

**The Changing Landscape of the Commercial Speech Doctrine and FDA Advertising  
Regulation: Off-Label Marketing in the Wake of *Sorrell v. IMS***  
by Kyle Thomson

**Table of Contents**

<b>I. Introduction: FDA Marketing Restrictions and the First Amendment.....</b>	<b>1</b>
<b>II. FDA Regulation: Drug Labeling and Enforcement.....</b>	<b>4</b>
<b>A. Regulating Pharmaceutical Companies: The Approval Process and the Meaning of a Drug “Label” .....</b>	<b>4</b>
<b>B. Drug Manufacturers’ Liability for Off-Label Promotion: The Expanding Role of the False Claims Act in Off-Label Marketing Enforcement.....</b>	<b>7</b>
<b>C. Leaving the Medical Profession Alone: Off-Label Prescription Regulation and Practice .....</b>	<b>10</b>
<b>III. The Commercial Speech Doctrine and Off-Label Promotion.....</b>	<b>14</b>
<b>A. The Commercial Speech Doctrine and the <i>Central Hudson</i> Test.....</b>	<b>14</b>
<b>B. Traditional Application of the <i>Central Hudson</i> Test in Challenges to FDA Advertising Restrictions .....</b>	<b>15</b>
1. <i>Thompson v. Western States Medical Center</i> .....	16
2. <i>Washington Legal Foundation v. Friedman</i> .....	17
3. <i>U.S. v. Caronia</i> and the General Approval of Off-Label Promotion Restrictions.....	19
<b>C. <i>Sorrell v. IMS</i>.....</b>	<b>20</b>
<b>D. <i>Citizens United v. Federal Election Commission</i>.....</b>	<b>25</b>
<b>IV. The Implications of Recent Commercial Speech Jurisprudence and Potential Future Regimes .....</b>	<b>27</b>
<b>A. Allergan’s First Amendment Suit: A Blueprint for Future Challenges .....</b>	<b>30</b>
1. The Facts .....	30
2. Evaluating Allergan’s Claims.....	32
3. The Shape of Things to Come: What Might a Future Off-Label Promotion Regulatory Regime Look Like?.....	35
<b>V. Conclusion: The Uncertain Future of Off-Label Marketing Restrictions .....</b>	<b>37</b>

## I. Introduction: FDA Marketing Restrictions and the First Amendment

On Wednesday September 1, 2010, the pharmaceutical manufacturer Allergan Inc. agreed to pay \$600 million to resolve civil and criminal allegations that it had illegally promoted the drug Botox.<sup>1</sup> Such settlements have become so commonplace in the pharmaceutical marketplace today that they are essentially a cost of doing business.<sup>2</sup> Indeed, the Allergan settlement in particular was anything but a shock. While Allergan sued the Food and Drug Administration (FDA), claiming that it had a right to make off-label claims about Botox, the suit proved to be one step in the larger marketing scheme for Botox.<sup>3</sup> Just days after announcing this settlement, Allergan released positive results from a Phase-III study showing that Botox was indeed effective in treating patients with migraines.<sup>4</sup> A month after the settlement, the FDA approved an amendment to the Botox's label, making the same advertising practices for which Allergan just paid \$600 million in fines completely legitimate.<sup>5</sup> This may seem like an exorbitant amount of money to pay for promoting a drug treatment that, ultimately, was deemed safe and effective, but it is hardly an anomaly in the current regulatory regime.

---

<sup>1</sup> Press Release, Department of Justice, Office of Public Affairs, Allergan Agrees to Plead Guilty and Pay \$600 Million to Resolve Allegations of Off-Label Promotion of Botox (Sept. 1, 2010), available at <http://www.justice.gov/opa/pr/2010/September/10-civ-988.html>.

<sup>2</sup> Jim Edwards, *Crime Pays: How Allergan's Illegal Botox Promotion is Just the Cost of Doing Business*, CBSNEWS (Sept. 9, 2010), [http://www.cbsnews.com/8301-505123\\_162-42845709/crime-pays-how-allergans-illegal-botox-promotion-is-just-the-cost-of-doing-business/](http://www.cbsnews.com/8301-505123_162-42845709/crime-pays-how-allergans-illegal-botox-promotion-is-just-the-cost-of-doing-business/).

<sup>3</sup> Plaintiff's Memorandum of Law in Support of Cross-Motion for Summary Judgment and in Opposition to Motion to Dismiss or for Summary Judgment, Allergan, Inc. v. United States, No. 09-1879 (D.D.C. Jan. 15, 2010), ECF No. 28-1, available at <http://www.vernialaw.com/FCA%20Documents/Pleadings/Allergan%20v%20FDA/Allergan%20Mot%20for%20SJ.pdf> [hereinafter "Allergan Complaint"].

<sup>4</sup> Press Release, Allergan, Allergan Announces Positive Top-Line Results from Phase III BOTOX(R) Headache Program (Sept. 11, 2008), available at <http://agn.client.shareholder.com/releasedetail.cfm?ReleaseID=333850>.

<sup>5</sup> News Release, U.S. Food & Drug Administration, FDA approves Botox to treat chronic migraine (Oct. 15, 2010), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm229782.htm>.

This begs the question: why were Allergan's advertising practices illegal in the first place? After all, Botox was already approved for use, was widely sold on the market, and physicians had found it effective for the treatment of headache and migraines. The answer lies in the FDA's drug approval process and where it draws the line between acceptable marketing practices and illegal "off-label" marketing. Pharmaceutical companies may only advertise a drug for the specific purpose it has been approved through the review process with the FDA.<sup>6</sup> While other uses for the drug may become apparent through physicians' use, the drug manufacturer is restricted in promoting such use unless and until it receives full approval from the FDA for that specific use.

The restriction on off-label marketing has become more controversial in recent years, subject to widespread academic and industry criticism.<sup>7</sup> No challenge to the FDA's restrictions has been successful, however, recent developments in First Amendment jurisprudence suggest that the Supreme Court may be open to striking them down, at least insofar as they apply to advertising to physicians and other medical professionals, were the right challenge to reach the Court. The 2011 ruling in *Sorrell v. IMS* demonstrated the Court's readiness to expand

---

<sup>6</sup> See generally Food, Drug, and Cosmetic Act, 21 U.S.C § 355 (2006).

<sup>7</sup> See generally, e.g., Briana R. Barron, Comment, *Silent Warning: The FDA's Ban on Off-Label Speech: is it Protecting Our Safety?*, 94 MARQ. L. REV. 983 (2011); A. Elizabeth Blackwell & James M. Beck, *Drug Manufacturers' First Amendment Right to Advertise and Promote Their Products for Off-Label Use: Avoiding a Pyrrhic Victory*, 58 FOOD & DRUG L.J. 429 (2003); Ralph F. Hall & Elizabeth S. Sobotka, *Inconsistent Government Policies: Why FDA Off-Label Regulation Cannot Survive First Amendment Review Under Greater New Orleans*, 62 FOOD & DRUG L.J. 1 (2007); Coleen Klasmeier & Martin H. Redish, *Off-Label Prescription Advertising, the FDA and the First Amendment: A Study in the Values of Commercial Speech Protection*, 37 AM. J. L. & MED. 315 (2011); Lars Noah, *Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)*, 21 Health Matrix 31 (2011); John E. Osborn, *Can I Tell You the Truth? A Comparative Perspective on Regulating Off-Label Scientific and Medical Information?*, 10 YALE J. HEALTH POL'Y L. & ETHICS 299, 301 (2010).

heightened judicial scrutiny to restrictions on commercial speech.<sup>8</sup> *Sorrell* held that a state law prohibiting pharmaceutical manufacturers from using information on physician prescribing practices to tailor their advertising to the physician violated the First Amendment.<sup>9</sup> While *Sorrell* did not directly concern off-label marketing restrictions, it may have a significant impact on how the Court ultimately views a constitutional challenge to the current regulatory regime. Importantly, *Sorrell* comes on the heels of the Court's decision in *Citizens United v. Federal Election Commission*, another landmark case redefining the government's ability to restrict purely corporate speech in the electoral context.<sup>10</sup> Although *Citizens United* dealt with election contributions and political speech, traditionally a sacrosanct function of First Amendment discourse, its analysis, combined with the broadening of scrutiny standards in *Sorrell*, implies that where an agency's restriction of speech is incoherent and otherwise acts as a prior restraint, it is unconstitutional.<sup>11</sup> Even if the Court declines to apply the doctrine of prior restraint to commercial speech,<sup>12</sup> the Court's increasing tendency to view *all* restrictions on speech, regardless of the speaker or commercial content, skeptically could certainly have implications for the continuing vitality of the FDA's regulation of off-label promotion.

This paper discusses the FDA's drug labeling regulatory regime, including restrictions on promoting drugs for uses other than those explicitly approved by the FDA, and the current

---

<sup>8</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011); John N. Joseph et. al., *Is Sorrell the Death Knell for FDA's Off-Label Marketing Restrictions?*, 5 J. HEALTH & LIFE SCI. L. 1, 4 (2012). *But see* *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010) (upholding a Maine law allowing license drug prescribers to withhold prescriber-identifying data used by pharmaceutical manufacturers for detailing); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 2360 (2006) (upholding a statute mandating pharmacy benefit managers disclose conflicts of interests in certain financial arrangements with pharmaceutical manufacturers and other third parties against a First Amendment claim).

<sup>9</sup> The advertising practice is known as "detailing," or the face-to-face promotion of a drug by a marketing representative to a physician. Joseph et. al, *supra* note 8, at 4 n. 4.

<sup>10</sup> *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

<sup>11</sup> *Id.* at 896.

<sup>12</sup> *See infra*, part III.D., and discussion therein.

developments in First Amendment jurisprudence that may lead to a drastic departure from the FDA's current marketing restriction practices in the near future. Part II of this paper outlines the drug approval process and defines the contours of a drug's "label." This includes a definition of off-label marketing and a discussion of the potential consequences of "misbranding." Part III surveys the commercial speech doctrine and how recent developments in First Amendment jurisprudence, including *IMS v. Sorrell* and *Citizens United*, have altered the traditional understanding of acceptable restrictions on commercial communications. This section will compare the rationales used in past cases upholding FDA advertising restrictions and argue that *Sorrell* implies these rationales will no longer be sufficient, at least insofar as the marketing restrictions apply to communications directed at physicians rather than the lay public. Part IV applies these developments by using the Allergan complaint as a roadmap to a potential challenge, and suggests what a potential future regime might look like if the FDA's off-label regulations are overturned.

## **II. FDA Regulation: Drug Labeling and Enforcement**

### **A. Regulating Pharmaceutical Companies: The Approval Process and the Meaning of a Drug "Label"**

The FDA extensively regulates the manufacture and sale of prescription drugs and medical devices pursuant to the Food, Drug, and Cosmetic Act (FDCA).<sup>13</sup> Underpinning the entire scheme is a ban on introducing a new drug into interstate commerce unless and until it has been approved by the FDA for a specified use.<sup>14</sup> To gain approval, all new drugs and medical devices must go through extensive clinical and pre-clinical testing in order to be deemed "safe

---

<sup>13</sup> Food, Drug, and Cosmetic Act, 21 U.S.C §§ 301-99 (2006).

<sup>14</sup> *Id.* § 355(a).

and effective.”<sup>15</sup> After development in the laboratory and testing on animals for basic toxicology information, a drug manufacturer may register an Investigational New Drug Application (IND) and begin conducting research on human subjects to confirm the safety and efficacy of the drug.<sup>16</sup>

First, Phase I trials are conducted to determine the maximum dose of the drug that can safely be administered to human subjects.<sup>17</sup> Phase II studies consider the efficacy of the drug in treating the disease or condition it is meant to cure or alleviate.<sup>18</sup> Finally, Phase III trials are meant to confirm Phase II findings and generally “evaluate the overall benefit-risk relationship of the drug.”<sup>19</sup> In the end, the FDA makes a risk-benefit determination as to whether the drug should be allowed on the market. As Aaron Kesselheim explains: “[t]he crux of the decision-making. . . is not simply whether the drug is efficacious or safe enough to be allowed on the

---

<sup>15</sup> *Id.* § 355(a), (b), (j); *see also id.* at § 355(d) (defining the “substantial evidence” standard under which the FDA makes its final determination).

<sup>16</sup> Aaron S. Kesselheim, *Off-Label Drug Use and Promotion: Balancing Public Health Goals and Commercial Speech*, 37 AM. J. L. & MED. 225, 231 (2011) (citing 21 C.F.R. § 312.23(a)(3)(iv)(2004)). The research on human subjects itself (while ultimately overseen by the FDA) is regulated almost exclusively by autonomous bodies in the institution conducting the research known as Institutional Review Boards (IRBs). *See* 45 CFR § 46.107-111 (defining IRBs, their membership requirements and responsibilities); *see generally* James D. Shelton, *How to Interpret the Federal Policy for the Protection of Human Subjects or “Common Rule” (Part A)*, 21 IRB: ETHICS AND HUMAN RESEARCH 6 (1999). IRBs formally apply (and thus, are subject to) federal regulations administered by OHRP and the FDA, but they are not themselves a part of the federal regulatory apparatus. Currently, the rules governing IRBs (commonly referred to as the Common Rule) are in the midst of a major shakeup. *See* DEPT. OF HEALTH & HUMAN SERVS., *Human Subjects Research Protections: Enhancing Protections for Research Subjects and Reducing Burden, Delay, and Ambiguity for Investigators* 76 Fed. Reg. 44512 (proposed rule) (July 26, 2011) [hereinafter “ANPRM”]; 45 CFR § 46; *see also* Ezekiel J. Emanuel & Jerry Menikoff, *Reforming the Regulations Governing Research with Human Subjects*, 365 NEW ENG. J. MED. 1145, 1145 (2011); Scott Kim, Peter Ubel & Raymond De Vries, *Pruning the Regulatory Tree*, 457 NATURE 534 (2009) (arguing that the best approach to simplify IRB regulation is by exempting minimal-risk research from IRB review). This should improve the safety and efficacy of trials and other human subject research, but it is unclear whether it will otherwise significantly affect the FDA’s approval process.

<sup>17</sup> 21 C.F.R. § 312.21(a)(2004).

<sup>18</sup> *Id.* § 312.21(b).

<sup>19</sup> *Id.* §312.21(c).

market, but whether the drug's efficacy and safety justify approval for a particular intended use."<sup>20</sup>

Upon approval, the drug receives a "label" which indicates the precise use for which the FDA has approved it. The drug label summarizes all the evidence about the safety and efficacy of the drug and describes the medical conditions and dosages for which the drug has been approved.<sup>21</sup> "Labeling," in this context, is a term of art that includes not just the drug or device's packaging, but all written, printed, or graphic material that relates to or "accompanies" the drug.<sup>22</sup> Thus, any material that explains the uses of the product or otherwise supplements the instructions, including everything from brochures to price lists to videos, whether or not the information is provided on the packaging, is part of the drug's label.<sup>23</sup>

Under current FDA regulations, any claim made by a drug or device manufacturer about the uses of its product must pertain only to the information contained on the drug's label (viz., on-label uses of the drug). If a company advertises an approved drug for an unapproved use, the advertisement is deemed an "off-label promotion," and the company can be held criminally liable for "misbranding."<sup>24</sup> In other words, promotional material used to explain additional, "off-

---

<sup>20</sup> Kesselheim, *supra* note 16, at 231.

<sup>21</sup> 21 C.F.R. § 201.56 (2010); Kesselheim, *supra* note 16, at 231.

<sup>22</sup> 21 U.S.C. § 352(f), § 321 (k)-(m); Kristie Lasalle, *A Prescription for Change: Citizens United's Implications for Regulation of Off-Label Promotion of Prescription Pharmaceuticals*, 19 J.L. & POL'Y 867, 878 (2011).

<sup>23</sup> Prescription-drug advertisements, 21 C.F.R. § 202.1(2010); *see* *Kordel v. United States*, 335 U.S. 345, 349-50 (1948) ("It would, indeed, create an obviously wide loophole to hold that these drugs would be misbranded if the literature had been shipped in the same container but not misbranded if the literature left in the next or in the preceding mail . . . . Accordingly, we conclude that the phrase 'accompanying such article' is not restricted to labels that are on or in the article on package that is transported."); Lasalle, *supra* note 22, at 878; *see also* *U.S. v. Vitamin Industries, Inc.*, 130 F. Supp. 755 (D.C. Neb. 1955) (holding that advertisements purporting to recommend conditions for the use of drugs are properly within the FDA's power to regulate (whether or not they are 'labeling')).

<sup>24</sup> 21 U.S.C. 331 (2010); *U.S. v. Park*, 421 U.S. 658 (1975) (holding that company executives can be held criminally liable for willful violations of FDA regulations).

label,” uses for the product is considered part of the labeling of the drug or device. As such, when these off-label promotional materials are disseminated, they are effectively considered fraudulent because they portray the “label” as endorsing the use of the product for a medical indication or type of treatment that the FDA has not approved it for.<sup>25</sup>

### **B. Drug Manufacturers’ Liability for Off-Label Promotion: The Expanding Role of the False Claims Act in Off-Label Marketing Enforcement**

Pharmaceutical and medical device manufacturers’ ability to market their products is key to the wide acceptance and use of their products.<sup>26</sup> If they can expand the market base of their product to uses on additional medical indications, the rewards are potentially enormous. The annual market for off-label prescription use totals upwards of \$44 billion,<sup>27</sup> and increased use for the drug on one indication may lead to more widespread use of the drug for other indication.<sup>28</sup> In addition, many off-label uses are simply a function of the pace of medical advancement, while others are the result of a cost-benefit analysis – even though the drug may treat a certain ailment, there may be so few patients who require it for that purpose that the cost of seeking and obtaining FDA approval for that treatment is simply unjustified.<sup>29</sup> The FDA

---

<sup>25</sup> *Id.* 351, 352(a); *see also* Lasalle, *supra* note 22, at 879-80.

<sup>26</sup> Kesselheim, *supra* note 16, at 228 (citations omitted).

<sup>27</sup> Darshak Sanghavi, *Cooking the Books: The Statistical Games Behind “Off-Label” Prescription Drug Use*, SLATE (Dec. 21, 2009), [http://www.slate.com/articles/news\\_and\\_politics/prescriptions/2009/12/cooking\\_the\\_books.html](http://www.slate.com/articles/news_and_politics/prescriptions/2009/12/cooking_the_books.html).

<sup>28</sup> *See also* CTRS. FOR MEDICARE & MEDICAID SERVS., OFFICE OF THE ACTUARY, NAT’L HEALTH STATISTICS GRP., NATIONAL HEALTH CARE EXPENDITURE DATA (2012), *available at* <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads//tables.pdf> (showing \$839 billion in total prescription drug expenditures in 2010).

<sup>29</sup> David M. Fritch, *Speak No Evil, Hear No Evil, Harm the Patient?*, 9 MICH. ST. U. J. MED. & L. 315, 334-35 (2005) (“Off-label treatments are frequently prescribed in cases where medical advancements outstrip the pace of FDA approvals or where the off-label use is directed at a condition or patient population where it would not be economically viable for the manufacturer to seek FDA approval for the use.”).

clearly recognizes the import of such uses, or else it might have banned off-label prescription altogether.<sup>30</sup>

On the other hand, liability for misbranding can be massive. Allergan's \$600 million settlement is just one of many in a string of staggering payments over the past decade to settle criminal and civil charges levied against pharmaceutical companies under the False Claims Act.<sup>31</sup> A sampling of recent high-profile suits and settlements underscores exactly how much money is at stake. In 2009, for example, Pfizer agreed to a landmark payment of \$2.3 billion to settle allegations that it had illegally marketed its painkiller Bextra.<sup>32</sup> This settlement came a few years after Pfizer agreed to a \$430 million settlement for similar charges of illegal off-label promotion of the drug Neurontin.<sup>33</sup> Yet, Pfizer's damages pale in comparison to the \$3 billion settlement GlaxoSmithKline agreed to last year for various illegal marketing practices.<sup>34</sup>

These investigations can drag out for years, increasing uncertainty for manufacturers and creating more risk in the marketplace. It wasn't until April 19, 2012 that Merck plead guilty to criminal misdemeanor charges and agreed to pay \$950 million to settle a misbranding claim for

---

<sup>30</sup> Allergan Complaint, *supra* note 3, at 2.

<sup>31</sup> DEPT. OF JUSTICE, *supra* note 1. See generally Katherine A. Blair, *In Search of the Right Rx: Use of the Federal False Claims Act in Off-Label Drug Promotion Litigation*, 23 HEALTH LAW. 44 (2011); see also Thomas M. Greene, *A New Weapon in Pharma Cases*, 47 TRIAL 40 (describing the phenomenon of using the Racketeer Influenced and Corrupt Organizations Act (RICO) to enforce the FDCA).

<sup>32</sup> Gardner Harris, *Pfizer Pays \$2.3 Billion to Settle Marketing Case*, N.Y. TIMES (Sept. 1, 2009), <http://www.nytimes.com/2009/09/03/business/03health.html>; Jim Edwards, *How Pfizer Hid a \$2.6 Bill. Bextra Settlement in Plain Sight*, CBSNEWS (Jan. 26, 2009), [http://www.cbsnews.com/8301-505123\\_162-42840361/how-pfizer-hid-a-23-bill-bextra-settlement-in-plain-sight/](http://www.cbsnews.com/8301-505123_162-42840361/how-pfizer-hid-a-23-bill-bextra-settlement-in-plain-sight/).

<sup>33</sup> Bernadette Tansey, *Huge Penalty in Drug Fraud: Pfizer Settles Felony Case in Neurontin Off-Label Promotion*, SAN FRANCISCO CHRONICLE (May 14, 2004), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/05/14/BUGKK6L0LB1.DTL>; Verdict Settlement, U.S. *ex rel.* David Franklin v. Parke-Davis, No. 96-11651PBS (D. Mass. May 13, 2004).

<sup>34</sup> Duff Wilson, *Glaxo Settles Cases with U.S. for \$3 billion*, N.Y. TIMES (Nov. 3, 2011), <http://www.nytimes.com/2011/11/04/business/glaxo-to-pay-3-billion-in-avandia-settlement.html>.

selling the painkiller Vioxx off-label for rheumatoid arthritis.<sup>35</sup> The practices they were accused of took place in a three-year period from May 1999 to April 2002.<sup>36</sup> Vioxx hasn't been on the market since 2004, yet Merck has had this investigation hanging over its head for the better part of a decade.

In total, the Department of Justice received \$8 billion in settlement payments over the course of the past decade from pharmaceutical companies.<sup>37</sup> Currently, there are more than 100 ongoing civil and criminal investigations against pharmaceutical and medical device manufacturers.<sup>38</sup> The size of the settlements, the longevity of the investigations, and the uncertainty this potential liability creates in the marketplace makes treading the line between proper and improper marketing practices a decidedly high stakes game.

In the grand scheme of things, these settlement numbers represent but a fraction of the annual sales of any of the large pharmaceutical companies.<sup>39</sup> However, the fines still represent a strong deterrent against any unauthorized marketing. Even if the fines are not crippling, government investigation and condemnation of marketing practices serves as bad publicity, often

---

<sup>35</sup> Jay Feeley & Janelle Lawrence, *Merck Unit's Plea Over Vioxx Investigation Accepted by Judge*, BLOOMBERGBUSINESSWEEK (Apr. 19, 2012), <http://www.businessweek.com/news/2012-04-19/merck-unit-s-plea-over-vioxx-investigation-accepted-by-judge>; see U.S. v. Merck, Sharp & Dohme Corp., 11-CR-10384-PBS, Apr. 12, 2012 (D.C. Mass), available at <http://freepdfhosting.com/ab6c416ccf.pdf>.

<sup>36</sup> Feeley & Lawrence, *supra* note 35.

<sup>37</sup> Kesselheim, *supra* note 16, at 240-41.

<sup>38</sup> Margaret Gilhooley, *Commercial Speech and Off-Label Drug Uses: What Role for Wide Acceptance, General Recognition and Research Incentives*, 37 AM. J.L. & MED. 258, 262 (2011) (citing Osborn, *supra* note 7, at 311); see also Nick Repucci, *An Examination of Off-Label Marketing and Promotion: Settlements, Issues, and Trends*, 13 J. HEALTH CARE COMPLIANCE 15 (stating that the government recovered nearly \$4 billion between 2006 and September, 2011 (prior to settlements with GlaxoSmithKline)).

<sup>39</sup> Wilson, *supra* note 34 (“Although \$3 billion is a very big number in terms of drug industry settlements, it’s not a very big number in relation to almost \$50 billion in annual revenue for the world’s fourth-largest pharmaceutical company.”) (quoting Professor Frances H. Miller in reaction to the GlaxoSmithKline settlement).

leading companies to reform their practices (or at least their rhetoric).<sup>40</sup> More importantly, if the companies do not settle, a finding of significant impropriety under the False Claims Act “can bar the company from receiving government reimbursement for their drugs.”<sup>41</sup> The Department of Justice thus has a great deal of leverage to extract a favorable settlement from companies seeking to avoid such an imposing penalty. It is no surprise, then, that there have been repeated First Amendment challenges to the FDA’s restriction of off-label promotion. These challenges will certainly continue, and, perhaps, succeed, in the wake of *Sorrell v. IMS*.

### **C. Leaving the Medical Profession Alone: Off-Label Prescription Regulation and Practice**

While the FDA actively regulates pharmaceutical labeling, it does not regulate the medical profession or physician prescribing practices in any way. Physicians will inevitably work with certain drugs and find other, auxiliary uses in the course medical practice. An easy example is an oncologist who treats a variety of cancer patients. She may find that a drug approved for use to reduce the size of one type of tumor is effective in reducing the size of another type of tumor (one that has not been specifically approved by the FDA for that drug). The FDA does not regulate the physician’s choice to prescribe the drug for that alternative use. In addition to using an approved drug for a non-approved use, a physician may also have patients with different administration or dosage needs; uses which also qualify as “off-label.”<sup>42</sup> For example, a physician may have a patient that is too sick to swallow a pill, forcing the physician to prescribe the drug to be administered intravenously even though the drug has only been

---

<sup>40</sup> Kesselheim, *supra* note 16, at 240.

<sup>41</sup> Gilhooley, *supra* note 38, at 262 (citing Osborn, *supra* note 38, at 310, 327-29; Sandra H. Johnson, *Polluting Medical Judgment? False Assumptions in the Pursuit of False Claims Regarding Off-Label Prescribing*, 9 MINN. J. OF L. SCI. & TECH. 61, 144 (2008)).

<sup>42</sup> Mark Herrmann & Pearson Bownas, *Keeping the Label Out of the Case*, 103 NW. U. L. REV. 477, 478-79 (2009). Indeed, oncologists are the most likely physicians to use a drug off-label. See *infra*, note 45, and citations therein.

approved for oral administration. Similarly, a patient may not require the dosage level that has been approved by the FDA; even a lower dose of an otherwise approved drug is an off-label use of the drug. With these examples in mind, it is unsurprising that the FDA does not have the authority, nor does it wish to obtain the authority, to regulate prescribing practices. To do so would greatly impede medical progress and may even put patients at risk.

In practice, off-label prescribing is widespread, with the use of drugs for medical disorders that are not approved by the FDA increasing.<sup>43</sup> Recent studies have shown off-label usage rates account for over one-fifth of prescriptions.<sup>44</sup> In certain practices, particularly oncology and psychiatry, off-label prescription rates may be as high as fifty percent.<sup>45</sup> Troublingly, off-label prescriptions are often made without any scientific evidence supporting the efficacy of the therapy in question; one study estimates this to be as high as seventy-three percent of all off-label prescriptions.<sup>46</sup> Even if off-label uses are often necessary in certain situations, these uses lose legitimacy when other treatments are administered without any evidence suggesting they will be effective.

---

<sup>43</sup> Amy E. Todd, *No Need for More Regulation: Payors and Their Role in Balancing the Cost and Safety Considerations of Off-Label Prescriptions*, 37 AM. J. L. & MED. 422, 424 (2011) (“Off-label prescribing is extremely common among physicians.”).

<sup>44</sup> See, e.g., Alison Young & Chris Adams, *Prescribing Drugs ‘Off-Label’ Routine but Can Harm Patients*, MCCLATCHY NEWSPAPERS (Nov. 2, 2003), <http://www.mcclatchydc.com/2003/11/02/28122/prescribing-drugs-off-label-routine.html#> (showing off-label drug use rates of 22% in a study of forty-five drugs, based on physician-reported prescribing data); David C. Radley et al., *Off-Label Prescribing Among Office-Based Physicians*, 166 ARCHIVES INTERNAL MED. 1021 (2006) (showing an off-label prescription rate of 21% in a sample of 160 drugs). But see James M. Beck & Elisabeth D. Azari, FDA, *Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 FOOD & DRUG L.J. 71, 80 (1998) (estimating off-label use as 60% of all prescriptions).

<sup>45</sup> AM. SOC’Y OF CLINICAL ONCOLOGY, *Reimbursement for Cancer Treatment: Coverage of Off-Label Drug Indications*, 24 J. ONCOLOGY 3206, 3206 (2006) (reporting 50% off-label prescription rate for oncology pharmaceuticals); see also Hermann & Brownas, *supra* note 42, at 479 (estimating off-label use is as high as 65% in cancer patients, 70% in kidney dialysis patients, and 80% of usage in drugs for AIDS patients); Kesselheim, *supra* note 16, at 235-237 (discussing the phenomenon).

<sup>46</sup> See Radley, *supra* note 44.

Of course, manufacturers may use data obtained from post-marketing studies conducted to test the drug in different disease populations to submit a supplemental New Drug Application to the FDA in order to change the label to include new uses.<sup>47</sup> In practice, however, the time and costs involved in conducting further rigorous trials combined with the risks associated with a failed trial disincentivize manufacturers from seeking formal FDA approval for additional uses. The costs associated with the trial may be too high relative to the gain from increase in prescription practices for the drug. In addition, and perhaps more importantly, an adverse review of a supplemental indication may affect prescribing practices for existing on-label uses.<sup>48</sup>

This dichotomy has led to a regime where pharmaceutical companies cannot directly advertise their products' off-label uses to physicians but physicians can prescribe the drug for any indication they see fit - usually using information they gather from colleagues or reading the latest medical literature. The most a pharmaceutical company may do under the current regime is attempt to persuade physicians of their products' effectiveness for off-label uses by disseminating peer-reviewed literature that shows the effectiveness of such uses.<sup>49</sup> The oddity of

---

<sup>47</sup> Kesselheim, *supra* note 16, at 237 (citing Katherine A. Helm, *Protecting Public Health from outside the Physician's Office: A Century of FDA Regulation from Drug Safety Labeling to Off-Label Drug Promotion*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 117, 134 (2007)).

<sup>48</sup> *Id.* at 237.

<sup>49</sup> U.S. DEP'T HEALTH & HUMAN SERVS. FOOD & DRUG ADMIN., 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 (2009), available at <http://www.fda.gov/RegulatoryInformation/Guidances/ucm125126.htm>; see Gilhooly, *supra* note 38, at 266-67; Michelle M. Mello et al., *Shifting Terrain in the Regulation of Off-Label Promotion of Pharmaceuticals*, 360 NEW ENG. J. MED. 1557 (2009); see also Wash. Legal Found. v. Friedman, 13 F. Supp. 2d 51 (D.D.C. 1998), amended by sub nom. Wash. Legal Found. v. Henney, 56 F. Supp. 2d 81, 87 (D.D.C. 1999), vacated in part and appeal dismissed, Wash. Legal Found. v. Henney, 202 F.3d 331 (D.C. Cir. 2000) (finding that the First Amendment allowed a manufacturer to distribute unsolicited medical journal reprints so long as it provides a disclaimer that the indication the reprints present data on have not been approved for use by the FDA) (vacated without reaching the merits). For a history of the FDA's position on reprints, see Margaret Gilhooly, *Drug Safety and Commercial Speech: Television*

this scheme should be clear: a pharmaceutical company can send peer-reviewed articles to a physician that shows the effectiveness of their product for an off-label use, but as soon as the manufacturer creates an advertisement that incorporates this information, or verbally asserts the effectiveness of their product for this use, even with a citation to the same study, they may be held criminally liable for misbranding.

When viewed in light of the *Sorrell* decision, it becomes immediately clear how such a restriction on otherwise truthful speech may violate the First Amendment. Rather than banning certain speech on a neutral basis, the FDA's regulations favors one class of speakers, physicians (and, indeed, essentially any party other than the manufacturer of the drug that advances information about the effectiveness of a drug for off-label uses), over another, the manufacturer of the drug. Moreover, the limitation on manufacturer's speech is content oriented, implying the Supreme Court will be more likely to apply heightened scrutiny to the restriction as it was applied in *Sorrell*.<sup>50</sup> Whether the Court or lower courts interpreting *Sorrell* will see it this way depends on a reading of the Supreme Court's precedent concerning the regulation of commercial speech as a whole, and in particular whether the FDA's (or, generally, the federal government's) justification for imposing the restriction is legitimate.

---

*Advertisements and Reprints on Off-Label Uses*, 47 SAN DIEGO L. REV. 845 (2010). See also Noah, *supra* note 7, at 77-84 (discussing FDA regulation surrounding continuing medial education and reprint distribution).

<sup>50</sup> *Sorrell*, 131 S. Ct. at 2671 (explaining that "heightened judicial scrutiny is warranted" whenever the government employs a content-based ban on speech"); Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, 2011 CATO SUP. CT. REV. 129, 133 (2011).

### III. The Commercial Speech Doctrine and Off-Label Promotion

#### A. The Commercial Speech Doctrine and the *Central Hudson* Test

The First Amendment forbids Congress to make any law “abridging the freedom of speech,”<sup>51</sup> a restriction that has been interpreted to protect the free expression of ideas in a broad way. In general, this means that while the government may be able to exert some control over the context in which expression is made (so-called “time, place, and manner” restrictions),<sup>52</sup> it cannot restrict speech based on its message. In the context of commercial speech, however, the Supreme Court has generally been more permissive of restrictions.<sup>53</sup> In fact, up until 1976, the Court left all control over the content of advertisements or other communications relating to the sale of a product or service up to the Congress.<sup>54</sup> Recognizing that consumers “and society in general may have strong interests in the free flow of commercial information,” the Supreme Court has since subjected commercial speech regulations to scrutiny, albeit to a less exacting degree than other types of expression.<sup>55</sup>

---

<sup>51</sup> U.S. CONST. AMEND. I.

<sup>52</sup> *See, e.g.*, *Feiner v. New York*, 340 U.S. 315 (1951) (upholding the conviction of disorderly conduct where the speaker was arrested after refusing to stop speaking after the threat of violence by other pedestrians); *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a ban on placing signs on public utility poles). *But see, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43 (striking down a ban on certain signs placed in front yards).

<sup>53</sup> Kesselheim, *supra* note 16, at 242.

<sup>54</sup> *See Va. State Bd. Of Pharm. v. Citizens Consumer Council*, 425 U.S. 748 (1976) (striking down a law preventing pharmacies from advertising the prices of prescription drugs).

<sup>55</sup> *Id.* at 763-64; *see* CONG. RESEARCH SERVICE, CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION: ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES, COMMERCIAL SPEECH (1992 ed.), *available at* <http://caselaw.lp.findlaw.com/data/constitution/amendment01/17.html#2> (referring to First Amendment protection of commercial speech as “qualified protection”); *In re Doser*, 412 F.3d 1056 (9<sup>th</sup> Cir. 2005) (holding that commercial speech is afforded less protection than other kinds of expression).

Commercial speech includes any communication that proposes a commercial transaction that is likely to influence consumers in their commercial decisions.<sup>56</sup> Thus, while an advertisement is the quintessential commercial communication, speech may be commercial so long as it relates to a consumer's decision-making process.<sup>57</sup> To determine whether a commercial speech restriction violates the First Amendment, the Court applies a four-part test originally set forth in *Central Hudson Gas & Electric Corporation v. Public Service Commission*.<sup>58</sup> Under the *Central Hudson* test, a commercial speech restriction is constitutional only if: "(1) the speech is misleading or related to unlawful activity; (2) the restriction serves a substantial governmental interest; (3) the restriction directly advances that governmental interest; and (4) the regulation is not "more extensive than is necessary to serve that interest."<sup>59</sup>

## **B. Traditional Application of the *Central Hudson* Test in Challenges to FDA Advertising Restrictions**

There have been a number of challenges to the FDA's restriction on off-label promotion. For the most part, the Supreme Court and lower appellate courts have upheld the restriction as in line with the *Central Hudson* criteria. In two cases, *Thompson v. Western States Medical*

---

<sup>56</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 477 U.S. 557 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"); *see, e.g.*, *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F. 3d 110, 115 (1st Cir. 2005); *U.S. v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143-44 (D.C. Cir. 2009).

<sup>57</sup> *See, e.g.*, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002). *But see, e.g.*, *Bulger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (noting that determining whether speech is commercial or not can depend on the confluence of a number of factors including whether the speech is an advertisement, whether it references a specific product, and whether the speaker has an economic motivation); *Larson v. City & Cnty. of San Francisco*, 192 Cal. App. 4<sup>th</sup> 1263, 2011 WL 628138 (1st Dist. 2011) (noting that the fact that speech is an advertisement or that the speaker has an economic motivation for engaging in the communication does not necessarily make the speech commercial).

<sup>58</sup> 477 U.S. 557 (1980).

<sup>59</sup> *Id.* at 566; *see generally* ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW* 1089-1108 (3<sup>rd</sup> ed.) (discussing the *Central Hudson* test and its application).

*Center*,<sup>60</sup> and *Washington Legal Foundation v. Friedman*,<sup>61</sup> however, certain promotion restrictions were overturned, signaling that the Supreme Court or lower courts may be more sympathetic to future challenges.

### **1. *Thompson v. Western States Medical Center***

*Western States* concerned a ban on advertising for compounded drugs by pharmacies. Compounded drugs are simply variations on otherwise legal drugs, either in that they are administered in a different size or form or “compound” more than one drug in a single administration.<sup>62</sup> The Food and Drug Administration Modernization Act of 1997 (FDAMA)<sup>63</sup> created a “safe harbor” exempting compounded drugs from regular approval requirements so long as pharmacists and other providers agreed to certain restrictions, one of which was refraining from advertising for the sale of the compounded drug.<sup>64</sup> Essentially, the restriction on advertising was meant to curtail a market developing around “compounded” drugs as a way of skirting the usual FDA approval process.<sup>65</sup>

Striking down the restriction, the Court held that the ban did not meet the first or fourth prongs of the *Central Hudson* test.<sup>66</sup> The Court accepted that the government had a significant

---

<sup>60</sup> 535 U.S. 357 (2002).

<sup>61</sup> 13 F. Supp. 2d 51 (D.D.C. 1998), *amended by sub nom.* Wash. Legal Found. v. Henney, 56 F. Supp. 2d 81, 87 (D.D.C. 1999), *vacated in part and appeal dismissed*, Wash. Legal Found. v. Henney, 202 F.3d 331 (D.C. Cir. 2000).

<sup>62</sup> See Gilhooley, *supra* note 38, at 263-64; Noah, *supra* note 7, at 51 (“Compounding generally refers to the extemporaneous preparation of pharmaceutical products to meet the special needs of patients unable to tolerate commercially available formulations.”) (citing *Thompson*, 535 U.S. at 360-61).

<sup>63</sup> The Food and Drug Administration Modernization Act of 1997, Pub. L. 105-115, 105th Congress.

<sup>64</sup> *Id.* at § 353a(b)(1)(D).

<sup>65</sup> Kesselheim, *supra* note 16, at 243.

<sup>66</sup> *Thompson*, 535 U.S. at 372 (listing examples of other ways the FDA could have distinguished between compounding and large-scale manufacturing).

interest in preserving the effectiveness and integrity of the FDA's approval process while still ensuring that compounded drugs were available for patients with special needs.<sup>67</sup> The commercial speech in question, however, was not itself false or misleading and the restrictions were not narrowly tailored to meet the interests advanced by the government.<sup>68</sup> Importantly, the Court's primary example of a potential regime that would be less restrictive while still advancing the government's goals was the use of disclaimers.<sup>69</sup> As the Court noted, misleading advertisements could be prevented by "requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown."<sup>70</sup>

## **2. *Washington Legal Foundation v. Friedman***

In *Washington Legal Foundation*, a United States District Court for the District of Columbia struck down specific FDA policies restricting drug manufacturers from distributing peer-reviewed medical articles, reprints of medical textbooks, and from involvement in continuing medical education seminars as a means of promoting off-label uses of otherwise approved drugs.<sup>71</sup> While the case was subsequently vacated, the FDA eventually released

---

<sup>67</sup> *Id.* at 371.

<sup>68</sup> *Id.*; see also Joseph et. al., *supra* note 8, at 12; Gilhooly, *supra* note 38, at 264; Kesselheim, *supra* note 16, at 243.

<sup>69</sup> Kesselheim, *supra* note 16, at 243.

<sup>70</sup> *Western States*, 535 U.S. at 376.

<sup>71</sup> *Wash. Legal Found. v. Friedman*, 13 F. Supp. 2d 51, 54 (D.D.C. 1998), *amended by sub nom. Wash. Legal Found. v. Henney*, 56 F. Supp. 2d 81, 87 (D.D.C. 1999), *vacated in part and appeal dismissed*, *Wash. Legal Found. v. Henney*, 202 F.3d 331 (D.C. Cir. 2000); see U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 49; Final Guidance on Industry-Supported Scientific and Educational Activities, 62 Fed. Reg. 64,074, 64,094, 64,096-99 (Dec. 3, 1997) (pharmaceutical industry financial support of continuing medical education only escapes enforcement if the educational program is "truly independent and nonpromotional," which is determined by weighing a number of factors); Noah, *supra* note 7, at 77-84 (discussing FDA regulation surrounding continuing medical education and reprint distribution).

guidance in line with the holding, and the case has generally been viewed as good law, particularly in the light of the Supreme Court's holding in *Western States*.<sup>72</sup>

Applying the *Central Hudson* test, the court ruled that because it is lawful to prescribe drugs for off-label uses and the educational material used by the companies was not misleading, the speech was not commercial and, as such, the government had to use the least restrictive means possible to further its goal of compelling manufacturers to seek approval for off-label uses of the drug.<sup>73</sup> Outright bans of all educational material distribution, in other words, was more restrictive than necessary and thus violated the First Amendment.<sup>74</sup> The court noted a less restrictive alternative was available, and suggested that the FDA can require “full, complete, and unambiguous disclosure by the manufacturer” of its interest in the educational materials and a disclaimer that the off-label use has not been approved by the FDA.<sup>75</sup>

While the case was later vacated without decision, the FDA found this reasoning persuasive and later adopted guidance allowing drug manufacturers to disseminate educational material, complete with disclaimers, to physicians on off-label uses of drugs.<sup>76</sup> Ultimately, the Court could potentially agree that FDA's decision to allow distribution of educational materials but not outright advertisements of off-label uses is indeed the least restrictive means for the FDA to achieve its regulatory goals. The Court may be particularly persuaded by the FDA's inclusion of the Court's favored approach to allow commercial communications with a requirement that a disclaimer to explain the bias of the speaker accompanies the communication.

---

<sup>72</sup> Gilhooly, *supra* note 38, at 259-60; U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 49; *see also* Joseph et. al., *supra* note 8, at 12; Noah, *supra* note 7, at 80-84 (discussing Good Reprint Practices).

<sup>73</sup> Wash. Legal Found., 13 F. Supp. 2d at 66, 69-73.

<sup>74</sup> *Id.*; *see* Joseph et. al., *supra* note 8, at 12-13.

<sup>75</sup> Wash. Legal Found., 13 F. Supp. 2d at 73, 75.

<sup>76</sup> *See* U.S. DEP'T HEALTH & HUMAN SERVS., *supra* note 49; Noah, *supra* note 7, at 80-84.

### 3. *U.S. v. Caronia* and the General Approval of Off-Label Promotion Restrictions

While there have been some circumstances in which courts have held that the FDA's regulations were overly stringent and violated the First Amendment, the courts have generally continued to side with the FDA, concluding that the First Amendment does not protect off-label promotional speech under *Central Hudson*.<sup>77</sup> *U.S. v. Caronia* serves as a useful recent example.<sup>78</sup> There, a sales representative for a pharmaceutical company moved to dismiss charges for misbranding under the FDCA, arguing that truthful, non-misleading promotion by a pharmaceutical company or its employees to a physician cannot be restricted by the government.<sup>79</sup> Applying the *Central Hudson* test, the United States District Court for the Eastern District of New York concluded that the First Amendment did not protect commercial speech in this context.<sup>80</sup>

First, the district court concluded that the defendant's speech was lawful and not inherently misleading because it was directed at physicians, "a sophisticated audience familiar with the FDA approval process and able to evaluate independently the validity of the defendant's claims."<sup>81</sup> The court held, however, that the restriction did meet the second and third prongs in the *Central Hudson* test because: (1) the government had a substantial interest in incentivizing manufacturers to seek approval for off-label uses in order to ensure public safety; and (2) the

---

<sup>77</sup> See, e.g., *United States v. Caputo*, 517 F.3d 935 (7<sup>th</sup> Cir. 2008) (holding that speech restrictions on an unapproved medical device do not implicate the First Amendment); *United States v. Harkonen*, N.D. Cal. No. C 08-00164 (2010), 2010 WL 2985257 (rejecting a First Amendment challenge by a defendant convicted of wire fraud for disseminating a press release that interpreted data from a clinical trial). See generally *Joseph et. al.*, *supra* note 8, at 14-20 (discussing these cases and *Caronia*).

<sup>78</sup> *United States v. Caronia*, 576 F. Supp. 2d 385 (E.D.N.Y. 2008).

<sup>79</sup> *Id.* at 388-89; see *Joseph et. al.*, *supra* note 8, at 17.

<sup>80</sup> *Caronia*, 576 F. Supp. 2d 385.

<sup>81</sup> *Joseph et. al.*, *supra* note 8, at 17 (citing *Caronia*, 576 F. Supp. 2d at 396-98).

restriction on off-label advertising significantly advances that interest.<sup>82</sup> As the court put it, “the government clearly [has] a substantial interest in promoting the health and safety of its citizens” and, as such, “the government had a substantial interest in compelling manufacturers to get off-label treatments on-label.”<sup>83</sup> Finally, the court went on to uphold the FDCA’s misbranding provisions as no more extensive than necessary, passing the fourth prong of the test.<sup>84</sup>

Ultimately, *Western States*, *Washington Legal Foundation*, and *Caronia* are limited by the precedent set by the Supreme Court. While these challenges were rejected under the commercial speech doctrine as it stood, *Sorrell* directly calls into question both the legitimacy of the government’s interest as outlined in *Caronia* (to incentivize manufacturers to seek approval for off-label marketing) and whether an outright ban on such marketing practices are the least restrictive means possible.

### **C. *Sorrell v. IMS***<sup>85</sup>

At issue in *Sorrell* was a Vermont statute (Act 80) that restricted pharmacies from selling prescription information to a third party that would then package this information and sell it to pharmaceutical manufacturers.<sup>86</sup> Drug companies want physician prescribing information because it allows them to tailor their advertising - particularly a process known as “detailing” where marketing representatives visit doctors’ offices directly to make a sales pitch - more

---

<sup>82</sup> *Caronia*, 576 F. Supp. 2d 385.

<sup>83</sup> *Id.* at 398.

<sup>84</sup> *Id.* at 401.

<sup>85</sup> 131 S. Ct. 2653 (2011).

<sup>86</sup> *Sorrell*, 131 S. Ct. at 2659-60; An Act Relating to Increasing Transparency of Prescription Drug Pricing and Information, Vt. Stat. Ann. Tit. 18, § 4631 (2011), *available at* <http://www.leg.state.vt.us/docs/legdoc.cfm?URL=/docs/2008/acts/ACT080.htm>.

effectively.<sup>87</sup> Problematically, the law included various exceptions which essentially made prescribing information available to any party other than drug companies themselves.<sup>88</sup> Meanwhile, drug companies were not allowed to purchase prescribing information from pharmacies, insurers or other entities, nor were they permitted to use the information “for marketing or promoting a prescription drug, unless the prescriber consents.”<sup>89</sup>

The Court began its analysis by noting that the statute erected a ban on speech both on the basis of content and the basis of the speaker.<sup>90</sup> “[W]henver the government creates ‘a regulation of speech because of disagreement with the message it conveys,’ the First Amendment requires heightened scrutiny.”<sup>91</sup> This is a seeming departure from the traditional commercial speech doctrine, which would normally start by identifying the commercial character of the communication before analyzing whether the government’s restriction on that communication was pursuant to a legitimate interest and done in the least restrictive way possible.<sup>92</sup> In short, *Sorrell*’s language suggests that where otherwise truthful speech is prohibited on the solely on the basis of who the speaker is or what the speaker is saying, that may be all that is necessary to render the prohibition unconstitutional, regardless of whether it is

---

<sup>87</sup> *Sorrell*, 131 S. Ct. 2659 (Detailing “involves a scheduled visit to a doctor’s office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring the drug samples as well as medical studies that explain the ‘details’ and potential advantages of prescription drugs. Interested physicians listen, ask questions, and receive followup data.”).

<sup>88</sup> Samp, *supra* note 50, at 131.

<sup>89</sup> Vt. Stat. Ann. Tit. 18, § 4631(d); Samp, *supra* note 50, at 131.

<sup>90</sup> *Sorrell*, 131 S. Ct. at 2663 (“On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.”).

<sup>91</sup> *Id.* at 2664 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>92</sup> See *supra* Part III.A. and discussion therein.

commercial speech or ordinary speech.<sup>93</sup> Put another way, content or speaker based restrictions on speech may be *per se* violations of the First Amendment.

At the same time, the Court went on to conclude that the restriction would not pass the intermediate scrutiny required by the *Central Hudson* test either.<sup>94</sup> Without going through the *Central Hudson* criteria in full, the Court held that Vermont's law was not narrowly drawn to advance the dual goals Vermont asserted: that the law is necessary to protect medical privacy and integral to reduce healthcare costs.<sup>95</sup> In the first place, the law was not written narrowly enough to protect medical privacy because it allowed for prescription information to be used by "anyone for any reason save one:" marketing by pharmaceutical companies.<sup>96</sup> Second, the aim of reducing health care costs goes to the heart of the Court's weariness with content based restrictions. As the Court stated, "the 'fear that people would make bad decisions if given truthful information,'" by prescribing more expensive drugs after being detailed on the differences between generics and brand-name drugs that cost more, "cannot justify content-based burdens on speech."<sup>97</sup>

The Court's departure from precedent should be made explicit: in addition to applying heightened scrutiny to content and speaker based prohibitions on speech regardless of the type of speech being regulated, the Court in *Sorrell* did not accept as legitimate the goal of restraining speech in order to stop third parties from acting "in a matter that the government deems

---

<sup>93</sup> Joseph et. al, *supra* note 8, at 20-21 ("Importantly, the majority did not conclude that Vermont's restrictions should be subject to a lesser standard of review because they regulated only commercial speech, as opposed to ordinary speech.").

<sup>94</sup> *Sorrell*, 131 S. Ct. at 2667-68 (holding that the outcome would be the same regardless of "whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied").

<sup>95</sup> *Id.* at 2688.

<sup>96</sup> Joseph et. al, *supra* note 8, at 23 (quoting *Sorrell*, 131 S. Ct. at 2668).

<sup>97</sup> *Sorrell*, 131 S. Ct. at 2670-71 (quoting *Thompson v. Western States Medical Ctr.* 535 U.S. 357, 374 (2002)); *see id.* at 2671 ("That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.").

undesirable.”<sup>98</sup> As a result, the *Central Hudson* test’s third prong of acceptable governmental interests may be substantially reduced in future commercial speech cases. Richard Samp, chief counsel of the Washington Legal Foundation,<sup>99</sup> suggests that the Court may only be open to three types of content based commercial speech restrictions in the future:

“(1) prophylactic rules designed to protect against the possibility that consumers will be misled, (2) laws prohibiting commercial speech that is false or proposes an illegal transaction, and (3) laws designed to protect privacy.”<sup>100</sup>

This would mean that one of the chief justifications recognized in cases like *Caronia* - incentivizing manufacturers to receive FDA approval for the additional uses of the drug - would no longer be acceptable as a “substantial interest” under the *Central Hudson* test, forcing the FDA to justify the prohibition of off-label marketing on other grounds.<sup>101</sup>

Central to this analysis is the fact that the audience of the communication is “prescribing physicians” who are “sophisticated and experienced” consumers, and will not easily be misled by detailing.<sup>102</sup> Where an audience is informed, governmental paternalism is not justifiable grounds to restrict speech because there is no need for a prophylaxis against potential misleading communications. As the Court explains:

“Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the ‘fear that people would make bad decisions if given truthful information’ cannot justify content-based burdens on speech. . . . ‘The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own

---

<sup>98</sup> Samp, *supra* note 50, at 138 (citing *Sorrell*, 131 S. Ct. at 2671).

<sup>99</sup> Richard Samp, *On the Docket*, FORBES.COM (last visited Apr. 16, 2012), <http://blogs.forbes.com/people/rsamp/>. It should be noted that the Washington Legal Foundation is a conservative organization that would generally favor cabining commercial speech restrictions to narrow categories.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 140-42; *Sorrell*, 131 S. Ct. at 2678 (Breyer, J., dissenting) (“If the Court means to create constitutional barriers to regulatory rules that might affect the content of a commercial message, it has embarked upon an unprecedented task - a task that threatens significant judicial interference with widely accepted regulatory activity.”).

<sup>102</sup> *Sorrell*, 131 S. Ct. at 2671 (internal citations omitted).

good.” . . . That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.”<sup>103</sup>

This language suggests that any ban on direct to consumer advertising or communication with otherwise unsophisticated consumers will be acceptable as a prophylactic to protect consumers from being misled, should the Court continue to accept that as a justification for commercial speech restrictions. The tone in *Sorrell*, however, seems clearly antagonistic to restricting communications with physicians themselves, as it can only be justified on paternalistic grounds similar to those offered in *Sorrell* or as an incentive structure as in *Caronia*. This sends a clear signal that off-label promotion restrictions may face deeper scrutiny in a future challenge.

This is particularly true if the heightened scrutiny applied in *Sorrell* is applied in a similar manner in a future challenge. The enforcement policy to restrict off-label advertising mirrors Vermont’s restriction in that it is both content and speaker based. While physicians and other medical researchers can openly communicate about potential off-label uses of a drug, the manufacturer of the drug is uniquely “prohibited from speaking truthfully about those uses.”<sup>104</sup> The FDA will have to explain why a complete prohibition on truthful communications is warranted in this context and why the use of disclaimers, clearly the preferred approach for a less restrictive alternative to prohibiting communication under recent First Amendment jurisprudence, would not achieve the FDA’s goals.<sup>105</sup>

---

<sup>103</sup> *Id.* at 2670-71 (quoting *Thompson v. Western States Medical Ctr.* 535 U.S. 357, 374 (2002); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)).

<sup>104</sup> Samp, *supra* note 50, at 141.

<sup>105</sup> *Id.*

#### **D. *Citizens United v. Federal Election Commission***<sup>106</sup>

*Citizens United* was a controversial case that struck down a federal law (the McCain-Feingold bill)<sup>107</sup> prohibiting corporations from using general treasury funds to expressly advocate for a particular candidate in elections.<sup>108</sup> While the analysis in *Citizens United* did not rely on the commercial speech doctrine – the Court evaluated it under the stricter scrutiny given to political speech – the outcome in favor of corporate speech as well as the contours of its’ First Amendment analysis is instructive for how the Court may rule in a decision regarding the FDA’s advertising restrictions.<sup>109</sup> This is particularly true if the stricter scrutiny used in *Sorrell* evaluating the third prong of the *Central Hudson* test is applied in a similar fashion in a future challenge to off-label promotion, as this may indicate a willingness to depart from the practice of allowing different degrees of restriction on speech based on its intended effect on the recipient.<sup>110</sup>

One particularly telling comparison draws a parallel between the Court’s concern for the FEC’s “amorphous regulatory interpretation”<sup>111</sup> and the FDA’s regulatory practice as it relates to off-label promotion.<sup>112</sup> As the Court noted in *Citizens United*: “[a]s a practical matter... given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid the threats of criminal liability and the heavy costs

---

<sup>106</sup> 130 S. Ct. 876 (2010).

<sup>107</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, Pub. L. No. 107-155, 166 Stat. 81, 91-92.

<sup>108</sup> See generally *Citizens United*, 130 S. Ct. 876; Lasalle, *supra* note 22.

<sup>109</sup> See Kesselheim, *supra* note 16, at 246-47. See generally Lasalle, *supra* note 22.

<sup>110</sup> See *supra* Part III.C.

<sup>111</sup> *Citizens United*, 130 S. Ct. at 889.

<sup>112</sup> Lasalle, *supra* note 22, at 893-98. See Kevin Michael Lewis, *Informal Guidance and the FDA*, 66 FOOD & DRUG L.J. 507 (2011) (discussing the FDA’s general trend of issuing informal guidance rather than adopting formal rules).

of defending against FEC must ask a governmental agency for prior permission to speak.”<sup>113</sup> One could argue that FDA’s current practice is “amorphous” in the way the Court in *Citizens United* defines it, and, as such, acts as a prior restraint on any potential promotional speech by a drug manufacturer. For example, one could point to the fluid nature of regulations surrounding Good Reprint Practices, both because of the FDA’s changing policy and the potentially unclear guidance itself.<sup>114</sup> Similarly, one could argue that the subjective, case-by-case enforcement of advertising restrictions through misbranding actions brought by the Justice Department is “amorphous” and results in pharmaceutical companies simply abstaining from otherwise protected speech (in this case, truthful information).<sup>115</sup>

The problem with this argument is that it is unclear whether the prior restraint doctrine is applicable to commercial speech.<sup>116</sup> Unlike *Citizens United*, any First Amendment challenge by a pharmaceutical company against off-label promotion will be firmly within the commercial speech doctrine. Even though the Court may apply increased scrutiny similar to *Sorrell*, it is not clear that the Court is also willing to extend the prior restraint doctrine to non-political speech. Moreover, it is hardly clear that the FDA’s enforcement practices are “amorphous” or overly complex to the point of restricting speech altogether. On the contrary, although guideline may evolve, the regulatory regime is quite consistent as to what constitutes illegal practice: overt advertising of off-label uses. Striking down all off-label advertising restriction because of shifting standards for the dissemination of reprints of medical literature would have significant

---

<sup>113</sup> *Citizens United*, 130 S. Ct. at 896.

<sup>114</sup> Lasalle, *supra* note 22, at 893-96; U.S. DEP’T HEALTH & HUMAN SERVS., *supra* note 49.

<sup>115</sup> *Id.* at 896-97 (quoting *Citizens United*, 130 S. Ct. at 896).

<sup>116</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 n.24 (1976) (suggesting that “commercial speech may be more durable than other kinds. Since advertising is the Sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely”); *Cent. Hudson Gas & Elec. Co. v. Public Serv. Comm’n*, 447 U.S. 557, 571 n.13 (1980) (“We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.”).

and far-reaching effects on the regulatory state as a whole given the propensity of executive agencies to reverse-course on long standing policy.

That said, the general willingness of the Court to accept arguments about corporations' rights to engage in speech is instructive in considering the breadth of the holding in *Sorrell*. Moreover, the suggested remedies are familiar: "the Court in *Citizens United* explicitly endorsed disclaimers and disclosures as alternatives to prohibitions on commercial speech."<sup>117</sup> As Justice Kennedy wrote, requiring disclosure is "a less restrictive alternative to more comprehensive regulations of speech."<sup>118</sup> This assertion is in line with recent precedent applying the *Central Hudson* test such as *Thompson v. Western States Medical Center*, where the Court explicitly recommended that the FDA should use disclaimers as a less restrictive means of achieving its goal of preventing misleading advertisements.<sup>119</sup> Combined with *Sorrell*, a trend is clear: the Court favors disclaimers to outright bans on speech.

#### **IV. The Implications of Recent Commercial Speech Jurisprudence and Potential Future Regimes**

Taking the *Sorrell* analysis to its next logical step, the FDA's outright prohibition on off-label marketing could fail a First Amendment analysis for three reasons. First, the ban on off-label promotion is content-based in the way that *Sorrell* uses that term in that it precludes drug manufacturers from promoting truthful information about a drug's off-label use.<sup>120</sup> Second, by prohibiting pharmaceutical manufacturers from marketing and discussing off-label uses of a drug

---

<sup>117</sup> Kesselheim, *supra* note 16, at 246.

<sup>118</sup> *Citizens United*, 130 S. Ct. at 915.

<sup>119</sup> *Id.* at 376 (suggesting that the government's interest in preventing misleading advertisements "could be satisfied by the far less restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not undergone FDA testing and that its risks were unknown.").

<sup>120</sup> Joseph et. al, *supra* note 8, at 26.

but not restricting similar communications from *any* other party, the FDA is targeting a specific class of speakers in the same way the Court warned against in *Sorrell*.<sup>121</sup> Finally, the restriction on off-label marketing may fail the *Central Hudson* test. The government's dual purposes of ensuring that doctors are not misled by biased marketing on the part of manufacturers and incentivizing pharmaceutical companies to seek full approval for their drugs may not be legitimate ends under *Central Hudson*'s second prong after *Sorrell*.<sup>122</sup> Even if these are legitimate government interests, the ban is likely not narrowly drawn to meet these goals given the narrow reading of permissible restrictions in *Sorrell*.<sup>123</sup> As in *Citizens United*, *Thompson*, and other recent commercial speech precedent, the Court is likely to suggest that such speech is protected by the First Amendment, but may instead be regulated by forcing the speaker to include adequate disclaimers to ensure that the communication would not be misleading.<sup>124</sup>

The first two assertions may prove dispositive.<sup>125</sup> If the Court continues to apply the kind of heightened scrutiny seen in *Sorrell*, the fact that the off-label speech ban applies selectively to

---

<sup>121</sup> Viz., it is a speaker-based restriction on speech. *Id.*; *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2663 (2011) (“On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information.”).

<sup>122</sup> Samp, *supra* note 50, at 141 (“In defending against First Amendment challenges, the FDA has asserted that its restrictions on truthful manufacturer speech serve two important government interests: (1) manufacturers have a natural tendency to provide a biased summary of their products’ attributes, and a ban on manufacturer off-label speech is the only means of ensuring that doctors and patients are not misled; and (2) prohibiting off-label speech provides manufacturers with an incentive to conduct the extensive product testing necessary to obtain agency approval for the new use, and conducting such testing is the only way to determine for sure that the off-label use is actually safe and effective.”).

<sup>123</sup> Of course, *Sorrell* does not go through each prong of the *Central Hudson* test, so it is hard to parse out which part of the analysis might ultimately doom the off-label promotion restriction.

<sup>124</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 915 (noting that disclosure requirements are “a less restrictive alternative to more comprehensive regulations of speech.”); *see supra* Part III and discussion therein.

<sup>125</sup> Joseph et. al, *supra* note 8, at 26-27 (“Assuming that *Sorrell* compels heightened judicial scrutiny of the government’s off-label marketing prohibition, the majority’s perfunctory application of that standard all but guarantees that the prohibition would not survive review. As the majority explained, the fact that a commercial speech restriction is content-based and

certain groups of speakers (viz., *only* drug manufacturers) will probably be enough to render it unconstitutional.<sup>126</sup> Moreover, given the explicit language by the Court in *Sorrell* regarding the lack of an informational asymmetry between physicians and pharmaceutical companies, it is unlikely that the Court will accept an argument that the ban on off-label promotion is designed to prevent misleading communications, even under a traditional *Central Hudson* analysis.<sup>127</sup> Of course, this rationale would probably still be solid ground to assert the constitutionality of the restriction on similar communications made directly to consumers, but the resulting shift in the regulatory landscape from removing promotion restrictions to physicians would be momentous even as is.

If the Court takes the FDA's argument that the regime is necessary to incentivize seeking full approval seriously at all, however, the analysis will likely depend on the *Central Hudson* test as understood through the lens of recent First Amendment jurisprudence.<sup>128</sup> It is still unclear to what extent the analyses in *Sorrell* and traditional *Central Hudson* cases like *Caronia* are

---

viewpoint discriminatory is "all but dispositive" of the constitutional question. On its face, the *Sorrell* majority leaves little room in which to argue that the government's ban on off-label commercial speech is of a different ilk than Act 80's ban on the use of prescriber-identifying information." (citing *Sorrell*, 131 S. Ct. at 2667); Samp, *supra* note 50, at 148 ("Sorrell represents a broad reaffirmation of the Court's commercial speech doctrine and - depending on how its "heightened scrutiny" standard is applied in the future - may mark a substantial expansion in First Amendment protection for commercial speech.").

<sup>126</sup> Samp, *supra* note 50, at 141 (noting that "current enforcement policy entails a high degree of the content-based and speaker-based speech regulation of which *Sorrell* was so critical" and concluding that "although the manufacturer of a drug is likely to be as well-acquainted as anyone with medical research regarding off-label uses of that drug, the manufacturer is the *only* entity that is prohibited from speaking truthfully about those uses.").

<sup>127</sup> *Sorrell v. IMS*, 131 S. Ct. 2675 (2011) (noting that the precepts disfavoring paternalism "apply in full force when the audience, in this case prescribing physicians, consists of 'sophisticated and experienced' consumers") (internal citation omitted); see *supra* Part III.C and discussion therein.

<sup>128</sup> *But see* Samp, *supra* note 50, at 141 ("Nothing in the Court's decision indicated that content-based speech suppression as a means of inducing a censored party to engage in additional scientific research is the sort of "neutral justification" that can survive First Amendment scrutiny.").

independent of one another,<sup>129</sup> but it is certainly true that if the ban cannot withstand the *Central Hudson* test, it cannot survive the more exacting standards called for in *Sorrell*. If the Court sees this goal as legitimate, the result would perhaps more likely be in favor of upholding the current regulatory regime. Even then, however, it may be that a better reading of *Sorrell* is that where a legitimate government purpose exists to restrict commercial speech, it still must do so in the least restrictive way possible. Given that the incentivization rationale does not call into question the truthfulness of the speech being made by pharmaceutical companies, it may be that the only permissible restriction is to require speakers to deliver a disclaimer.

To sharpen this analysis, the Allergan Complaint serves as useful case study for how the claims of both the FDA and drug manufacturers might play out in practice. Because a heightened scrutiny approach is likely to be dispositive, the analysis of Allergan's claims will focus on whether it would survive the *Central Hudson* test as it has been applied in recent commercial speech jurisprudence.

## **A. Allergan's First Amendment Suit: A Blueprint for Future Challenges**

### **1. The Facts**

On October 1, 2009, Allergan sued the FDA in the United States District Court for the District of Columbia seeking injunctive and declaratory relief from the FDA's labeling regulations.<sup>130</sup> The suit came in response to the FDA instituting a Risk Evaluation and Mitigation Strategies (REMS) request - a procedure designed to require manufacturers to

---

<sup>129</sup> See, e.g., Kesselheim, *supra* note 16, at 246 (describing the analyses in *Sorrell*, *Lorillard Tobacco*, and *Western States* as "close scrutiny of the third *Central Hudson* factor").

<sup>130</sup> Allergan Complaint, *supra* note 3 at 1; Terry M. Henry & Laurent A. Tulli, *Smoothing the Wrinkles of Off-Label Promotion: Allergan's Pre-Emptive Strike*, MEDMARC LOSS CONTROL WEBINAR SERIES 4, [http://www.cozen.com/admin/files/publications/Emerging\\_Issues\\_in\\_Medical\\_Device\\_L](http://www.cozen.com/admin/files/publications/Emerging_Issues_in_Medical_Device_L).

respond to unexpected outcomes or adverse side effects.<sup>131</sup> Interestingly, or perhaps bizarrely, the FDA can “require a REMS concerning an off-label use of a drug” but continue to restrict the drug company responding to the REMS from adding warnings to its label or expanding promotion relating to the same negative side effects in response to a REMS.<sup>132</sup> In this case, the FDA requested additional information for *all* Botox products and uses, including off-label treatments.<sup>133</sup> Thus, even while Allergan was forced to provide information about potential negative side effects for all off-label uses of Botox to the FDA, they could not communicate these outcomes to physicians because Good Reprint Practices at the time limited companies to providing information to physicians only upon request.<sup>134</sup> Facing an untenable position, Allergan challenged the FDA’s prohibition on providing truthful information to physicians about the off-label uses of Botox and potential negative side effects.<sup>135</sup>

---

<sup>131</sup> Press Release, Food & Drug Administration, FDA Requires Boxed Warning for All Botulinum Toxin Products (Apr. 30, 2009), *available at* <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm149574.htm>; *see also* 21 U.S.C. 355-1 (creating section 505-1 of the FDCA, authorizing the FDA to require applicants to submit and implement a REMS if the FDA determines it is necessary); CTR. FOR DRUG EVAL. & RESEARCH, FOOD & DRUG ADMIN, DEPT. OF HEALTH & HUMAN SERVS., *Risk Evaluation and Mitigation Strategy Assessments: Social Science Methodologies to Assess Goals Related to Knowledge*, Issue Paper, Docket No. FDA-2012-N-0408 (June 7, 2012), *available at* <http://www.fda.gov/downloads/Drugs/NewsEvents/UCM301966.pdf>. *See generally* Andrew Wilson & Christopher-Paul Milne, *FDA’s Risk Evaluation and Mitigation Strategies (REMS): Efficient Safety Tools or Process Poltergeist?*, 66 FOOD & DRUG L.J. 569 (2012) (detailing the REMS process and examining the program’s effectiveness).

<sup>132</sup> Henry & Tulli, *supra* note 130, at 2.

<sup>133</sup> *See* Press Release, Food & Drug Admin., *supra* note 131.

<sup>134</sup> Henry & Tulli, *supra* note 130, at 3-4; *see also supra* note 49 and citations therein.

<sup>135</sup> *See generally* Allergan Complaint, *supra* note 3.

## 2. Evaluating Allergan's Claims

Allergan's suit "focused solely on its desire to communicate truthful, scientific information to doctors."<sup>136</sup> Rather than bringing a broader challenge to the prohibition on off-label promotion that would have argued direct-to-consumer advertising bans on truthful information are unconstitutional as well, Allergan crafted a narrower argument exactly where the Court in *Sorrell* suggested a drug manufacturer should: truthful information directed at an intelligent audience.<sup>137</sup> If doctors can fend for themselves from an informational standpoint, then restrictions on commercial speech directed at them cannot be justified on the grounds that they may be misled.

Allergan's chief claim was, predictably, that an across-the-board restriction on off-label promotion is more extensive than necessary: "although the Government has significant interests that could justify some restrictions on off-label promotional practices, there is no need for the Government to choose the drastic means reflected in FDA's regulations: the blanket suppression of off-label speech."<sup>138</sup> The complaint argued three ways in which the restriction on off-label promotion is more extensive than necessary. First, the regulations are "most clearly overbroad as applied to truthful speech" to doctors about uses that are medically accepted but not yet approved by the FDA.<sup>139</sup> Rather than regarding uses that are "medically accepted" as legitimate and

---

<sup>136</sup> Henry & Tulli, *supra* note 130, at 6. To be sure, a future suit could challenge the advertising restrictions in their entirety, but the government would have a ready response that a regime that limits off-label marketing to the consumer base at large while allowing for advertising to physicians is a less restrictive alternative than banning all off-label speech by manufacturers. See Joseph et. al, *supra* note 8, at 31. "This... would ensure that off-label commercial messages are limited to a sophisticated and experienced consumer base, a factor cited by the *Sorrell* majority." *Id.*

<sup>137</sup> See *supra* Part III.C.; *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2670-71 (2011); (quoting *Thompson v. Western States Medical Ctr.* 535 U.S. 357, 374 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996)).

<sup>138</sup> *Id.*, at 18-19.

<sup>139</sup> *Id.* at 27.

allowing promotion in such circumstances, this speech is banned unless the manufacturer receives full FDA approval.<sup>140</sup> Second, Allergan argued it was placed in an untenable situation whereby it was forced to speak on some issues through the REMS action, but was not allowed to communicate additional information about off-label uses unless responding to a request by a physician, potentially resulting in negative public health ramifications.<sup>141</sup> Finally, Allergan argued that the FDA’s “policy of total suppression justified largely by the need to incentivize companies to seek FDA approval should not apply indiscriminately to uses for which approval is imminent.”<sup>142</sup> In other words, because approval for certain uses of Botox was pending, off-label promotion restrictions for these uses in particular are more restrictive than necessary.<sup>143</sup>

Under current jurisprudence, the government “would have little difficulty establishing that its off-label marketing prohibition serves the substantial governmental interest of preserving the effectiveness and integrity of FDA’s drug approval process to protect public health.”<sup>144</sup> Indeed, this is exactly what the Court held in *Western States*, and what lower courts have continued to uphold in cases such as *Caronia*. Moreover, as seen in cases like *Caronia*, the FDA would have little trouble establishing that the ban on off-label promotion advances this goal. After *Sorrell*, however, it is unclear whether this will serve as a legitimate interest. Instead, it seems that the government will need to rely on an argument that speech regarding off-label promotion is either itself misleading, because it implies that the FDA has approved the use of the

---

<sup>140</sup> *Id.* at 27-28; see 42 U.S.C. 1395r-8(k)(6) (defining “medically accepted”).

<sup>141</sup> See Allergan Complaint, *supra* note 3, at 32-33; Kesselheim, *supra* note 16, at 245; Henry & Tulli, *supra* note 130, at 3. Again, good reprint practices at the time did not allow Allergan to supply studies indicating negative outcomes without a request from a physician first.

<sup>142</sup> Allergan Complaint, *supra* note 3, at 32.

<sup>143</sup> See Kesselheim, *supra* note 16, at 245.

<sup>144</sup> Joseph et. al, *supra* note 8, at 28.

drug for that purpose, or that it serves as a prophylaxis against potentially misleading commercial speech.<sup>145</sup>

The Court's bold warning in *Sorrell* that "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech," may clear the way for a similar suit to prevail in the future.<sup>146</sup> Because the speech is truthful, a restriction cannot be based on the fact that the communication may mislead, at least where the audience is otherwise informed. As applied in this particular case it seems the restriction is even more burdensome than usual. As Allergan argued, the Court's reluctance to stifle speech should be further heightened where such categorical restrictions can "create a chilling effect that discourages communication about safety and best practices involving off-label uses."<sup>147</sup> Again, this chilling effect is magnified in this case by the FDA's REMS request. Even though the FDA acknowledged potential safety concerns and requested additional information on off-label safety issues, it continued to restrict Allergan's ability to communicate this same information to physicians.<sup>148</sup> The government may be at a loss to come up with a compelling justification for such an uneven regime.

In a similar suit in the future, the FDA will likely argue that off-label promotion restrictions are designed strictly to prevent false or misleading speech, an argument not advanced

---

<sup>145</sup> Samp, *supra* note 50, at 138 (citing *Sorrell*, 131 S. Ct. at 2671); *see supra* Part III.C.

<sup>146</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2671 (2011).

<sup>147</sup> Joseph et. al, *supra* note 8, at 28.

<sup>148</sup> *See supra*, note 131, and citations therein. Of course, this may only result in an as-applied rejection of the ban in situations where a REMS has been requested for off-label uses, but a similar scenario could exist today where Allergan is allowed to provide studies detailing these problems but still preventing wider promotion of bad outcomes. This would arguably be enough to implicate the regime as a whole because it still restricts truthful communications of poor outcomes in potentially more discrete and useful forms.

by the state of Vermont in *Sorrell*.<sup>149</sup> Restrictions on either false and misleading speech itself or restrictions that serve as a prophylaxis to prevent false or misleading speech “presumably are not subject to the majority’s heightened scrutiny, or even the intermediate *Central Hudson* test, and could pass judicial scrutiny under a less exacting standard.”<sup>150</sup> If the FDA can show that off-label marketing is false and or misleading by definition (because it attempts to show a use is safe and effective, which, by the FDA’s standards, it is not) or that the ban prevents such misleading speech from occurring, the prohibition should be upheld.<sup>151</sup> The problem, however, is the same one outlined above: the the speech in question is, in fact, truthful and physicians are an informed that is intelligent enough to not be misled in normal circumstances.

### **3. The Shape of Things to Come: What Might a Future Off-Label Promotion Regulatory Regime Look Like?**

The Allergan complaint also serves as a useful place to dissect potential alternatives to the prohibition on off-label promotion. The complaint itself suggests a number of alternative approaches, including: requiring companies to seek approval when an off-label use passes a certain sales threshold; taxing off-label uses as a deterrent; prohibiting them entirely; and prohibiting off-label promotion, but not non-promotional speech.<sup>152</sup> Other proposals for ambitious regulatory overhauls include restricting physicians from prescribing off-label uses

---

<sup>149</sup> *Sorrell*, 131 S. Ct. at 2672 (noting that Vermont did not “argue that the [law]... will prevent false or misleading speech,” or that detailing was itself misleading).

<sup>150</sup> *Joseph et. al*, *supra* note 8, at 32.

<sup>151</sup> *Id.*

<sup>152</sup> *See* Allergan Complaint, *supra* note 3; Kesselheim, *supra* note 16, at 245; *see also* Brenda Sandburg, *Off-Label Promotion: FDA Court Filing Says it Must Retain Enforcement Flexibility, Citing Harms from Premarin and ESAs*, PINK SHEET, Apr. 12, 2010, at 17.

where they “are not justified by high-quality evidence of safety and efficacy,”<sup>153</sup> and creating promotional safe harbors for drugs that benefit vulnerable patient populations.<sup>154</sup>

None of these alternatives, however, are workable or effective regimes in practice. For example, there is no practical way off-label uses could be tracked and distinguished from on-label uses for taxation purposes. Similarly, there is no intelligible way to construct a distinction between off-label promotion and non-promotional speech. It is not clear how a line would be drawn between off-label prescriptions made with strong scientific evidence or not. Indeed, this suggestion seems to beg the question - if scientific evidence were rigorous enough, the use need not be off-label. Although it may be feasible to target vulnerable patient groups and the drugs they require, it is not altogether clear that a safe harbor for pharmaceutical promotion is the best way to deliver necessary care to these groups. A general public health program that would invest in care for those populations would seemingly better serve the goals that proposal is concerned with. Finally, The prohibition of off-label uses entirely would be counter-productive and unduly restrictive, if not outside of the FDA’s regulatory reach.

All this is not to say that the only possible outcome in a challenge to the off-label promotion restrictions is allowing the speech while requiring disclosures. Perhaps the Court would accept certain restrictions on how this truthful speech may be presented - such as by restricting such promotion to print or electronic solicitation alone - but would reject an outright ban.<sup>155</sup> This middle ground would create a safe harbor for certain mediums but still ban others, certainly a less restrictive means than a complete ban. In the meantime, it would continue to

---

<sup>153</sup> Philip M. Rosoff & Doriane Lamelet Coleman, *The Case for Legal Regulation of Physicians’ Off-Label Prescribing*, 86 NOTRE DAME L. REV. 649, 656 (2011).

<sup>154</sup> Tim Mackey & Brian A. Liang, *Off-Label Promotion Reform: A Legislative Proposal Addressing Vulnerable Patient Drug Access and Limiting Inappropriate Pharmaceutical Marketing*, 45 U. MICH. J.L. REFORM 1 (2011).

<sup>155</sup> *Id.* at 29.

prevent misleading speech that might occur in a direct visit with a physician. Importantly, written communications could be actively reviewed and policed, while in person communications could more readily leave to misleading communications to physicians.<sup>156</sup> In the end, the Court may think too highly of its usual preferred approach to a less restrictive regime and require the FDA to impose disclosure requirements as an alternative to outright prohibition on off-label promotion.

### **V. Conclusion: The Uncertain Future of Off-Label Marketing Restrictions**

*Sorrell* presents a clear indication that the Supreme Court is open to arguments that commercial speech cannot be restricted simply because of who is delivering the communication or who the intended recipient of the communication is. In full, it articulates a clear path for pharmaceutical companies to follow in future challenges to off-label restrictions. It remains to be seen what a future regulatory regime might look like, but it is likely that the current outright prohibition will not survive a First Amendment challenge under the Court's recent commercial speech jurisprudence.

---

<sup>156</sup> *Id.* at 32-33 (“Once the government opens the door to some degree of off-label commercial disclosure... it becomes difficult for it to monitor or control what is being discussed in a physician’s office. In theory at least, the existing prohibition better ensures that no false or misleading off-label message is reaching the medical community because it creates a bright-line rule easier for the government to monitor and enforce.”).