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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 98N-0222]

Decision in Washington Legal Foundation v. Henney

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: In the **Federal Register** of August 12, 1999 (64 FR 44025), the Food and Drug Administration (FDA) published in its entirety an order entitled "Final Amended Order Granting Summary Judgment and Permanent Injunction." The order was entered by the United States District Court for the District of Columbia in *Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81 (1999). The Court of Appeals subsequently vacated the district court decision and injunction (and earlier decisions and injunctions) insofar as they declared unconstitutional (1) Statutory provisions concerning the dissemination by manufacturers of certain written materials concerning new uses of approved products (21 U.S.C. 360aaa *et seq.*), and (2) an FDA guidance document concerning certain industry-supported scientific and educational activities known generally as industry-supported continuing medical education or "CME." *Washington Legal Foundation v. Henney*, No. 99-5304, 2000 WL 122099, slip op. (D.C. Cir. Feb. 11, 2000). Consequently, these statutory provisions now constitute a "safe harbor" for manufacturers that comply with them; the CME guidance document details how the agency intends to exercise its enforcement discretion. FDA, consistent with its longstanding interpretation of the laws it administers, may proceed, in the context of case-by-case enforcement, to determine from a manufacturer's written materials and activities how it intends that its products be used. The Court of Appeals also recognized that if the agency brings an enforcement action, a manufacturer may raise a First Amendment defense.

FOR FURTHER INFORMATION CONTACT:

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Regarding biological products and devices regulated by the Center for Biologics Evaluation and Research: Toni M. Stifano, Center for Biologics Evaluation and Research (HFM-600), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301-827-6190.

Regarding human drug products: Laurie B. Burke, Center for Drug Evaluation and Research (HFD-40), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-2828.

Regarding medical devices: Byron L. Tart, Center for Devices and Radiological Health (HFZ-302), Food and Drug Administration, 2098 Gaither Rd., Rockville, MD 20850, 301-594-4639.

SUPPLEMENTARY INFORMATION: The Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), as amended, generally prohibits the manufacturer of a new drug or medical device¹ from distributing a product in interstate commerce for any intended use that FDA has not approved as safe and effective. The intended use or uses of a drug or device may be set forth in, among other things, its label or “labeling,” which includes written, printed, or graphic matter affixed to or “accompanying” the product. See 21 U.S.C. 321(m); 21 CFR 202.1(l)(2); see also 21 CFR 201.128, 801.4. The intended use or uses of a drug or device may also be determined from advertisements, promotional material, oral statements by the product’s manufacturer or its representatives, and any other relevant source. *Action on Smoking and Health v. Harris*, 655 F.2d 236, 239 (D.C. Cir. 1980); see also 21 CFR 201.128 and 801.4.

When FDA approves a drug or medical device, the agency approves the product for each use set out in the product’s approved labeling. A use that FDA approves is thus sometimes referred to as an “approved” or “labeled” use. A use that does not appear in the labeling is not approved as safe and effective by FDA and is known as an “unapproved” or “off-label” use. In this notice, such a use is referred to as a “new use.”

¹ For purposes of this notice, the terms “drug or medical device” include biologic products regulated under section 351(a) of the Public Health Service Act.

A central feature of the FDCA is that it generally prohibits interstate commerce in new drugs and devices for “new uses.” In particular, the statute provides that “[n]o person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to [21 U.S.C. § 355(b) or (j)] is effective with respect to such drug.” 21 U.S.C. 355(a); see 21 U.S.C. 331(d). Such an application must identify the particular use or uses to which the new drug will be put, and an approval of such an application for interstate distribution can become effective only with respect to such use(s). See 21 U.S.C. 355(b), (d), (j). Thus, an approved new drug that is marketed for a “new use” becomes an unapproved new drug with respect to that use.

An approved new drug that is marketed for a “new use” is also “misbranded” under the FDCA, because the labeling of such a drug would not include “adequate directions for use.” 21 U.S.C. 352(f); see *United States v. Articles of Drug * * * Rucker Pharmacal Co.*, 625 F.2d 665, 673 (5th Cir. 1980). Similarly, a medical device that is distributed for a “new use” is “adulterated,” see 21 U.S.C. 351(f), and “misbranded,” see 21 U.S.C. 352(f). An adulterated or misbranded product is prohibited from distribution in interstate commerce (21 U.S.C. 331(a), (k)), as is a drug that is marketed for a “new use” (21 U.S.C. 331(d)).

An approved new drug that is marketed for a “new use” may be seized (because it is an unapproved new drug with respect to that use), as may an adulterated or misbranded new drug or device (21 U.S.C. 334), and the government may seek an injunction against, or criminal prosecution of, those responsible for introducing such a product into commerce (21 U.S.C. 332, 333).

Section 401 of the Food and Drug Administration Modernization Act of 1997 (FDAMA or section 401), 21 U.S.C. 360aaa *et seq.*, amended the FDCA. It describes certain conditions under which a drug or device manufacturer may choose to disseminate to physicians and other health care practitioners certain written materials discussing a “new use” of its product. If those conditions are met, the government may not use that dissemination as evidence of the

manufacturer's intent that its product be used for a new use. See 21 U.S.C. 360aaa-6(b). If section 401 did not exist, the government could use such dissemination as evidence in establishing a manufacturer's illegal distribution of a new drug or device for a "new use," and in establishing that the product is misbranded or, in the case of a device, adulterated as well as misbranded.

Prior to FDAMA, FDA articulated its policy concerning the promotion of "new uses" in three guidance documents. FDAMA and its implementing regulations superseded the two guidance documents that addressed the dissemination of written "new use" information (reprints and reference texts) by drug and medical device manufacturers. See 61 FR 52800–52801 (October 8, 1996). FDAMA does not affect the third guidance document (the CME guidance document), which identifies 12 factors that the agency will consider in determining whether a manufacturer, through its support of scientific and educational activities, evidenced a "new use" of its drugs or devices. See 62 FR 64093–64100 (December 3, 1997).

Washington Legal Foundation presented a First Amendment challenge to section 401 and the three guidance documents. The district court issued orders declaring FDAMA, its implementing regulations, and the guidance documents unconstitutional. Among other things, the district court, with a number of qualifications, enjoined FDA from "in any way * * * limit[ing] any pharmaceutical or medical device manufacturer" from "disseminating" specified journal articles or medical texts and from "suggesting content or speakers" to an "independent program provider" in connection with a seminar or symposium funded by the manufacturer. See *Washington Legal Foundation v. Henney*, 56 F. Supp. 2d 81, 88–89 (D.D.C. 1999); *Washington Legal Foundation v. Friedman*, 36 F. Supp. 2d 16, 18–19 (D.D.C. 1999); *Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51, 74–75 (D.D.C. 1998).

On February 11, 2000, the Court of Appeals for the District of Columbia Circuit vacated the district court's decisions and injunctions insofar as they declared section 401 and the CME guidance document unconstitutional. See slip op. at 10. (The other two guidance documents,

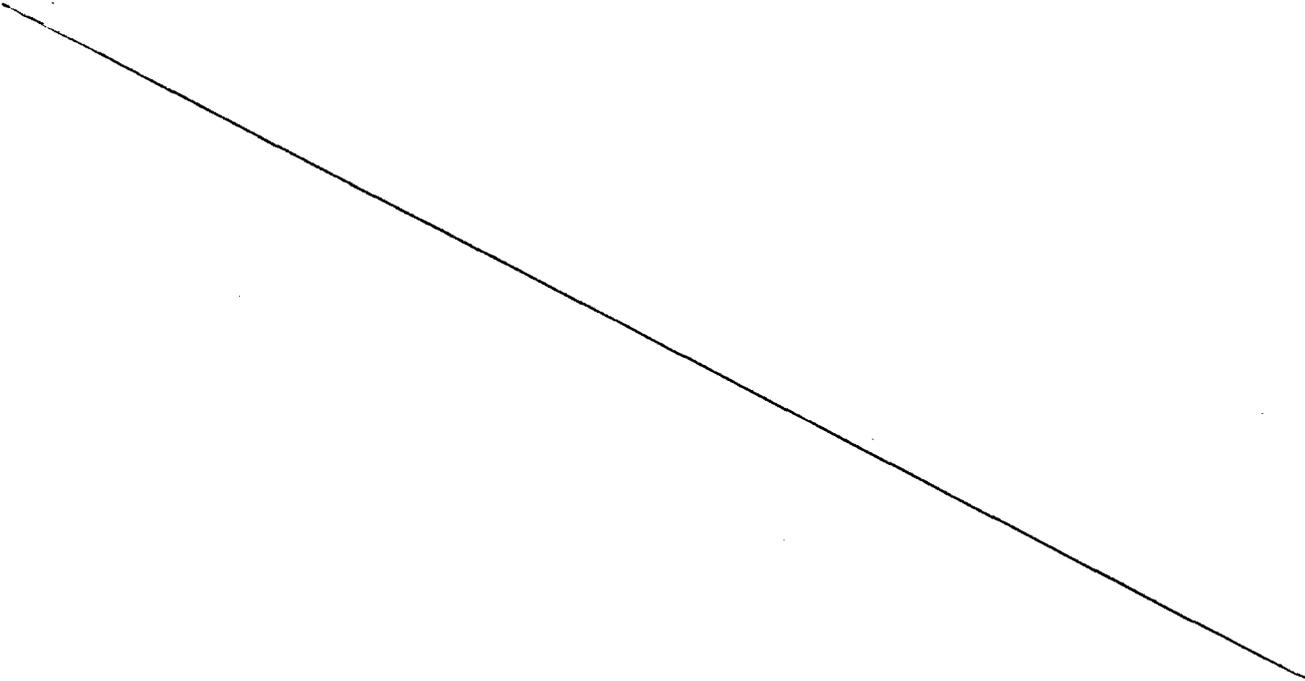
pertaining to the dissemination of certain written materials about “new uses,” had been superseded by FDAMA and its implementing regulations and were not at issue in the Court of Appeals.)

The D.C. Circuit’s decision was based on its conclusion that there is no case or controversy to provide a basis for WLF’s facial First Amendment challenge. In reaching that conclusion, the court relied on the government’s interpretation that (1) Section 401 provides a “‘safe harbor’ ensuring that certain forms of conduct [will] not be used against manufacturers in misbranding and ‘intended use’ enforcement actions” based on pre-FDAMA enforcement authority (slip op. at 8), discussed above, and (2) neither FDAMA nor the CME Guidance Document “‘independently authorizes the FDA to prohibit or sanction speech’” (id.). Put another way, if a manufacturer follows the provisions of FDAMA and its implementing regulations (21 CFR part 99), including, but not limited to, its provision concerning the submission of a supplemental application for FDA approval of a “new use,” FDA may not use the information disseminated by the manufacturer as evidence that the product is intended to be used for a “new use.” If a manufacturer proceeds under section 401 and its implementing regulations but does not comply, FDA may seek to enforce compliance through an injunction action under the FDCA to halt a violation of section 301(z). If a manufacturer does not proceed under section 401, that failure does not constitute an independent violation of law.

FDA traditionally has recognized the important public policy reasons to permit industry support for the full exchange of views in scientific and educational discussions, including discussions of “new uses.” FDA has distinguished between those activities supported by manufacturers that are nonpromotional and otherwise independent from the substantive influence of the supporting manufacturer and those that are not. Those activities that have been deemed by the agency to be independent from influence by the supporting manufacturer and nonpromotional have not been treated as labeling or advertising, and have not been subjected to the agency’s regulatory scrutiny. Under the CME guidance document, FDA does not expect to treat industry-supported CME any differently than it traditionally has done. If a manufacturer does not follow

the CME guidance document, that, by itself, is not an independent violation of law. Slip op. at 8.

Plaintiff Washington Legal Foundation (WLF) expressly agreed that FDA may proceed on a case-by-case basis under pre-FDAMA enforcement authority. See e.g., *Washington Legal Foundation v. Henney*, No. 99–5304, Transcript of Oral Argument, January 10, 2000 (TR.) at 43, 58, 75; see *Washington Legal Foundation v. Henney*, slip op. at 7, 8, and 9. Nonetheless, WLF urged the D.C. Circuit to reach the merits of the district court’s decisions and injunctions on the ground that FDA “will prosecute manufacturers for violating a normative standard” set forth in FDAMA or the CME Guidance Document. Slip op. at 9. The appellate court declined, finding that there was no constitutional controversy between the parties that remained to be resolved and that ruling on the constitutionality of a hypothetical interpretation of the statute would be inappropriate. *Id.* at 10. In vacating the district court’s decisions and injunctions insofar as they declared FDAMA and the CME Guidance Document unconstitutional, the D.C. Circuit noted that a manufacturer may, of course, argue that FDA’s use of the manufacturer’s promotion of a “new use” as evidence in a particular enforcement action violates the First Amendment. Slip op. at 9, n. 6.



In sum, then, FDAMA and its implementing regulations constitute a “safe harbor” for a manufacturer that complies with them before and while disseminating journal articles and reference texts about “new uses” of approved products. If a manufacturer does not comply, FDA may bring an enforcement action under the FDCA, and seek to use journal articles and reference texts disseminated by the manufacturer as evidence that an approved product is intended for a “new use.” Manufacturers that support CME may wish to become familiar with the CME guidance document, which details the factors FDA intends to take into account in exercising its enforcement discretion in relation to industry-supported scientific and educational activities. The CME guidance document, however, does not itself have the force and effect of law.

References

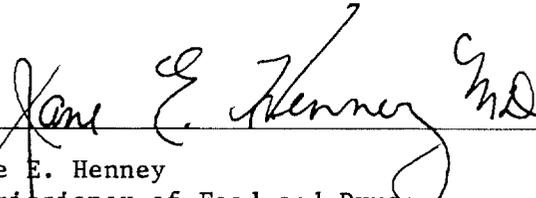
The following references are on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. *Washington Legal Foundation v. Henney*, No. 99-5304, 2000 WL 122099, slip op. (D.C. Cir. February 11, 2000).

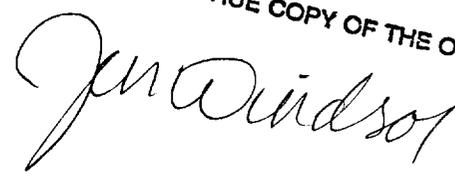
2. *Washington Legal Foundation v. Henney*, No. 99-5304, transcript of oral argument, January 10, 2000.

Dated: 3/9/00

March 9, 2000



Jane E. Henney
Commissioner of Food and Drugs

CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL


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