

First Amendment Smorgasbord

Friday, December 16, 2011

While we're all waiting for the Second Circuit to decide the Caronia case – and, we hope, hold that the FDA's prohibiting the truthful promotion of off-label use violates the First Amendment – we'd like to pass along some light reading. The [current issue of Health Matrix](#), published by the Case Western Reserve Law School, is mostly a symposium on commercial speech and public health. It contains six articles that provide a variety of viewpoints on the First Amendment and health-related communications generally, and off-label use in particular.

Here are some brief descriptions to whet your appetite:

- Beales, “Health Related Claims, the Market for Information, & the First Amendment,” [21 Health Matrix 7](#) (2011). A former FTC consumer regulator, argues for surprising limited regulation of commercial speech. More information is better than less, and regulation should be viewed skeptically lest it backfire.
- Noah, “Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA),” [21 Health Matrix 31](#) (2011). We could read Lars Noah all day on any number of topics (his recent article on Conte liability is a gem). Well, here's sixty more pages. He thinks the FDA's on the path to perdition, and that regulation of off-label promotion needs to be a lot more nuanced than the Agency's current meat axe approach.
- Gilhooley, “Commercial Speech, Drugs, Promotion & A Tailored Advertisement Moratorium,” [21 Health Matrix 97](#) (2011). She doesn't like DTC advertising, so she would be happy to see Congress shut it down. Back-handedly, she seems to admit that she has a lousy legal hand at the moment, so she wants the Court to back away from its decision in Thompson v. Western States Medical Center, 535 U.S. 357 (2002).
- Masoudi & Pruitt, “The Food & Drug Administration v. The First Amendment: A Survey of Recent FDA Enforcement,” [21 Health Matrix 111](#) (2011). Masoudi worked in the belly of the beast, but seems to have thought better of it. The article posits that the FDA's enforcement posture is both substantively unconstitutional and chills free speech. It takes one to know one.

- Conko, “Hidden Truth: The Perils and Protection of Off-Label Drug & Medical Device Promotion,” [21 Health Matrix 149](#) (2011). This one’s probably closest to our views, since it: (a) recognizes the health benefits of off-label use and (b) emphasizes less restrictive alternatives to the FDA’s flat ban.
- Yosifon, “Discourse Norms as Default Rules: Structuring Corporate Speech to Multiple Stakeholders,” [21 Health Matrix 189](#) (2011). The other side will like this, since he views corporate speech as a “problem,” and somehow consumers become “stakeholders” just by existing. This view can’t really be reconciled with the last 30 years of First Amendment jurisprudence, so Yosifon doesn’t much bother to try.

Enjoy.