Making up for Lost Time

Current Trends in Legal Advertising

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The recent trends in legal advertising and filings confirm that litigation is here to stay and the trends generally point to one conclusion: mass-tort litigation is on the rise. In the 40 years after the *Bates v. State Bar of Arizona* case, advertising in the legal industry has soared surpassing $1 billion.[[1]](#footnote-1) Much of this has to do with the marketing strategy of firms themselves. According to the U.S Chamber Institute of Legal Reform, “[t]he marketing strategies of law firms are increasingly sophisticated and localized in terms of broadcast ad buying, search keyword purchases, and search engine optimization. In short, they comprise a highly coordinated and targeted set of localized campaigns in terms of broadcast and digital presence.”[[2]](#footnote-2)

The most effective methods for advertising include broadcast advertising, search engine marketing, and social media.[[3]](#footnote-3) In the realm of television advertising, the legal sector has “outpaced the growth in the advertising sector as a whole in recent years and was one of the few advertising sectors to have *increased* its ad spending during the recent recession.”[[4]](#footnote-4) In 2015, the top non-pharmaceutical and medical device mass-tort litigation ads were beaten out only by ads for asbestos claims, lawsuit funding, and loan modifications.[[5]](#footnote-5) However, it is very difficult to prove a link between the amount of advertising spent and the number of cases filed in the courts. Stephen Myers state thatthere has not been enough data available to “link the dramatic spike in complaints with onslaught of product-specific advertising by plaintiff’s law firms and others following a recall.”[[6]](#footnote-6) But how much data is really necessary to make this correlation?

In 2005, Congress sought to curb this trend by streamlining the Federal class action process by implementing the Class Action Fairness Act (CAFA). CAFA was implemented to address perceived abuses of the class action device. CAFA had three main purposes: 1) to assure fair and prompt recoveries for class members with legitimate claims; 2) restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction; and 3) benefit society by encouraging innovation and lowering consumer prices.[[7]](#footnote-7)

Simultaneous to this effort to reign in class actions, technology has been rapidly changing and advancing in a seemingly exponential fashion every year. “With these advances have come the increased development and production of products, as well as an increased ability to market and sell products nationally and internationally. Perhaps as an inevitable consequence of the mass production and mass-marketing of an increased number of products, broad-based complex litigation has also increased at a high rate.” [[8]](#footnote-8) Through CAFA’s discouragement of class action suits, lawyers are increasingly relying upon Multidistrict Litigation panel’s remedial powers for consolidation and resolution of the matters.[[9]](#footnote-9)

In 2014, MDL cases made up 36% of the civil caseload. This number is more than double the percentage from 2002.[[10]](#footnote-10) The increase in use of the MDL process comes with its own problems. “The relatively small number of judges who have been assigned a mass-tort MDL have dealt with these serious issues largely on their own and have developed disparate approaches − some effective, some not so effective − to dispose of the cases without the benefit of rules or a set of best practices.”[[11]](#footnote-11) This leads to different approaches among MDLs that do not provide consistency and some level of procedural predictability for attorneys and their clients. This is evident by the various techniques in which transferee judges have embraced their new roles. Examining outcomes, there is wide variance between them. Some judges utilize private neutrals or special master while some judges will retain more distance from the settlement process.[[12]](#footnote-12)

While there is little data to connect advertisement to the large increase in litigation, it is important to keep in mind that it does have some effect on the litigation process and the public at large. In an opinion piece authored by Lisa Rickard of the U.S. Chamber of Commerce in the *Washington Post*, she discussed how advertising has the potential to frighten plaintiffs out of using their prescribed medications.[[13]](#footnote-13) As recently as March 7, 2017, Congressman Bob Goodlatte of Virginia, who chairs the Committee on the Judiciary, penned a letter to Linda A. Klein, the president of the ABA, asking the organization to evaluate the impact advertising is having on the public. Ms. Klein responded. Both letters are attached to the materials for your review. The exchange is worth the read.

American companies have enjoyed the benefits of advertising since the rise of print media in 19th century and the legal profession seems to have made up for lost time in the 40 years following *Bates.* Going forward, advertisers, lawyers, and rule-makers should be mindful of the impact that advertising has on the litigation process and the legal profession. With lawsuits on the rise, MDLs on the rise and mass-tort litigation continuing to escalate, now is as good of a time as any to critically assess the not just how we arrived at this point but also where do we, as a profession, go from here.

1. Li, Victor. Ad Up, ABA Journal, 35. April 2017. [↑](#footnote-ref-1)
2. Goldstein, Ken, and Dhavan V. Shah. Trial Lawyer Marketing: Broadcast. Search, and Social Strategies, U.S. Chamber Institute for Legal Reform, October 27, 2015 [↑](#footnote-ref-2)
3. Id. [↑](#footnote-ref-3)
4. Myers, Stephen G.A. The Impact of Plaintiffs’ Lawyer Advertising on Mass-Tort Litigation (2016) [↑](#footnote-ref-4)
5. Id. [↑](#footnote-ref-5)
6. Id. [↑](#footnote-ref-6)
7. Trehan, Ashley Bruce. Class Actions 101: A Refresher on the Act that Transformed Federal Court Class Actions. American Bar Association. (2015) http://apps.americanbar.org/litigation/committees/classactions/articles/fall2015-1115-class-actions-101-cafa-federal-court-class-actions.html [↑](#footnote-ref-7)
8. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, Bellwether Trials in Multidistrict Litigation, 82 Tulane L. Rev. 2323, 2355 (2008). [↑](#footnote-ref-8)
9. Id. [↑](#footnote-ref-9)
10. Standards and Best Practices for Large Mass-Tort MDLS, Duke Law Center for Judicial Studies, i-132, x, December 19, 2014. [↑](#footnote-ref-10)
11. Id at xii [↑](#footnote-ref-11)
12. Dodge, Jaime L., Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation, 64 EMORY L. J. 229, 331-382, 334, January 2015 [↑](#footnote-ref-12)
13. Rickard, Lisa A., How Lawyers Scare People Out of Taking Their Meds, Above the Fold, U.S. Chamber of Commerce, August 23.2016. https://www.uschamber.com/above-the-fold/how-lawyers-scare-people-out-taking-their-meds [↑](#footnote-ref-13)