In Search of Mass Tort Plaintiffs: Advertising and Its Impact on the Targeted Populations, Potential Jury Pools, and Our Clients

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MANY people see the television ads flashing warnings, the FDA logo, "recall" notices, and of course, the toll-free number to call for "more information." Fewer see the miniscule text (if, indeed, there is any such text) indicating the ads seek personal injury clients, often for mass tort litigation. This article briefly reviews the landscape of legal advertising and the First Amendment issues legal advertising raises. This article then turns to the world of mass-tort advertising and its potential effects, particularly the effects of those advertisements seeking clients for claims involving pharmaceutical products and medical devices. Finally, it concludes by describing recent efforts to mitigate some of the risks posed by these ads while respecting the recognized First Amendment rights of the advertisers.

I. Background

On September 24, 2019, the Federal Trade Commission announced it sent letters to seven undisclosed law firms and lead generators "expressing concern" that some television advertisements soliciting clients for personal injury lawsuits against drug manufacturers "may be deceptive or unfair under the FTC Act."[1] The FTC's concerns included possible misrepresentations of the risks associated with certain pharmaceuticals and the "false impression" that physician-prescribed medications had been recalled when they had not.[2] Several states have enacted or introduced legislation addressing the same concerns. These advertisements can have real repercussions: there is some evidence of patients discontinuing prescribed medications after viewing the advertisements and suffering adverse consequences. To appreciate how we have reached this point, it is useful to revisit the historical issues surrounding the advertisement of legal services.

II. Legal Advertising and the First Amendment

Attorney advertising has been around far longer than many may realize. Abraham Lincoln's firm advertised in the 1850's.[3] Attitudes changed over the next few decades, and by the early 1900's, ethical rules essentially banned all forms of advertising beyond business cards (and even those were simply "not *per se* improper").[4] In 1963, the ABA

[1] *See,* Press Release, Fed. Trade Comm'n, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (Sept. 24, 2019). Although the FTC did not disclose the identities of the parties to whom the letters were sent, copies of what purport to be September 19, 2019, letters from the FTC to four law firms and three lead generators are available on the internet. Each of those letters outlines specific "lawsuit ads" run by the recipient that FTC indicated may be misleading and/or unfair or deceptive.

[2] In addition, the FTC has taken the position in an investigatory closing letter sent to a separate lead generator that "deceptive attorney advertising that has an effect on drug or device sales violates Section 12(a)(2) of the FTC Act, 15 U.S.C. § 52(a)(1)." Fed. Trade Comm'n, *Closing Letter to Relion Group, Inc.* at 1-2 (July 8, 2020).

[3] *See, e.g.*, DAILY ILL. STATE J. at 1 (December 2, 1857) (ad for "LINCOLN & HERNDON, Attorneys and Counsellors at Law"); *see also* Robert F. Boden, *Five Years After* Bates*: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L.R. 547, 547–549 (1982) (discussing Lincoln's advertising efforts and providing an excellent summary of advertising restrictions on lawyers).

[4] *See* Canon 27, ABA Canons of Professional Ethics (1908). The Final Report of the ABA's Committee on Code of Professional Ethics proposing those Canons included an undated quote from Lincoln in its Preamble: "Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the

issued an ethics opinion stating that lawyers could not send holiday greeting cards to clients or other lawyers but only to personal friends; and even there, the card could not identify the law firm or be signed in a way that identified the sender as a lawyer.[5] As the First Amendment's protections were originally not understood to extend to "commercial speech,"[6] there was little reason to question the constitutionality of restrictions on legal advertising. A series of Supreme Court decisions would change all of that.

In 1976, the Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[7] and held some level of First Amendment protection extended to commercial speech. There, consumers challenged a statutory prohibition on pharmacists advertising prescription drug pricing. Plaintiffs claimed that they were entitled to receive information that pharmacists wished to advertise concerning the price of medication. As the majority opinion noted, "The 'idea' [the pharmacist] wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'"[8] Thus, the case squarely presented the question of whether the First Amendment's protections applied to purely commercial speech. The majority held that they did under the circumstances before it.[9] The majority opinion pointed out there was no claim the speech at issue was "false or misleading." This was important because:

> Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information

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profession which would drive such men out of it." *Report of The Thirty-First Annual Meeting of The American Bar Association*, 33 A.B.A. Report at 575 (1908).

[5] ABA Comm. on Ethics and Pro. Responsibility, Formal Op. 309 (1963).

[6] That is, "expression related solely to the economic interests of the speaker and its audience." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980).

[7] 425 U.S. 748 (1976).

[8] 425 U.S. at 761.

[9] The majority explicitly reserved the question of whether restrictions on commercial speech by other types of professionals, such as lawyers or physicians, might "require consideration of quite different factors." *Id.* at 773 n.25.

> flow cleanly as well as freely.[10]

The very next term, in *Bates v. State Bar of Arizona*,[11] the Court addressed one of the questions it reserved in *Virginia State Board of Pharmacy* and squarely held the First Amendment's protections extended to some forms of attorney advertising, overturning Arizona's categorical ban. It reiterated, though, that the protection would not extend to "[a]dvertising that is false, deceptive, or misleading."[12] The Court further held the First Amendment permitted "reasonable restrictions on the time, place, and manner of advertising."[13]

The Court continued to flesh out the contours of the First Amendment protections for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[14] With respect to commercial speech that is neither false nor misleading, *Central Hudson* established a three-part inquiry. First, does the government assert a substantial interest in support of its regulation? Second, can the government demonstrate that the restriction on commercial speech directly and materially advances that interest? Finally, is the regulation narrowly drawn?[15] This basically established an intermediate level of Constitutional scrutiny for commercial speech.[16]

In *Zauderer v. Office of Disciplinary Counsel of Supreme Court,*[17] the Court held the First Amendment protected a lawyer's newspaper advertisements soliciting clients with potential Dalkon Shield claims (including an accurate illustration of the device and an accurate description of the types of injuries allegedly caused by its use). The Court invalidated a public reprimand based on disciplinary rules that purportedly prohibited such content in legal advertising. The Court noted, "An attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential

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[10] *Id*. at 771-772 (citing to a Virginia statute criminalizing untrue, deceptive, or misleading advertising).

[11] 433 U.S. 350 (1977).

[12] *Id.* at 383.

[13] *Id.* at 384. The next year, the Court upheld some restrictions on in-person solicitation by lawyers. Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978).

[14] 447 U.S. 557 (1980).

[15] *Id*. at 564-565.

[16] In contrast, where the speech at issue is considered within the core of the First Amendment, the applicable standard is "strict scrutiny," which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)).

[17] 471 U.S. 626 (1985).

clients."[18] The application of the disciplinary rules to the lawyer's Dalkon Shield advertisements failed the *Central Hudson* test because, among other things, the rules as applied did not directly advance a substantial governmental interest, nor were they narrowly tailored to advance the State's supposed interests.[19]

On the other hand, the Court upheld a portion of the reprimand based on the lawyer's failure to disclose in those same advertisements – which explicitly stated that "if there is no recovery, no legal fees are owed by our clients" – that those clients would still be liable for significant litigation costs if their lawsuits were unsuccessful. Stating that the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,"[20] the Court held this mandatory disclosure, requiring inclusion of "purely factual and uncontroversial information about the terms under which his services will be available," was not an infringement on that minimal interest. The disclosure requirement was "reasonably related to the State's interest in preventing deception of consumers."[21] The Court reached the latter conclusion because a majority considered it "self-evident" there was a possibility of deception due to the "substantial number" of clients who might not appreciate the technical difference between "fees" and "costs."[22] Accordingly, it upheld this portion of the reprimand.

For the most part, subsequent Supreme Court decisions (including other lawyer advertising cases) have continued to protect commercial speech. In *Florida Bar v. Went for It*,[23] however, a 5-4 majority upheld a thirty-day ban on direct mail solicitations of potential clients for known injuries (i.e., the mailings went to injured parties or their survivors) under the *Central Hudson* test. Specifically, it concluded – based on the record[24] before it – that:

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[18] *Id.* at 647.
[19] *Id*. at 639-649.
[20] *Id*. at 651.

[21] *Id*. The Court further noted that "all our discussions of restraints on commercial speech have recommended disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech." *Id.* at 651 n.14 (citing *Central Hudson*, 447 U.S. at 565).
[22] *Id*. at 652-653. Justices Brennan and Marshall dissented from this portion of the decision. *Id*. at 656.
[23] 515 U.S. 618 (1995).
[24] The record presented to the Court included a summary of statistical and anecdotal data gathered by the Florida Bar

> [T]he Bar's 30-day restriction on targeted direct-mail solicitation of accident victims and their relatives withstands scrutiny under the three-pronged *Central Hudson* test that we have devised for this context. The Bar has substantial interest both in protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions have engendered. The Bar's proffered study, unrebutted by respondents below, provides evidence indicating that the harms it targets are far from illusory. The palliative devised by the Bar to address these harms is narrow both in scope and in duration. The Constitution, in our view, requires nothing more.[25]

Even then, the Court stated, "Our lawyer advertising cases have afforded lawyers a great deal of leeway to devise innovative ways to attract new business. Florida permits lawyers to advertise on prime-time television and radio as well as in newspapers and other media."[26] As a result, the Court's First Amendment jurisprudence affords significant protection to lawyers seeking personal injury clients.

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that the "Florida public views direct-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly on the profession." *Id*. at 626.

[25] *Id*. at 635. In dissent, Justice Kennedy (joined by Justices Stevens, Souter, and Ginsburg), concluded that the Florida Bar rule failed all three prongs of the *Central Hudson* test, stating:

> Today's opinion is a serious departure, not only from our prior decisions involving attorney advertising, but also from the principles that govern the transmission of commercial speech. The Court's opinion reflects a new-found and illegitimate confidence that it, along with the Supreme Court of Florida, knows what is best for the Bar and its clients. Self-assurance has always been the hallmark of a censor. That is why under the First Amendment the public, not the State, has the right and the power to decide what ideas and information are deserving of their adherence. The general rule is that the speaker and the audience, not the government, assess the value of the information presented. By validating Florida's rule, today's majority is complicit in the Bar's censorship. For these reasons, I dissent from the opinion of the Court and from its judgment.

Id. at 645 (Kennedy, J., dissenting) (*internal citations and quotations omitted*).

[26] *Id*. at 633.

III. The Legal Advertising Market for Drug and Medical Device Claims

In his dissent in *Bates*, Justice Powell stated, "I am apprehensive, despite the Court's expressed intent to proceed cautiously, that today's holding will be viewed by tens of thousands of lawyers as an invitation—by the public-spirited and the selfish lawyers alike—to engage in competitive advertising on an escalating basis."[27]

Boy howdy! He got that one right.

The legal advertising market is now a small but significant fraction of overall spending on television marketing. A study by the American Tort Reform Association looked at legal advertising running on national and local television stations between 2017 and November 2021.[28] The numbers are astounding; advertisers spent an estimated $5,177,587,971 to run 66,604,300 legal ads during that time frame.[29] Not surprisingly, ad spending fell in 2020 ($1,140,371,738 in 2019 to $1,026,112,303 in 2020) while still buying almost the same number of ads.[30]

Who is spending that kind of money? And why? Elizabeth Tippett, a law professor, and Jesse King, a marketing professor, addressed the potential effects of legal advertising seeking pharmaceutical and medical device claimants in a recent paper.[31] Their scholarship offers answers to both questions.

As for the "why," the financial incentive for seeking mass tort claimants is apparent. A settlement announced by Bayer to resolve tens of thousands of Roundup claims exceeded $10,000,000,000.[32] That "incentive has produced a market in

[27] *Bates*, 433 U.S. at 403 (Powell, J., dissenting).

[28] American Tort Reform Association, *Legal Services Advertising in The United States, 2017 – 2021* (February 2022).

[29] *Id*. at 4, 6.

[30] *Id*. *See also* Nate Raymond and Disha Raychaudhuri, *Mass Tort TV Ads Fell In 2020 Amid Drop in Roundup Advertising*, REUTERS (January 21, 2021), https://www.reuters.com/article/us-lawyers-advertising-idUSKBN29Q30Q (last accessed September 13, 2022).

[31] Jesse King and Elizabeth Tippett, *Drug Injury Advertising*, 18 YALE J. OF HEALTH POLICY, LAW, AND ETHICS 114 (2019).

[32] Press Release, Bayer, *Bayer announces agreements to resolve major legacy Monsanto litigation* (June 24, 2020), available at https://www.bayer.com/

which advertisers compete to identify the most valuable plaintiffs for promising (or well-established) mass tort claims."[33] The competition is fierce and highly concentrated.

As for the "who," the authors note the top ten most prolific national advertisers for legal services accounted for 72% of all legal advertising volume, and the top three alone accounted for almost 50%.[34] Unsurprisingly, at least three advertisers were not law firms.[35] Pointing to the disparity between the entities that conducted the advertising and the law firms that filed the cases, they concluded:

> The disconnect between litigation filings and advertising—as well as the presence of non-law firm advertisers—suggests that some law firms, and corporations, specialize in producing and financing advertising spots, while other law firms specialize in litigating. This market will thus require some form of transaction between the advertiser that generated the lead and the litigator that files the claim. The nature of these transactions is not widely known, as they exist in an ambiguous regulatory space within attorney ethics rules.[36]

Professors Tippett and King looked solely at the television advertising market. There are also internet-based campaigns, social media campaigns, and even text-messaging-based campaigns all seeking the same thing: mass tort plaintiffs.[37]

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media/bayer-announces-agreements-to-resolve-major-legacy-monsanto-litigation/ (last accessed September 13, 2022).

[33] King and Tippett, *supra* note 31, at 121.

[34] *Id*. at 122.

[35] *Id.*

[36] *Id.* at 123 (footnote omitted).

[37] The founder of one of the historically bigger television advertisers was quoted recently as saying he was now spending the "majority" of his marketing dollars online. Raymond and Raychaudhuri, *supra* note 30. A recent article in the Alabama Law Review explores issues related to the impact of "online behavioral advertising" on the legal advertising market (the author notes how a Google search for an article on factors predictive of divorce was accompanied by banner advertisements for divorce attorneys in his town). Seth Katsuya Endo, *Ad Tech and The Future of Legal Ethics*, 73 ALA. L. REV. 107 (2021). The implications of this sort of legal advertising are beyond the scope of this article, but it is not obvious that the advertising medium would impact on

As Professors Tippett and King hypothesized, much of the spending on legal advertising is driven by the business model used to obtain and represent plaintiffs in mass tort litigation.[38] In a complaint (subsequently sealed by the trial judge) filed by a former employee of a Houston law firm seeking commissions for financing he said he obtained for the firm, the former employee alleged that the firm had purchased inventories of cases from other firms in the transvaginal mesh litigation, paying some $40,000,000 for almost 14,000 mesh cases.[39] As alleged in the complaint, the firm had a straight-forward business model:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[40]

One firm that helped generate leads for mass tort plaintiffs' attorneys published an online guide outlining its views on the outlook for various mass torts claims in 2021.[41]

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the overall business model discussed in the body of the article.

[38] *See*, *e.g.*, U.S. Chamber Inst. For Legal Reform*, Gaming The System: How Lawsuit Advertising Drives The Litigation Lifecycle,* 1-6 (April 2020).

[39] *See,* Daniel Fisher, *Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases*, FORBES (Oct. 20, 2015), https://www.forbes.com/sites/danielfisher/2015/10/20/lawsuit-details-how-law-firms-borrow-and-pay-millions/?sh=1a6ec72c61de (last accessed September 13, 2022).

[40] Complaint, Shenaq v. Akin, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015) ¶ 76.

[41] Legal Growth Associates, *2021 State of Mass Torts*, https://legalgrowthassociates.com/mass-torts-2021/ (last accessed Jan. 24, 2021; website no longer active when most recently accessed on September 13, 2022). A law firm blog, the Lawsuit Information Center Blog, recently posted *Mass Torts To Watch In 2022*, https://www.lawsuit-information-center.com/mass-torts-2022.html (last accessed September 13, 2022), which outlined "the mass tort class action lawsuits with the highest predicted settlement payouts." The same blog has posted then-current costs to purchase various mass tort leads, which the author believed was a "barometer for which mass torts have the

This guide treated the mass tort leads for what they really are—investments—and assessed whether acquirers should be moving quickly or with caution in obtaining such leads.[42]

Although the FTC has the regulatory authority to address deceptive lawyer advertising nationally, it has traditionally deferred to local authorities, limiting its comments to what it considers overly restrictive rules of lawyer advertising. What led it to issue the letters in September 2019?

IV. The Effects of Mass Tort Advertising

As the FTC noted in its press release announcing the warning letters, "the FDA's Adverse Event Reporting System [FAERS] contains reports of consumers who saw lawsuit ads about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences as a result."[43] Several studies—sometimes financed by interested parties—suggest a link between legal advertising and patients discontinuing their medications. Significantly, a recent letter to the editor authored by FDA employees who analyzed data from FAERS concluded, "Our findings provide evidence consistent with a previous study showing attorney advertising influenced patients to discontinue" a prescribed medication.[44]

In addition, Professors Tippett and King offer some empirical evidence in support of that effect, especially in specific circumstances. Although the methodology they employed is beyond the scope of this article (generally it involved study participants viewing advertisements and responding to targeted questions), their research indicated:

> When consumers are unable to recognize a drug injury ad as a form of attorney advertising, it has important implications for their ability to process the persuasive content. **If they mistakenly believe, as some participants did, that the advertisement is a public service or government announcement, or**

greatest potential for success." Lawsuit Information Center Blog, https://www.lawsuit-information-center.com/mass-tort-leads.html (last accessed September 13, 2022).

[42] *See also* Sara Randazzo and Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits,* WALL ST. J. (Nov. 25, 2019).

[43] Press Release, Fed. Trade Comm'n, *supra* note 1.

[44] Mohamed Mohamoud et al., Letter to the Editor, *Discontinuation of Direct Oral Anticoagulants in Response to Attorney Advertisements: Data From the FDA Adverse Event Reporting System*, ANNALS OF PHARMACOTHERAPY (May 2019).

> **originates from the manufacturer, they will process the medication information without the benefit of important knowledge about the advertiser.** Consumers may also be less likely to apply their persuasion knowledge, on the assumption that the public entity has no pecuniary motive, or perhaps that the manufacturer has been forced by a government agency to issue corrective advertising. This too may limit their ability to 'cope' with the medical information.[45]

Viewers of advertisements prominently disclosed as legal advertisements (labeled "transparent") were more likely to discount the advertised risks of ingesting a particular pharmaceutical product versus those who viewed an ad cloaked as a warning with negligible and fleeting information it was legal advertising (labeled "deceptive"). This effect would help explain the FDA's concern with the discontinuation data culled from FAERS.

In addition to the potentially adverse effects on the patients themselves, there are two avenues of potential impact to the client. The first is the effect of the relentless advertising on the potential jury pool and the second is the effect on the client's brand image. As to the latter, companies are forced to counter the negative (and often misleading) statements running relentlessly. Investors may also take note of legal advertising upticks for a particular product and adjust their view of the manufacturer's stock price.

As to the former, courts have recognized generally that pretrial publicity—including advertising—could impact jury pools. In the talc litigation, the defendants unsuccessfully challenged venue, despite the fact that targeted and pervasive advertisements regarding recent verdicts involving the product had been aired in the market where more juries would be drawn.[46]

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[45] King and Tippett, *supra* note 31, at 147(emphasis added).

[46] Slemp v. Johnson & Johnson, Circuit Court of St. Louis County, Missouri, No. ED106190. Following jury's award of compensatory and punitive damages, the defendants appealed on a number of grounds, including the denial of the venue motion. The appellate court vacated the judgment in favor of the out-of-state plaintiff because the trial court lacked personal jurisdiction over the defendants and did not reach the other issues raised on

Authority on the point is scant, but trial courts have held that targeted advertising in the community may impact the jury pool. In *Majorana v. Crown Century Petroleum Corp.*, a case alleging the defendant was liable for a sexual assault committed by a gas station attendant it employed, plaintiff's counsel placed an advertisement in a local newspaper shortly before trial seeking witnesses or information concerning any other sexual assaults or similar behavior by the attendant.[47] As described on appeal,

> The advertisement resem bled a 'wanted poster,' made allegations that [the attendant] was a sexual predator, offered a 'reward based on useful information provided for the current lawsuit against [the employer] and [the attendant],' and directed persons with information to 'Call: Attorney' at two phone numbers.[48]

The trial court refused a motion to dismiss the case or to transfer venue but did hold that there was a "substantial probability that this advertisement might taint the jury pool summoned" for the scheduled trial date and continued the trial date.[49] The appellate court did not reach the issue of the propriety of the trial court's decision but did refer to the advertisement as "ethically questionable."[50]

Some courts have stated that assessing the impact of advertising (by either side) can be handled through *voir dire* or other means.[51] Of course, another court has

appeal. Slemp v. Johnson & Johnson, 589 S.W.3d 92 (Mo. Ct. App. 2019).

[47] 539 S.E.2d 426 (Va. 2000).

[48] *Id.* at 429.

[49] *Id*.

[50] *Id.* at 430.

[51] *See*, *e.g.*, Terry v. McNeil-PPC, Inc. (In re Tylenol (Acetaminophen) Mktg., Sales Practices & Prods. Liab. Litigation, 2016 U.S. Dist. LEXIS 72774 at *9 (E.D. Pa. June 3, 2016) (refusing to issue a gag order prohibiting the defendant from engaging in reputational marketing prior to trial and stating that less restrictive alternatives included "a change of venue, trial postponement, a searching voir dire, emphatic jury instructions, and sequestration of jurors"); *cf.*, Megan M. La Belle, *Influencing Juries in Litigation "Hot Spots,"* 94 IND. L. J. 901 (2019) (noting that pre-trial advertising has the potential for swaying the jury pool); *see also,* Robert Trager, Sandra Moriarty, and Tom Duncan, *Selling Influence: Using Advertising To*

"recognized the ineffectiveness of voir dire in detecting juror bias created by pre-trial publicity. Since jurors are aware that they are supposed to be impartial, they are unlikely to reveal any bias, even if they recognize it in themselves."[52]

V. Recent Efforts to Mitigate the Effect of Mass Tort Advertising

Against the backdrop of a potential threats to patient safety, there have been calls for different or more regulation of attorney advertising by state bars, by the FDA (which likely lacks regulatory authority), or by the FTC.[53] Some states have passed, or are considering, legislation addressing television advertising directed toward mass tort pharmaceutical plaintiffs. The problems identified in the studies discussed above exist despite current State Bar ethics rules and the state and federal consumer protection statutes prohibiting false or misleading statements. Five states have recently enacted legislation targeting lawyer advertising seeking pharmaceutical or medical device claimants.[54]

The scope of each statute varies, but they seek to address the problems noted by the FDA staff. For example, the Texas statute provides:

> An advertisement for legal services may not:

Prejudice The Jury Pool, 83 NEB. L. REV. 685 (2005).

[52] Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 52 (Miss. 2004) (quoting Beech v. Leaf River Forest Prods., Inc., 691 So. 2d 446, 450 (Miss. 1997) (stating that trial court should have granted change of venue to county with less of a connection to the mass tort litigation being tried)).

[53] U.S. Chamber Institute for Legal Reform, *Bad For Your Health: Lawsuit Advertising Implications And Solutions* 54-57 (October 2017) ("*Bad For Your Health"*).

[54] 2022 KANSAS LAWS Ch. 72 (Senate Bill 150) (2022); IND. CODE § 24-5-26.5 (2021); W. VA. CODE § 47-28-3 (2020); TEX. GOV'T CODE §§ 81.151-81.156 (2019); TENN. CODE ANN. §§ 47-18-3001-47-18-3006 (2019). Louisiana passed a version of the bill in 2021, Louisiana Senate Bill 43 (2021), but it was vetoed by the Governor on the stated basis that it was likely unconstitutional, as the Governor felt the Louisiana Supreme Court had the sole authority to regulate attorney advertising. This year, the Louisiana legislature again passed, and the Governor signed, a bill that approached the issue by exempting from its reach "any member of a profession if the regulation of that profession has been granted to a governmental entity pursuant to Article V, Section 5 of the Constitution of Louisiana." Louisiana Senate Bill 378 (2022). Other states have considered or are considering similar legislation. *See, e.g.*, Kentucky Senate Bill 51 (2022); Florida Senate Bill 1762 (2022); Iowa Senate Study Bill 3137 (2019).

> (1) present the advertisement as a 'medical alert,'" 'health alert,' 'drug alert,' 'public service announcement,' or substantially similar phrase that suggests to a reasonable viewer the advertisement is offering professional, medical, or government agency advice about medications or medical devices rather than legal services;
>
> (2) display the logo of a federal or state government agency in a manner that suggests to a reasonable viewer the advertisement is presented by a federal or state government agency or by an entity approved by or affiliated with a federal or state government agency; or
>
> (3) use the term 'recall' when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency.[55]

Similar language appears in the Kansas, Tennessee, and West Virginia statutes[56] and a variation of it appears in the Indiana statute.[57] All five statutes in one form or another provide that a violation of their provisions constitutes a deceptive trade practice.[58] Four also directly require a warning to not discontinue taking a medication without consulting a physician.[59]

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[55] TEX. GOV'T CODE § 81.152.

[56] 2022 KANSAS LAW Ch. 72 Section 1(a)(2)-(4); TENN. CODE ANN. § 47-18-3002; W.VA. CODE §§ 47-28-3(a) (2) – (4).

[57] INDIANA CODE § 24-5-26.5-9.

[58] 2022 KANSAS LAWS Ch. 72 Section 1(c); IND. CODE § 24-5-26.5-9; TEX. GOV'T CODE § 81.155; TENN. CODE ANN. § 47-18-3005; W.VA. CODE § 47-28-3(d).

[59] 2022 KANSAS LAWS Ch. 72 Section 1(a)(7); TEX. GOV'T CODE § 81.153(b); TENN. CODE ANN. § 47-18-3002(c)(1); W.VA. CODE § 47-28-3(b). Indiana simply makes it a deceptive act for advertisements or other commercial communications that cause, or are likely to

A first pass analysis suggests these statutes should meet the *Central Hudson* test in light of the studies to date. Although they are content-based restrictions on commercial speech, the provisions directly target a substantial government interest in patient safety, the restrictions directly and materially advance that interest by ensuring that patients have enough information to properly process the persuasive content of the ad, and the restrictions are narrowly drawn to address those concerns.

That said, a district court in my home state of West Virginia struck down portions of our state's version as unconstitutional.[60] Without even citing *Central Hudson* and instead citing the admittedly "fractured" opinions in *Barr v. American Association of Political Consultants, Inc.*,[61] the district court applied strict scrutiny (the highest level of First Amendment protection) to analyze the statute.[62] Under that standard, it considered the constitutionality of the provisions of the statute that prohibited legal advertisements from using phrases such as "consumer medical alert;"[63] that prohibited them from displaying a government agency's logo in a manner that suggests affiliation or sponsorship of that agency;[64] and that prohibited the use of the word "recall" when the product had not been recalled by a government agency.[65] It also applied that standard to analyze the mandatory disclosure provisions which require legal advertisements to include a warning not to stop taking a prescription medication without consulting with a physician and to disclose that a drug remained approved unless it had been recalled or withdrawn.[66] Concluding that none could pass muster, it permanently enjoined the state from enforcing these provisions.[67]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed and directed the district court to dismiss the case.[68] In a lengthy and well-reasoned decision, the court analyzed the statute's prohibitory provisions under *Central Hudson* and found that each prong had been met because the "three prohibitions

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cause, consumers to fail to use or discontinue the consumers' mediations. IND. CODE § 24-5-26.5-9(b)(1).

[60] Recht v. Morrisey, 2021 WL 5260297 Civil Action No. 5:20-cv-90 (N.D.W.Va. 5/13/2021), *reversed*, 32 F.4th 398 (4th Cir 2022).

[61] 140 S. Ct. 2335 (2020).

[62] And added that he would have reached the same result under an intermediate standard. 2021 WL 5260297 at *5.

[63] W.VA. CODE § 47-28-3(a)(2).

[64] W.VA. CODE § 47-28-3(a)(3).

[65] W.VA. CODE § 47-28-3(a)(4).

[66] W.VA. CODE § 47-28-3(b).

[67] 2021 WL 5260297 at *7.

[68] Recht v. Morrissey, 32 F.4th 398 (4th Cir. 2022), *petition for cert. pending*, No. 22-175 (filed August 25, 2022).

target misleading speech, West Virginia has substantial interests in protecting public health and in preventing deception, and the Act advances these interests in a narrowly tailored and reasonable way."[69] Drawing on sources such as the FTC's Press Release, the article by King and Tippett, and the Institute for Legal Reform's *Bad For Your Health*, the Fourth Circuit had little trouble concluding the statute's prohibitions passed muster under *Central Hudson*.[70]

With respect to the mandated disclosures, the court looked to *Zauderer* (which had upheld mandatory disclosures in legal advertising which contained "purely factual and uncontroversial information") and applied that same standard to the West Virginia statute's mandatory disclosures. It concluded that the mandatory disclosure requirements were "directly targeted at promoting the State's interest 'in dissipating the possibility of consumer confusion or deception,' … they [did] so by providing information directly connected to the subject of the advertisement … and are just the sort of 'health and safety warnings' that have been 'long considered permissible.'"[71] It further found, similar to the Supreme Court's decision in *Zauderer*, that the mandatory disclosures were "factual and uncontroversial."[72] As such, it also reversed the district court's holding that the disclosures violated the First Amendment:

> Plaintiffs try to transfigure the Act into a sweeping and draconian enactment. But all West Virginia requires is that attorneys truthfully present themselves as attorneys. The Act's prohibitions and disclosures work together to accomplish this end—and to protect the health of West Virginia citizens who may be misled into thinking that attorneys are reliable sources of medical advice. The Act survives constitutional challenge. We thus reverse the judgment of the district court and remand the case with directions that it be dismissed.[73]

Plaintiffs have sought review of the Fourth Circuit's decision from the Supreme Court and, as of the publication date of this article, the petition for a writ of certiorari remains pending.

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[69] *Id.* at 410.
[70] *Id*. at 410-416.
[71] *Id.* at 417.
[72] *Id*. at 417-419.
[73] *Id*. at 419-420.

VI. Conclusion

Potential issues with mass-tort advertising raise significant concerns about the state of legal advertising. These issues are even more glaring due to the business model underlying mass tort litigation and the fierce competition to develop an inventory of clients with potentially lucrative claims. Those concerns, however, must be addressed within the confines of well-established First Amendment jurisprudence. State-by-state restrictions, either at the bar level or at the state consumer protection act level, can only go so far. The nature of the business model generating mass tort claims suggests a national solution would be more effective.

On November 2, 2020, several members of the House Committee on Energy and Commerce raised a number of concerns about lawyer advertising and posed a series of questions in a letter to the FTC including some related to the West Virginia, Texas, and Tennessee legislation discussed above. In its response, Chairman Simons of the FTC indicated that "[t]he laws against deceptive lawsuit advertising in West Virginia, Texas, and Tennessee target the same concerns about lawsuit advertising raised in Commission staff's warning letters."[74] After further discussing the statutes, he stated:

> The Commission consistently has taken the position that, while unfair or deceptive advertising should be prohibited, consumers do not benefit from the imposition of overly-broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value. The requirements and restrictions in the aforementioned laws, however, appear narrowly tailored to prevent deception and not unnecessarily restrictive of truthful and non-misleading information about either potential harms from FDA-approved medication or available legal remedies for such harms. The prohibitions against "alert" language, government logos, and references to product recalls apply only when ads employ those elements in a deceptive manner. To this extent, the laws codify prohibitions already subsumed by the general prohibition against false

[74] Fed. Trade Comm'n, *Letter to The Honorable Greg Walden* at 4 (Nov 17, 2020).

> advertising in the FTC Act and similar state laws.
>
> While FTC staff has reviewed these state laws, the FTC has not taken a position on federal legislation on this topic.[75]

The actions taken by the FTC in 2019 and 2020 seemed like a step in the direction towards national regulation of what is truly a national issue. But those letters went out more than two years ago, and its November 17, 2020 letter suggests the FTC was not considering further action. For the time being, it seems that state-level efforts remain the most likely solution.

[75] *Id.* at 5.