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Free Speech Implications of Calif. Cell Phone Case

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Now pending before the U.S. Court of Appeals for the Ninth Circuit is a landmark case that could impact the First Amendment rights of manufacturers and retailers. *CTIA v. City and County of San Francisco*, No. 11-17707 (9th Cir.)

The case addresses the ability of a local government to require a consumer warning or advisory for a product based on the proposition that it has not been proven to be absolutely safe.

Last year, San Francisco enacted 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 "fact sheets" warning consumers about potential dangers from RF energy emitted by cell phones.

In October, a district court held most of the ordinance unconstitutional, but allowed the city to compel distribution of a modified fact sheet with every wireless phone purchased.

The lower court's ruling is the first case to approve a consumer warning or advisory where there is "nothing more than the possibility that an agent may (or may not) turn out to be harmful."

CTIA - The Wireless Association, represented by Wiley Rein, has appealed the "fact sheet" portion of the district court's ruling, and the Ninth Circuit has granted an injunction pending appellate review.

Were the Ninth Circuit to affirm the ruling below, it would create a

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conflict with the Second and Sixth Circuits and arguably present a case worthy of the U.S. Supreme Court's attention.

The City's Regime

San Francisco's ordinance is based on concerns that use of cell phones may cause cancer. San Francisco concedes that there is no evidence of this.

Nevertheless, acting under the so-called "precautionary principle," the city has taken the position that it "should not wait for scientific proof of health or safety risk before taking steps to inform the public of the potential for harm" of a given product.

The Proceedings

Under the city's regime, most cell phone retailers in San Francisco were required to:

1. Display in a "prominent" location an 11-inch-by-17-inch informational poster containing, among other things, statements about cell phones and "potential health effects," city recommendations to "reduce exposure" and graphics showing RF energy penetrating deep into the head and pelvic region of a human form;
2. Provide every customer who purchases a phone a copy of an informational fact sheet that elaborates on the city's recommendations and reiterates certain statements about potential health effects; and
3. Add or superimpose on any materials adjacent to phones that the retailer displays for sale a statement that RF energy is absorbed by the head and body.

San Francisco finalized the content of the display materials mandated by the ordinance on Sept. 30, 2011, and gave retailers 15 days from that date to begin compliance.

On Oct. 4, 2011, CTIA sought to enjoin this requirement. On Oct. 27, 2011, Judge William H. Alsup enjoined the city's regime, finding it unconstitutional under the First Amendment.

Nonetheless, Judge Alsup determined that as long as San Francisco made certain revisions, the city could mandate dissemination of one element of the regime — the fact sheet.

The revised fact sheet contains statements indicating that cell phones emit RF energy, that consumers may take steps to limit their exposure and that the World Health Organization has classified RF energy as a "possible carcinogen." The fact sheet also still contains the city's controversial and misleading "recommendations" about cell phone use.

In blessing this modified regime, the court "presume[d] that a government may impose, out of caution, at least some disclosure requirements" even where there is no proof that the product is or could be harmful.

CTIA sought an emergency stay of the city's implementation of the revised fact sheet pending appellate review of the district court's decision. On Nov. 28, 2011, the Ninth Circuit granted CTIA's request for a stay pending review, preventing the city from requiring the distribution of the revised fact sheet.

The city has cross-appealed the district court's decision with respect to the overall regime. Briefing on the appeal and cross-appeal will take place over the next several months, with amicus briefs due on Jan. 18, 2012. Argument is expected to occur in the spring.

Potential Impact

The novel legal positions that the city has taken in defending its cell phone warning law should be of concern to all retailers and manufacturers.

The city's primary position before the district court was that there need not be any First Amendment scrutiny of compelled speech in the commercial context so long as the message is attributed to the government.

The city's alternative argument attempted to bring the extensive informational requirements and warning statements within the narrow confines of a line of Supreme Court cases that permit the government to require disclosure of factual, noncontroversial information to prevent customer deception.

If accepted, the city's position would expand government authority to mandate warnings and disclosures to include circumstances where there is no evidence of any actual harm or danger.

The city's arguments would weaken the First Amendment's protections against compelled speech and content-based regulations in favor of a paradigm in which government can conscript private entities to disseminate controversial government viewpoints about contested matters with either zero or minimal First Amendment scrutiny.

CTIA's position is that the city's compelled messages are misleading, controversial and unnecessary given the comprehensive federal regulatory regime that ensures cell phones sold in the United States are safe.

CTIA takes the position that the burden is on the government under the First Amendment to demonstrate a real danger from a product before it can impose any "advisory" or warning requirements.

CTIA also argues that where the government-compelled speech is not purely factual, but instead expresses a governmental opinion on a matter of public debate, heightened First Amendment scrutiny should apply. Substantial case law supports the CTIA position.

The city remains free to promote its own views about what it deems a scientific and social "debate," but it cannot conscript private parties into promoting messages with which they disagree.

Put simply, there is no need for this intrusion, and the regime's burdens cannot be justified under any level of First Amendment scrutiny.