IN SEARCH OF MASS TORT PLAINTIFFS: ADVERTISING AND ITS IMPACT ON THETARGETED POPULATIONS, POTENTIAL JURY POOLS, AND OUR CLIENTS.

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Many 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 it raises, turns to the world of mass-tort advertising and its potential effects, particularly with respect to advertising related to pharmaceutical products and medical devices. Finally, it concludes with the recent efforts to mitigate some of these effects while balancing the First Amendment rights of advertisers with the risks their ads pose.

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." *See,* Press Release, *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits* (September 24, 2019). The FTC's concerns included possible misrepresentation of the risks associated with certain pharmaceuticals and the "false impression" that physician-prescribed medications had been recalled. Several states have enacted or introduced legislation addressing the same concerns. The advertisements have real consequences: 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 may be useful to revisit the historical issues surrounding the advertisement of legal services.

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. *See, e.g.,* Daily Illinois State Journal (December 2, 1857) at 1 (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). 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"). *See*, Canon 27, ABA Canons of Professional Ethics (1908). In 1963, the ABA 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 could not identify the law firm or be signed in a way that identified the sender as a lawyer. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 309 (1963). As the First Amendment's protections were originally not understood to extend to "commercial

speech," 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, Court decided *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), and held some level of First Amendment protection extended to commercial speech. The majority opinion pointed out there was no claim the speech at issue (prescription drug price advertisements) were "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 flow cleanly as well as freely.

Va. State Bd. Of Pharmacy, 425 U.S. at 771 – 772 (citing to a Virginia statute criminalizing untrue, deceptive, or misleading advertising).

The next term, in *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), the Court squarely held the First Amendment protections extended to some forms of attorney advertising, overturning a categorical ban on such. It reiterated, though, that the protection would not extend to "[a]dvertising that is false, deceptive, or misleading." *Bates*, 433 U.S. at 383. It further held the First Amendment permitted "reasonable restrictions on the time, place, and manner of advertising." *Id*. at 384. Subsequently, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985), the Court held the First Amendment protected 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). "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 clients." 471 U.S. at 647. The disciplinary rules at issue failed the so-called *Central Hudson* test: "Commercial speech that is not false or deceptive and does not concern unlawful activities" may be "restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." 471 U.S. at 638 (*citing Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980)).[1]

For the most part, subsequent Supreme Court decisions (including lawyer advertising cases) have continued to protect commercial speech. In *Fla. Bar v. Went for It*, 515 U.S. 618 (1995), however, a 5-4 majority upheld a thirty-day ban on direct mail solicitations of potential

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[1] With respect to commercial speech that is neither false nor misleading, the *Central Hudson* test has three prongs: First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be narrowly drawn. 447 U.S. at 564-565.

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 before it:

> [T]he Florida 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.

515 U.S. at 635.[2] Even then, however, 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." 515 U.S. at 633. As a result, the First Amendment affords significant protection to lawyers seeking personal injury clients.

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." 433 U.S. at 403 (Powell, J., dissenting). Boy howdy was he right. The legal advertising market is now a small but significant fraction of the overall spending on television marketing. A study by the American Tort Reform Association estimated that nearly 3,000,000 advertisements for legal services aired on broadcast networks in

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[2] 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, and stated:

> 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.

515 U.S. at 645 (Kennedy, J., dissenting) (*internal citations and quotations omitted*).

the 210 local media markets in the United States in the third quarter of 2018 alone at an estimated cost of almost $226,000,000. American Tort Reform Association, *Local Legal Services Advertising, 2018 – Quarter 3* (December 2018) at 3. For a number of reasons, estimated television advertising in 2020 fell slightly. *See*, Nate Raymond, 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 1/25/2021). Another analysis performed for the US Chamber's Institute for Legal Reform estimated that nearly one billion dollars would be spent on legal advertising in 2017. White Paper, Institute for Legal Reform, *Bad For Your Health: Lawsuit Advertising Implications and Solutions* (Oct. 2017) at 6. Another estimated that of that one billion dollars, $850,000,000 would be spent on mass tort advertising.

Who is spending that kind of money? Any why?

A recent paper co-authored by a law professor and a marketing professor specifically addressing the potential effects of legal advertising for pharmaceutical and medical device claims suggests answers to both questions. As for the "why," the financial incentive for seeking mass tort claimants is apparent. That "incentive has produced a market in which advertisers compete to identify the most valuable plaintiffs for promising (or well-established) mass tort claims." Jesse King and Elizabeth Tippett, *Drug Injury Advertising*, Yale Journal of Health Policy, Law, and Ethics, Volume 18, Issue 2 114, 121 (2019). The competition is fierce and highly concentrated.

As for "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%. *Id*. at 122. Unsurprisingly, at least three advertisers were not law firms. *Id.* Pointing to the disparity between the firms advertising and the firms filing 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.

Id. (footnotes omitted). 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.[3]

[3] Indeed, 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. *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 1/25/2021).

As Professors Tippett and King hypothesized, it seems likely that much of this is driven by the business model used by firms representing plaintiffs in mass tort litigation. 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, according to an October 20, 2015 article from a *Forbes* staff writer. *See,* Daniel Fisher, Lawsuit Details How Law Firms Borrow And Pay Millions To Get Mass Tort Cases, https://www.forbes.com/sites/danielfisher/2015/10/20/lawsuit-details-how-law-firms-borrow-and-pay-millions/?sh=1a6ec72c61de (last accessed 1/15/2021). 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.

Shenaq v. Akin, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015) ¶ 76. One firm that helps generate leads for mass tort plaintiffs' attorneys has published a guide outlining its views on outlook for various mass torts claims in 2021. Legal Growth Associates, *2021 State of Mass Torts*, https://legalgrowthassociates.com/mass-torts-2021/ (last accessed January 24, 2021), which treats the mass tort lead for what they really are – investments – and assesses whether acquirers should be moving quickly or with caution in obtaining such leads. *See also*, Sara Randazzo and Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits,* Wall Street Journal (November 25, 2019).

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 of 2019?

The Effects of Mass Tort Advertising

As the FTC noted in its 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." Several studies – sometimes financed by interested parties – suggest some 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. 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).

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 studies 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 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.

Id. at 147 (emphasis added). 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 ("deceptive"). This effect would help explain the 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 on the client's brand image. 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. *Slemp v. Johnson & Johnson*, Circuit Court of St. Louis County, Missouri, No. No. ED106190.[4]

Authority on the point is scant but trial courts have held that targeted advertising in the community may impact the jury pool. For example, in *Majorana v. Crown Cent. Petroleum Corp.*, 539 S.E.2d 426 (2000), 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. As described on appeal,

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

> The advertisement resembled 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.

539 S.E.2d at 429. 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. *Id*. 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." *Id. at 430.*

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

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. 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 state consumer protections statutes prohibiting false or misleading statements. Three states have recently enacted legislation targeting lawyer advertising seeking pharmaceutical or medical device claimants. *See*, West Virginia Code § 47-28-3 (2020); Tex. Gov't Code § 81.151 – 81.156 (2019); Tenn. Code Ann. § 47-18-3001 – 47-18-3006 (2019). Other states have unsuccessfully considered similar legislation recently. *See, e.g.*, Kentucky Senate Bill 178 (2020);[5] Florida House Bill 7083 (2020); Louisiana House Bill 445 (2020); Kansas Senate Bill 445 (2019); Iowa Senate Study Bill 3137 (2019).

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

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[5] A version of this bill has been reintroduced in 2021. Kentucky Senate Bill 20 (2021).

> An advertisement for legal services may not:
>
> (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.

Tex. Gov't Code § 81.152. Similar language appears in the Tennessee and West Virginia statutes. Tenn. Code Ann. § 47-18-3002; W.Va.Code § 47-28-3(a) (2) – (4). All three statutes in one form or another provide that a violation of their provisions constitutes a deceptive trade practice. Tex. Gov't Code § 81.155; Tenn. Code Ann. § 47-18-3005; W.Va. Code § 47-28-3(d). All also require a warning to not discontinue taking a medication without consulting a physician. Tex. Gov't Code § 81.153(b); Tenn. Code Ann. § 47-18-3002(c)(1); W.Va.Code § 47-28-3(b).

A first pass analysis suggests these statutes 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. But 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 these mass tort claims suggests a national solution is more likely needed. The FTC salvo seems like a step in the direction towards national regulation of what is a national issue. Whether FTC continues to press the issue though, is anyone's guess.