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PRESS RELEASE

Wiley Rein Secures Wide-Reaching First Amendment Decision on Behalf of the Wireless Industry

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In another First Amendment victory for the Wireless Industry, the U.S. Court of Appeals for the Ninth Circuit affirmed its preliminary decision to prohibit the City of San Francisco from requiring retailers to distribute "fact sheets" and display posters designed to warn consumers about unsubstantiated dangers from radio frequency (RF) energy emitted by cell phones.

Wiley Rein's Washington DC-based partners Andrew G. McBride, Joshua S. Turner and Megan L. Brown are representing CTIA - The Wireless Association in the industry's challenge to the City's warning requirements. Mr. McBride argued *CTIA v. City and County of San Francisco* before the Appeals Court, defending the First Amendment rights of manufacturers and retailers across the country.

The "fact sheet" in question contained numerous assertions about cell phone safety and "recommendations" from the City about how consumers could reduce their exposure to RF energy. CTIA argued successfully that this constituted government-compelled speech in violation of its First Amendment rights and that its members would suffer irreparable injury to their goodwill, reputations and product if the San Francisco ordinance was allowed to go into effect. In its decision, the Ninth Circuit held that the FCC "has established limits of radiofrequency energy exposure, within which it has concluded using cell phones is safe," and that San Francisco itself had conceded "that there is no evidence of cancer caused by cell phones." The court thus found that the "fact sheet" contained "more than just facts" and "could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous."

Related Professionals

Megan L. Brown
Partner
202.719.7579
mbrown@wiley.law

Joshua S. Turner
Partner
202.719.4807
jturner@wiley.law

Practice Areas

First Amendment/Commercial Speech Issues and Appeals
Telecom, Media & Technology
TMT Appellate

The City had also cross-appealed, asking the Ninth Circuit to lift the original injunction on the remainder of the ordinance. The Ninth Circuit rejected that request, stating that "[s]ince the ordinance compels statements that are even more misleading and controversial than the revised fact sheet, the original injunction must be affirmed."

In October 2011, a federal district judge in San Francisco agreed with CTIA that the City's regime and its materials were unconstitutional. The district court found that the City's materials were misleading and alarmist as promulgated and as a result the City could not require retailers to post and disseminate them. But the district court judge allowed the city to compel distribution of the modified "fact sheet" reflecting the judge's suggested revisions. The lower court's ruling was the first to approve a consumer warning where there is "nothing more than the possibility that an agent may (or may not) turn out to be harmful."

The Ninth Circuit's decision can be read here.