struck down the FDA's entire off-label framework. In *Washington Legal Foundation v. Friedman*,[16] the District Court for the District of Columbia held unconstitutional an earlier iteration of FDA Guidance Documents on the basis that the FDA's approach was "more extensive than necessary to serve the asserted government interest" and "unduly burden[ed] important speech."[17] That order was later vacated on mootness grounds, but without criticizing or rejecting the district court's reasoning.[18]

Friedman is not an isolated incident. In recent years, both civil and criminal decisions have begun to look anew at the FDA's off-label marketing prohibitions. Those cases have yielded inconsistent results, but some of the opinions have questioned long-held assumptions about the regulatory framework. One key theme, seen in *Friedman* and other cases, is that the First Amendment protects marketing and promotion—even for an off-label use—as commercial speech. This

[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Cornett v. Johnson & Johnson*, 211 N.J. 362, 382 & n.7 (2012) (addressing the 2009 Guidance Document); *Washington Legal Found. v. Henney*, 202 F.3d 331, 335 n.5 (2d Cir. 2000) (addressing an earlier iteration of Guidance Documents, which the FDA conceded "established a procedure for manufacturers who distribute certain materials regarding off-label uses in such a way that they will not be used as evidence against them in a prosecution under the misbranding provisions.")
[16] 13 F. Supp. 2d 51 (D. D.C. 1998).
[17] *Friedman*, *supra* at 74.
[18] *Henney*, *supra* at 335-37 & n.7.

argument has force not only in defending against prosecutions, but even in the civil context in responding to an off-label marketing claim in a lawsuit.[19]

For nearly 35 years, the Supreme Court's *Central Hudson*[20] test has dominated commercial speech claims. Under *Central Hudson*, whether commercial speech is protected depends on four factors: (1) is the speech misleading or does it concern unlawful activity; (2) is the government's interest in regulating speech "substantial"; (3) does the regulation "directly advance" the government's interest," as opposed to providing only ineffective or remote support for that purpose; and (4) is the regulation narrowly drawn to advance the government's purpose without adding excessive restrictions?[21] Obviously the last three factors are familiar formulae for describing the scrutiny of state action, but in practice, the exact level of scrutiny required by *Central Hudson* has always been somewhat "up in the air."

In 2011, the Supreme Court seems to have simplified the analysis in a way that significantly weakens off-label marketing claims. In *Sorrell v. IMS Health, Inc.*,[22] the Supreme Court held that "[s]peech in aid of pharmaceutical marketing … is a form of expression protected by the Free Speech Clause of the First Amendment."[23] The *Sorrell* Court explained that "[i]n the ordinary case, it is ***all but dispositive*** to conclude that a law is content-based."[24] This language appears to have effectively circumvented the whole issue of scrutiny, placing the focus on the simpler question of whether the speaker is prohibited from discussing certain topics, such as off-label uses of medicines or devices.

Shortly after *Sorrell*, in *United States v. Caronia*,[25] the Second Circuit tackled the specific issue of off-label marketing and promotion. There, a sales representative was caught promoting the off-label use of a medication called Xyrem[26] and prosecuted. In reviewing his conviction, the Second Circuit explained that the FDA is permitted to view off-label promotional statements as ***evidence*** of an intended use, and thus evidence of misbranding.[27] However, the *Caronia* court noted, the FDA was essentially "skipping a step" and had "construed the FDCA to prohibit promotional speech ***as misbranding itself***."[28]

---

[19] By entering and enforcing a civil judgment, a judicial forum would constitute a state actor and its action could justify a civil defendant's invocation of constitutional safeguards. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 20 (U.S. 1948) ("State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.")

[20] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[21] *Central Hudson*, 447 U.S. at 565.

[22] 131 S. Ct. 2653 (2011).

[23] *Id.* at 2659.

[24] *Id.* at 2667 (emphasis added).

[25] 703 F.3d 149 (2d Cir. 2012).

[26] Although *Caronia* involved a drug rather than a medical device, the analysis is not materially different.

[27] 703 F.3d at 154-55.

[28] *Id.* at 155.

Because physicians are permitted to prescribe drugs for off-label applications, the Court explained, prohibiting truthful[29] speech about those applications did not directly advance the government's goals of preserving the FDA's processes and improving patient safety.[30] The Court also observed that the government's regulations were too excessive, and that less restrictive means could be employed to address the perceived threat of off-label promotion.[31] The Second Circuit vacated the conviction, but in doing so, the court expressly declined to adopt the government's interpretation of FDA regulations.[32] Instead, the *Caronia* court "construe[d] the misbranding provisions of the FDCA as ***not*** prohibiting and criminalizing the truthful off-label promotion of FDA-approved prescription drugs."[33]

Caronia is a relatively new decision, with only a handful of cases referencing it. Few have addressed the larger issue, although in at least one, *Dawson v. Medtronic, Inc.*,[34] the *Caronia* framework was adopted by the district court, which was "not convinced that off-label promotion violates the FDCA." Likewise, the district court in *Schuler v. Medtronic, Inc.*,[35] concluded that "federal law does not bar off-label promotion."[36] Some courts in civil cases have distinguished *Caronia* because it was a criminal case.[37]

Caronia appears to have value in at least two ways. First, it offers a textually-faithful unpacking of the FDCA and of the FDA's own regulations. The insight of that case is the court's recognition of the FDA's interpretive looseness. If promotional statements in support of off-label uses constitute evidence of misbranding, what exactly would be evidence that the device is ***not*** misbranded? To date, no published decisions seem to have answered that question, but one can expect courts to wrestle with that issue in due course.

Second, while *Caronia* purposefully avoided a holding of constitutional proportions, the Second Circuit only did so after telegraphing what the holding would be if it were required. Device counsel facing an off-label marketing/promotion claim, even in a civil suit, should preserve and argue free speech defenses focusing upon the content-based nature of the FDCA and FDA regulations on misbranding.

Counsel defending civil claims involving an allegation of off-label marketing or promotion of a medical device should review *Sorrell*, *Caronia*, and the cases discussing those precedents to determine whether their jurisdiction has taken a position on this

[29] The decision in *Caronia* expressly noted that it was not dealing with allegations of false or misleading marketing or promotional statements. Rather, the court presumed that the speech at issue was entirely truthful. 703 F. 3d at 168-69.
[30] 703 F.3d at 166-67.
[31] *Id.* at 167-68.
[32] *Id.* at 162.
[33] *Id.* at 168-69.
[34] 2013 U.S. Dist. LEXIS 112877 (D. S.C. 2013).
[35] 2014 U.S. Dist. LEXIS 36960(C.D. Cal. 2014).
[36] *Schuler*, 2014 U.S. Dist. LEXIS 36960, at *3.
[37] *Blankenship v. Medtronic, Inc.*, 2014 U.S. Dist. LEXIS 39063 at **14-15 (E.D. Mo. 2014); *McDonald-Lerner v. Neurocare Assocs., P.A.*, 2013 Md. Cir. Ct. LEXIS 6, at *23 (Montgomery County, Md. 2013).

evolving issue. A working knowledge of these recent decisions may enable one to see defenses and arguments to help win the case.

Past Committee Newsletters

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

JULY 2014
United States Supreme Court Denies Certiorari to Medtronic
Moses Kim and Brett Tarver

MAY 2014
Developing a Regulatory Story That Counts
Mollie F. Benedict, Andrea Przybysz and Corena Larimer

APRIL 2014
Canada Introduces Draft Legislation to Strengthen Regulation of Dangerous Drugs and Devices
Steven F. Rosenhek

MARCH 2014
Assessing the Post-Riegel Landscape: The Effect of Sales Representatives' Actions on Preemption Analyses
Ken Baum, Jen Greenblatt and Julie Cantor

FEBRUARY 2014
Overcoming Tensions between Drug/Device Defendants and Treating Physicians
Pamela Yates, Walter "Billy" Bates, Allison Adams, and Evan Anziska

JANUARY 2014
The Single Bullet Theory: Multi-Plaintiff Complaints and Diversity Jurisdiction
Erik W. Legg

DECEMBER 2013
Pennsylvania Superior Court Decision Toughens Standard for Admissibility of Expert Testimony
William V. Essig

NOVEMBER 2013
Update on Liability of Brand-Name Drug Manufacturers for Injuries Caused by Generic Products after Weeks
Lauren Colton and Lindsay S. Goldberg

OCTOBER 2013
Does My Mobile App Need FDA Approval? The FDA Weighs In
Ginger Appleberry and Catherine Corless

SEPTEMBER 2013
Do "Twiqbal" Standards Apply to a State Court Complaint That Has Been Removed to Federal Court?
James F. Rogers and David L. Paavola