

Precautionary Principle Loses to First Amendment

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In *CTIA v. City and County of San Francisco*, No. 11-17707 (9th Cir.), the United States Court of Appeals for the Ninth Circuit on February 27 denied rehearing *en banc* in a closely watched case impacting the First Amendment rights of manufacturers and retailers. This development preserved the decision of the appellate panel, which rejected municipal cell phone safety warnings as inconsistent with the First Amendment. The City had sought to mandate warnings in retail stores based on the "Precautionary Principle," to justify warnings anytime a product has not been proven to be absolutely safe. Under this approach, there would be virtually no limit to the sorts of speech mandates a government could impose.

In 2010, San Francisco passed the "Cell Phone Right-to-Know" ordinance, which mandated radio frequency (RF) warnings for cell phones. It required cell phone retailers to display and disseminate posters, stickers and "factsheets" warning consumers about potential dangers from RF energy emitted by cell phones.

In October 2011, the District Court held that most of the ordinance was unconstitutional, but it allowed the city to mandate distribution of a modified "factsheet" containing government recommendations and opinion with every wireless phone purchase. CTIA-The Wireless Association[®], represented by Wiley Rein, successfully appealed the "factsheet" portion of the District Court's ruling and the City cross-appealed the portion finding the original materials invalid. The Ninth Circuit agreed with CTIA, affirming the District Court's threshold finding that the ordinance violated cell phone retailers' First Amendment rights. It rejected the "modification" of the "factsheet" because it was not "purely factual and uncontroversial" as required by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986). The City petitioned for *en banc* rehearing, which the Ninth Circuit denied on February 27, 2013.

The decision is a victory for retailers and manufacturers against unjustified government regulation. Among other things, the Ninth Circuit rejected the City's argument that there need not be First Amendment scrutiny of compelled speech in the commercial context because it is "informational" and the "message" is attributed to the government. Instead, the Ninth Circuit found that the City's compelled messages of potential danger are misleading and controversial and cannot be required consistent with the First Amendment. Retailers and manufacturers in various industries should be vigilant in reviewing and resisting unjustified "disclosure" or warning obligations.

Wiley Rein litigators Andrew G. McBride, Joshua S. Turner and Megan L. Brown led the litigation team representing CTIA in this case.