

# Bert Rein Weighs in on Eighth Circuit Ruling on "Inherently Misleading" Ads and Commercial Speech

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Wiley Rein founding partner Bert W. Rein was quoted extensively in an article published March 25 in *Bloomberg BNA's The United States Law Week* about a recent court ruling concerning misleading medical referral advertising and the implication on commercial speech.

The U.S. Court of Appeals for the Eighth Circuit ruled March 10 that "inherently misleading" advertising by a medical and legal referral business was not protected by the First Amendment. Mr. Rein told *BNA* via email that the decision demonstrates "how difficult it is to draw a line between advertising that is incomplete or imperfect and advertising that is inherently misleading. Under the Eighth Circuit's analysis, that distinction is crucial because characterizing a broad class of advertising as 'inherently misleading' permits suppressing it in its entirety by legislation and/or regulation."

Mr. Rein continued, "The exception for false or misleading advertising in the constitutional protection afforded commercial speech is premised on the theory that such speech lacks any value in the marketplace of ideas."

Mr. Rein said the company's speech had value "because it made the public aware of benefits they might seek under no-fault insurance policies." Furthermore, Mr. Rein suggested that had a consumer group given the same advice, "it would almost certainly have been constitutionally protected under strict scrutiny."

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He also said that the case could have implications at the Supreme Court of the United States. Mr. Rein said the Eighth Circuit decision could allow the Court to revisit the question left open in *Sorrell v. IMS Health Inc.* about "whether there is any reason to continue applying a lesser constitutional standard to commercial speech regulation, as the Court did here, than to other speech addressing the same subject matter." Wiley Rein filed an *amicus curiae* brief in the case with the Supreme Court.

"The commercial speech doctrine has vexed the Court for some time and the area is murky," Mr. Rein said. "A unification of speech doctrine and an acceptance of protecting the public from false or misleading statements as a compelling state interest can be legitimately advanced by narrowly tailored means may be the best way out of the current mire."