

ALERT

First Amendment Case May Doom State Health Care Laws

January 4, 2011

State health care laws in Maine, Vermont, and New Hampshire took a hit recently when the U.S. Court of Appeals for the Second Circuit overturned a Vermont law that restricted pharmaceutical company access to privately collected prescribing data for physicians practicing in the state. The Vermont law purported to reduce drug costs, improve health care, and protect physician privacy by barring pharmaceutical companies from obtaining information about individual physicians' prescribing habits, which could be used to target marketing efforts (commercial speech) by company sales representatives, unless those physicians consented to this use of their data. The Second Circuit invalidated the law as an unconstitutional restriction on commercial speech because it did not protect a legitimate interest in medical privacy or "advance the state's interests in public health and reducing costs in a direct and material way" and because there were "more direct, less speech-restrictive means available" that would advance the asserted public health and cost containment interests equally well.

Because the First Circuit Court of Appeals had previously upheld similar laws in New Hampshire and Maine, the Vermont case has been appealed to the U.S. Supreme Court, which, many observers believe, is likely to agree to hear the case. The outcome of a Supreme Court review could significantly affect the scope of permissible health care cost containment efforts at both the state and federal level.

Wiley Rein Food and Drug Administration (FDA) Practice Group partners Bert Rein and Karyn Ablin analyze these cases in a recently published article in BNA's *Pharmaceutical Law & Industry Report*, which can be viewed in its entirety [here](#).

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Practice Areas

Food & Drug

Wiley Rein's FDA Practice has for many years represented pharmaceutical and health care clients in matters involving governmental regulation of the pharmaceutical industry and the constitutional and statutory limitations on such regulation, including representing the plaintiffs in *Washington Legal Foundation v. Henney*, the landmark First Amendment challenge to FDA's attempted regulation of the dissemination of "off-label" drug information in continuing medical education programs. In addition, Mr. Rein and Ms. Ablin represented the Association of American Physicians and Surgeons, the Competitive Enterprise Institute, and Consumer Alert in their successful challenge to FDA's pediatric testing regulations in *AAPS v. FDA*. They also represented Wyeth before the Vermont Supreme Court and the U.S. Supreme Court in Wyeth's federal preemption challenge to a state-law products liability jury verdict based on inadequate labeling in *Wyeth v. Levine*. Jim Czaban, chair of Wiley Rein's FDA Practice, focuses on FDA compliance and policy matters and has also been lead counsel in numerous judicial and administrative proceedings involving the scope and extent of FDA's regulatory powers.