

August 12, 2015

## **Amarin Court Holds Truthful Off-Label Speech Entitled to First Amendment Protection**

### **Overview**

On August 7, 2015, the U.S. District Court for the Southern District of New York issued an [opinion](#) in *Amarin Pharma, Inc. v. FDA*, granting Amarin preliminary relief to engage in truthful and non-misleading off-label speech about its triglyceride-lowering drug, Vascepa. The court ruled that Amarin may make certain truthful statements about Vascepa's potential benefits for patients with "persistently high triglycerides," despite the drug lacking FDA approval for that use. Relying on the 2012 Second Circuit decision in *United States v. Caronia*, the court determined that Amarin's proposed off-label speech was constitutionally protected and could not, on its own, form the basis of a misbranding charge.

### **Background**

In 2012, FDA approved Vascepa, an omega-3 fatty acid, for the treatment of adult patients with triglyceride levels above 500 mg/dL of blood (i.e., "severe hypertriglyceridemia")—a patient population at increased risk of pancreatitis and cardiovascular disease. Amarin subsequently sought an indication for Vascepa to treat patients with triglyceride levels between 200 and 499 mg/dL despite being on statin therapy (i.e., "persistently high triglycerides"). Amarin's clinical research demonstrated with statistical significance that Vascepa was safe and effective in reducing persistently high triglyceride levels, but FDA determined, based on the results of clinical trials of other drugs, that lowering triglyceride levels was not an established surrogate for reducing cardiovascular risk in this patient population. FDA accordingly denied Amarin's supplemental application and made clear in a Complete Response Letter ("CRL") that it would consider Vascepa to be misbranded if Amarin marketed the drug for patients with persistently high triglycerides without approval.

After receiving the CRL, Amarin filed its complaint in the district court and subsequently moved for a preliminary declaration from the court and a preliminary injunction, arguing that the First Amendment permits it to engage in truthful and non-misleading speech about the off-label use of Vascepa. Amarin sought protection to make "carefully-circumscribed, truthful, and scientifically-accurate statements" when promoting the potential effects of Vascepa on coronary heart disease in patients with persistently high triglycerides and for providing doctors with peer-reviewed scientific publications about the off-label use. The Company also noted that FDA currently permits manufacturers of dietary supplements containing a chemically identical omega-3 fatty acid to make a qualified health claim about coronary artery disease similar to the one proposed by Amarin. The Medical Information Working Group, co-represented by Ropes & Gray, filed an *amicus* brief in support of Amarin.

### **Decision**

Granting Amarin's request for preliminary relief, the court declared that (1) Amarin may engage in truthful and non-misleading speech promoting the off-label use of Vascepa to treat patients with persistently high triglycerides, and under *Caronia*, such speech may not form the basis of a prosecution for misbranding, and (2) based on the information presently known, the combination of statements and disclosures that Amarin proposes to make to doctors, as modified by the court, are truthful and non-misleading.

### Caronia Broadly Protects Truthful and Non-Misleading Speech

The court relied extensively on the *Caronia* decision to support its ruling. In 2012, the Second Circuit vacated a conviction of a drug manufacturer's sales representative for conspiracy to misbrand the drug Xyrem by promoting it for unapproved uses. The Second Circuit held that a drug manufacturer's speech promoting an off-label use is constitutionally protected commercial speech, and that the Federal Food, Drug, and Cosmetic Act ("FFDCA") would "run afoul of the First Amendment" if it were construed to criminalize the mere promotion of a drug's off-label use by a manufacturer. FDA argued that *Caronia* was a fact-bound decision that turned on the particular jury instructions given in that case, and that it did not generally preclude the government from bringing a misbranding action for truthful and non-misleading statements promoting an off-label use. Ruling on Amarin's motion for preliminary relief, the court disagreed. In particular, the court held that *Caronia* was "categorical, rather than case-specific" and that the First Amendment protects *all* truthful and non-misleading off-label speech, including proactive, promotional statements made by a pharmaceutical manufacturer.

### No Protection for False or Misleading Speech

Although the court found that Amarin's truthful and non-misleading speech is protected and may not serve as the basis for a misbranding charge, it noted that the government's authority to prosecute manufacturers for off-label marketing remains intact against false or misleading speech, which is not entitled to First Amendment protection. The court carefully reviewed the promotional statements that Amarin proposed to make, including the contextual information and disclosures that Amarin proposed to accompany those statements, and, with certain modifications identified by the court, found them to be protected because they were truthful and non-misleading. In so doing, the court noted that the "unusual and extensive regulatory history" relating to Vascepa made it possible to determine the truthfulness of Amarin's proposed statements at this early stage of litigation.

### When Speech Can Be Evidence of Intended Use

The court acknowledged that although truthful and non-misleading off-label speech, without more, cannot form the basis for an FFDCA violation, a manufacturer's speech may serve as evidence of intent where the conduct in question is not purely speech-based. For example, if a manufacturer paid doctors or bought them resort vacations to reward off-label prescribing, the manufacturer's truthful statements promoting off-label use could be admissible to prove that its intent in paying the doctors had been to promote off-label (as opposed to on-label) use.

### **Implications**

The ultimate implications for FDA-regulated industry remain to be seen. For the moment, the case remains the opinion of one district court, and the government has 60 days within which to appeal to the Second Circuit. Although the court correctly rejected the government's assertion that protecting truthful and non-misleading off-label speech would constitute a "frontal assault" on the FFDCA's new drug approval requirements, the rationale of the *Amarin* court does call into question a number of key features of FDA's regulations and policies governing manufacturer speech—particularly as they relate to purported distinctions between proactive promotional statements and responses to unsolicited requests, or promotional communications and scientific exchange. Thus, at a minimum, we expect the decision will encourage FDA to expedite review of its promotional policies to align them with First Amendment principles. The decision should also provide helpful support to pharmaceutical and medical device manufacturers in cases where the government seeks to enforce the FFDCA based on allegations of truthful and non-misleading off-label promotion.

If you have questions about the implications of the *Amarin* decision, please consult your usual Ropes & Gray advisor.